UNITED STATES REPORTS

VOLUME 497

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1989

JUNE 21 THROUGH SEPTEMBER 28, 1990

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

WASHINGTON : 1994

Printed on Uncoated Permanent Printing Paper

For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
ISBN 0-16-045235-X

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.*
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.

RETIRED

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

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*JUSTICE BRENNAN retired on July 20, 1990.

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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*For order of July 23, 1990, vacated by order of August 7, 1990, assigning THE CHIEF JUSTICE to the First Circuit and the Third Circuit effective July 20, 1990, see *post*, p. 1043. For order of August 7, 1990, assigning JUSTICE BLACKMUN to the First Circuit and JUSTICE STEVENS to the Third Circuit, see *post*, p. 1044.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1989

MILKOVICH *v.* LORAIN JOURNAL CO. ET AL.

CERTIORARI TO THE COURT OF APPEALS OF OHIO, LAKE COUNTY

No. 89-645. Argued April 24, 1990—Decided June 21, 1990

While petitioner Milkovich was a high school wrestling coach, his team was involved in an altercation at a match with another high school's team. Both he and School Superintendent Scott testified at an investigatory hearing before the Ohio High School Athletic Association (OHSAA), which placed the team on probation. They testified again during a suit by several parents, in which a county court overturned OHSAA's ruling. The day after the court's decision, respondent Lorain Journal Company's newspaper published a column authored by respondent Diadiun, which implied that Milkovich lied under oath in the judicial proceeding. Milkovich commenced a defamation action against respondents in the county court, alleging that the column accused him of committing the crime of perjury, damaged him in his occupation of teacher and coach, and constituted libel *per se*. Ultimately, the trial court granted summary judgment for respondents. The Ohio Court of Appeals affirmed, considering itself bound by the State Supreme Court's determination in Superintendent Scott's separate action against respondents that, as a matter of law, the article was constitutionally protected opinion.

Held:

1. The First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws. While the Amendment does limit such application, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, the breathing space that freedoms of expression require to survive is adequately secured by existing constitutional doc-

trine. Foremost, where a media defendant is involved, a statement on matters of public concern must be provable as false before liability can be assessed, *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, thus ensuring full constitutional protection for a statement of opinion having no provably false factual connotation. Next, statements that cannot reasonably be interpreted as stating actual facts about an individual are protected, see, *e. g.*, *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U. S. 6, thus assuring that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of this Nation. The reference to "opinion" in dictum in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340, was not intended to create a wholesale defamation exemption for "opinion." Read in context, the *Gertz* dictum is merely a reiteration of Justice Holmes' "marketplace of ideas" concept, see *Abrams* v. *United States*, 250 U. S. 616, 630. Simply couching a statement—"Jones is a liar"—in terms of opinion—"In my opinion Jones is a liar"—does not dispel the factual implications contained in the statement. Pp. 11–21.

2. A reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that Milkovich perjured himself in a judicial proceeding. The article did not use the sort of loose, figurative, or hyperbolic language that would negate the impression that Diadiun was seriously maintaining Milkovich committed perjury. Nor does the article's general tenor negate this impression. In addition, the connotation that Milkovich committed perjury is sufficiently factual that it is susceptible of being proved true or false by comparing, *inter alia*, his testimony before the OHSAA board with his subsequent testimony before the trial court. Pp. 21–22.

3. This decision balances the First Amendment's vital guarantee of free and uninhibited discussion of public issues with the important social values that underlie defamation law and society's pervasive and strong interest in preventing and redressing attacks upon reputation. Pp. 22–23.

46 Ohio App. 3d 20, 545 N. E. 2d 1320, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 23.

Brent L. English argued the cause for petitioner. With him on the brief was *John D. Brown*.

Richard D. Panza argued the cause for respondents. With him on the brief were *William G. Wickens*, *David L. Herzer*, *Richard A. Naegele*, *P. Cameron DeVore*, and *Marshall J. Nelson.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment to the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This lawsuit is before us for the third time in an odyssey of litigation spanning nearly 15 years.[1] Petitioner Milkovich, now retired, was the wrestling coach at Maple Heights High

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*Briefs of *amici curiae* urging affirmance were filed for Dow Jones & Co. et al. by *Robert D. Sack*, *Richard J. Tofel*, *Richard M. Schmidt, Jr.*, *Devereux Chatillon*, *Douglas P. Jacobs*, *Barbara L. Wartelle*, *Harvey L. Lipton*, *Laura R. Handman*, *Slade R. Metcalf*, *Richard J. Ovelmen*, *Deborah R. Linfield*, *Jane E. Kirtley*, and *Bruce W. Sanford;* and for the American Civil Liberties Union et al. by *Henry R. Kaufman*.

Louis A. Colombo and *David L. Marburger* filed a brief for the Ohio Newspaper Association et al. as *amici curiae*.

[1] The Court has previously denied certiorari twice in this litigation on various judgments rendered by the Ohio courts. See *Lorain Journal Co.* v. *Milkovich*, 474 U. S. 953 (1985); *Lorain Journal Co.* v. *Milkovich*, 449 U. S. 966 (1980).

School in Maple Heights, Ohio. In 1974, his team was involved in an altercation at a home wrestling match with a team from Mentor High School. Several people were injured. In response to the incident, the Ohio High School Athletic Association (OHSAA) held a hearing at which Milkovich and H. Don Scott, the Superintendent of Maple Heights Public Schools, testified. Following the hearing, OHSAA placed the Maple Heights team on probation for a year and declared the team ineligible for the 1975 state tournament. OHSAA also censured Milkovich for his actions during the altercation. Thereafter, several parents and wrestlers sued OHSAA in the Court of Common Pleas of Franklin County, Ohio, seeking a restraining order against OHSAA's ruling on the grounds that they had been denied due process in the OHSAA proceeding. Both Milkovich and Scott testified in that proceeding. The court overturned OHSAA's probation and ineligibility orders on due process grounds.

The day after the court rendered its decision, respondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple beat the law with the 'big lie,'" beneath which appeared Diadiun's photograph and the words "TD Says." The carryover page headline announced " . . . Diadiun says Maple told a lie." The column contained the following passages:

> "'. . . [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.
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> "'A lesson which, sadly, in view of the events of the past year, is well they learned early.
>
> "'It is simply this: If you get in a jam, lie your way out.

"'If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"'The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

. . . . .

"'Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"'But they got away with it.

"'Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"'I think not.'" *Milkovich* v. *News-Herald*, 46 Ohio App. 3d 20, 21, 545 N. E. 2d 1320, 1321–1322 (1989).[2]

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[2] In its entirety, the article reads as follows:

"Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

"It's not final yet—the judge granted Maple only a temporary injunction against the ruling—but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

"But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

"When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

"There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way—many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with

Petitioner commenced a defamation action against respondents in the Court of Common Pleas of Lake County, Ohio, alleging that the headline of Diadiun's article and the

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and observations of their superiors and peers, from watching actions and reactions.

"Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

"A lesson which, sadly, in view of the events of the past year, is well they learned early.

"It is simply this: If you get in a jam, lie your way out.

"If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

"The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.

"Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor *[sic]*, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

"Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

"But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition *[sic]* of superintendent of schools.

"Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

"I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

"Any resemblance between the two occurrances *[sic]* is purely coincidental.

"To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were

nine passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se." App. 12. The action proceeded to trial, and the court granted a directed verdict to respondents on the ground that the evidence failed to establish the article was published with "actual malice" as required by *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). See App. 21–22. The Ohio Court of Appeals for the Eleventh Appellate District reversed and remanded, holding that there was sufficient evidence of actual malice to go to the jury. See *Milkovich* v. *Lorain Journal*, 65 Ohio App. 2d 143, 416 N. E. 2d 662 (1979). The Ohio

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passed off by the two as 'shrugs,' and that Milkovich claimed he was 'Powerless to control the crowd' before the melee.

"Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

"Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

"But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"'I can say that some of the stories told to the judge sounded pretty darned unfamiliar,' said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. 'It certainly sounded different from what they told us.'

"Nevertheless, the judge bought their story, and ruled in their favor.

"Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

"But they got away with it.

"Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

"I think not." App. to Pet. for Cert. A138–A139.

Supreme Court dismissed the ensuing appeal for want of a substantial constitutional question, and this Court denied certiorari. 449 U. S. 966 (1980).

On remand, relying in part on our decision in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the trial court granted summary judgment to respondents on the grounds that the article was an opinion protected from a libel action by "constitutional law," App. 55, and alternatively, as a public figure, petitioner had failed to make out a prima facie case of actual malice. *Id.*, at 55–59. The Ohio Court of Appeals affirmed both determinations. *Id.*, at, 62–70. On appeal, the Supreme Court of Ohio reversed and remanded. The court first decided that petitioner was neither a public figure nor a public official under the relevant decisions of this Court. See *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 294–299, 473 N. E. 2d 1191, 1193–1196 (1984). The court then found that "the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer. . . . The plain import of the author's assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law." *Id.*, at 298–299, 473 N. E. 2d, at 1196–1197. This Court again denied certiorari. 474 U. S. 953 (1985).

Meanwhile, Superintendent Scott had been pursuing a separate defamation action through the Ohio courts. Two years after its *Milkovich* decision, in considering Scott's appeal, the Ohio Supreme Court reversed its position on Diadiun's article, concluding that the column was "constitutionally protected opinion." *Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 254, 496 N. E. 2d 699, 709 (1986). Consequently, the court upheld a lower court's grant of summary judgment against Scott.

The *Scott* court decided that the proper analysis for determining whether utterances are fact or opinion was set forth in the decision of the United States Court of Appeals for the District of Columbia Circuit in *Ollman* v. *Evans*, 242 U. S. App. D. C. 301, 750 F. 2d 970 (1984), cert. denied, 471 U. S.

1127 (1985). See *Scott*, 25 Ohio St. 3d, at 250, 496 N. E. 2d, at 706. Under that analysis, four factors are considered to ascertain whether, under the "totality of circumstances," a statement is fact or opinion. These factors are: (1) "the specific language used"; (2) "whether the statement is verifiable"; (3) "the general context of the statement"; and (4) "the broader context in which the statement appeared." *Ibid.* The court found that application of the first two factors to the column militated in favor of deeming the challenged passages actionable assertions of fact. *Id.*, at 250–252, 496 N. E. 2d, at 706–707. That potential outcome was trumped, however, by the court's consideration of the third and fourth factors. With respect to the third factor, the general context, the court explained that "the large caption 'TD Says' . . . would indicate to even the most gullible reader that the article was, in fact, opinion." *Id.*, at 252, 496 N. E. 2d, at 707.[3] As for the fourth factor, the "broader context," the court reasoned that because the article appeared on a sports page—"a traditional haven for cajoling, invective, and hyperbole"—the article would probably be construed as opinion. *Id.*, at 253–254, 496 N. E. 2d, at 708.[4]

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[3] The court continued:

"This position is borne out by the second headline on the continuation of the article which states: '. . . *Diadiun says* Maple told a lie.' . . . The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun's having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie. . . . A review of the context of the statements in question demonstrates that Diadiun is not making an attempt to be impartial and no secret is made of his bias. . . . While Diadiun's mind is certainly made up, the average reader viewing the words in their internal context would be hard pressed to accept Diadiun's statements as an impartial reporting of perjury." *Scott*, 25 Ohio St. 3d, at 252–253, 496 N. E. 2d, at 707–708 (emphasis in original).

[4] Specifically, the court reasoned as follows:

"It is important to recognize that Diadiun's article appeared on the sports page—a traditional haven for cajoling, invective, and hyperbole. . . . In this broader context we doubt that a reader would assign the same

Subsequently, considering itself bound by the Ohio Supreme Court's decision in *Scott*, the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that "it has been decided, as a matter of law, that the article in question was constitutionally protected opinion." 46 Ohio App. 3d, at 23, 545 N. E. 2d, at 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, 493 U. S. 1055 (1990), to consider the important questions raised by the Ohio courts' recognition of a constitutionally required "opinion" exception to the application of its defamation laws. We now reverse.[5]

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weight to Diadiun's statement as if it had appeared under the byline 'Law Correspondent' on page one of the newspaper. . . . On balance . . . a reader would not expect a sports writer on the sports page to be particularly knowledgeable about procedural due process and perjury. It is our belief that 'legal conclusions' in such a context would probably be construed as the writer's opinion." *Id.*, at 253–254, 496 N. E. 2d, at 708.

[5] Preliminarily, respondents contend that our review of the "opinion" question in this case is precluded by the Ohio Supreme Court's decision in *Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 496 N. E. 2d 699 (1986). First, respondents claim that the determination by the Ohio Supreme Court in *Milkovich* v. *News-Herald*, 15 Ohio St. 3d 292, 298, 473 N. E. 2d 1191, 1196 (1984), that petitioner is not a public official or figure was overruled in *Scott*. Thus, since petitioner has failed to establish actual malice, his action is precluded under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). This contention is meritless. Respondents rely on the following statements made by the Ohio Supreme Court in its discussion of Scott's status as a public official: " 'To say that Milkovich nevertheless was not a public figure for purposes of discussion about the controversy is simply nonsense,' " 25 Ohio St. 3d, at 247, 496 N. E. 2d, at 704 (quoting *Milkovich* v. *Lorain Journal Co.*, 474 U. S. 953, 964 (1985) (BRENNAN, J., dissenting from denial of certiorari)), and "we overrule *Milkovich* in its restrictive view of public officials and hold a public school superintendent is a public official for purposes of defamation law." 25 Ohio St. 3d, at 248, 496 N. E. 2d, at 704. However, it is clear from the context in which these statements were made that the court was simply supporting its determination that Scott was a

Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

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public official, and that as relates to petitioner Milkovich, these statements were pure dicta. But more importantly, petitioner Milkovich was not a party to the proceedings in *Scott* and thus would not be bound by anything in that ruling under Ohio law. See *Hainbuchner* v. *Miner*, 31 Ohio St. 3d 133, 137, 509 N. E. 2d 424, 427 (1987) ("It is universally recognized that a former judgment, in order to be *res judicata* in a subsequent action, must have been rendered in an action in which the parties to the subsequent action were adverse parties") (quotation omitted). Since the Ohio Court of Appeals did not address the public-private figure question on remand from the Ohio Supreme Court in *Milkovich* (because it decided against petitioner on the basis of the opinion ruling in *Scott*), the ruling of the Ohio Supreme Court in *Milkovich* presumably continues to be law of the case on that issue. See *Hawley* v. *Ritley*, 35 Ohio St. 3d 157, 160, 519 N. E. 2d 390, 393 (1988) ("[T]he decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels").

Nor is there any merit to respondents' contention that the Court of Appeals below alternatively decided there was no negligence in this case even if petitioner were regarded as a private figure, and thus the action is precluded by our decision in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). Although the appellate court noted that "the instant cause does not present any material issue of fact as to negligence or 'actual malice,'" *Milkovich* v. *News-Herald*, 46 Ohio App. 3d 20, 24, 545 N. E. 2d 1320, 1325 (1989), this statement was immediately explained by the court's following statement that the *Scott* ruling on the opinion issue had accorded respondents absolute immunity from liability. See 46 Ohio App. 3d, at 24, 545 N. E. 2d, at 1325. The court never made an evidentiary determination on the issue of respondents' negligence.

Next, respondents concede that the *Scott* court relied on the United States Constitution as well as the Ohio Constitution in its recognition of an opinion privilege, Brief for Respondents 18, but argue that certain statements made by the court evidenced an intent to independently rest the decision on state-law grounds, see 25 Ohio St. 3d, at 244, 496 N. E. 2d, at 701 ("We find the article to be an opinion, protected by Section 11, Article I of the Ohio Constitution . . ."); *id.*, at 245, 496 N. E. 2d, at 702 ("These ideals are not only an integral part of First Amendment freedoms under the federal Constitution but are independently reinforced in Section 11, Article I

In Shakespeare's Othello, Iago says to Othello:

> "Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed." Act III, scene 3.

Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, *supra*, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, *e. g.*, Restatement of Torts § 558 (1938); *Gertz*

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of the Ohio Constitution . . ."), thereby precluding federal review under *Michigan* v. *Long*, 463 U. S. 1032 (1983). We similarly reject this contention. In the *Milkovich* proceedings below, the Court of Appeals relied completely on *Scott* in concluding that Diadiun's article was privileged opinion. See 46 Ohio App. 3d, at 23–25, 545 N. E. 2d, at 1324–1325. *Scott* relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants, see, *e. g.*, 25 Ohio St. 3d, at 244, 496 N. E. 2d, at 701 ("The federal Constitution has been construed to protect published opinions ever since the United States Supreme Court's opinion in *Gertz* v. *Robert Welch, Inc.* . . ."), and concluded that "[b]ased upon the totality of circumstances it is our view that Diadiun's article was constitutionally protected opinion both with respect to the federal Constitution and under our state Constitution." *Id.*, at 254, 496 N. E. 2d, at 709. Thus, the *Scott* decision was at least "interwoven with the federal law," and was not clear on its face as to the court's intent to rely on independent state grounds, yet failed to make a "plain statement . . . that the federal cases . . . [did] not themselves compel the result that the court . . . reached." *Long*, *supra*, at 1040–1041. Under *Long*, then, federal review is not barred in this case. We note that the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand.

v. *Robert Welch, Inc.*, 418 U. S., at 370 (WHITE, J., dissenting) ("Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule"). The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be statements of fact or opinion. See, *e. g.*, Restatement of Torts, *supra*, §§ 565–567. As noted in the 1977 Restatement (Second) of Torts § 566, Comment *a:*

> "Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory. . . . This position was maintained even though the truth or falsity of an opinion—as distinguished from a statement of fact—is not a matter that can be objectively determined and truth is a complete defense to a suit for defamation."

However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made

solely for the purpose of causing harm. See Restatement of Torts, *supra*, § 606. "According to the majority rule, the privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, *supra*, § 566, Comment *a*. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

In 1964, we decided in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 279–280. This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state-law "'rule compelling the critic of official conduct to guarantee the truth of all his factual assertions' would deter protected speech." *Gertz* v. *Robert Welch, Inc.*, *supra*, at 334 (quoting *New York Times*, *supra*, at 279).

Three years later, in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), a majority of the Court determined "that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials.' The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons 'who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Gertz*, *supra*, at 336–337

(quoting *Butts*, *supra*, at 164 (Warren, C. J., concurring in result)). As Chief Justice Warren noted in concurrence, "[o]ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'" *Butts*, *supra*, at 164. The Court has also determined that both for public officials and public figures, a showing of *New York Times* malice is subject to a clear and convincing standard of proof. *Gertz*, *supra*, at 342.

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was intially in doubt, see *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), the Court ultimately concluded that the *New York Times* malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. *Gertz* v. *Robert Welch, Inc.*, *supra*. As we explained:

> "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.
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> . . . . . .
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> "[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual." *Id.*, at 344–345 (footnote omitted).

Nonetheless, the Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See *id.*, at 347–348 ("This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful in-

jury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation"). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice. See 418 U. S., at 350 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . .").

Still later, in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767 (1986), we held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.*, at 777. In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.*, at 776. Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." *Id.*, at 777–778.

We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions. In *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U. S. 6 (1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as "blackmail," and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word "blackmail" implied the developer had committed the actual crime of blackmail, we held that "the imposition of

liability on such a basis was constitutionally impermissible—that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review." *Id.*, at 13. Noting that the published reports "were accurate and full," the Court reasoned that "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." *Id.*, at 13–14. See also *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 50 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Letter Carriers* v. *Austin*, 418 U. S. 264, 284–286 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members").

The Court has also determined that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984) (quoting *New York Times*, 376 U. S., at 284–286). "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 685 (1989).

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First-Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact." For

this proposition they rely principally on the following dictum from our opinion in *Gertz:*

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U. S., at 339–340 (footnote omitted).

Judge Friendly appropriately observed that this passage "has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question." *Cianci* v. *New Times Publishing Co.*, 639 F. 2d 54, 61 (CA2 1980). Read in context, though, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic "marketplace of ideas" concept. See *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (dissenting opinion) ("[T]he ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

Thus, we do not think this passage from *Gertz* was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." See *Cianci*, *supra*, at 62, n. 10 (The "marketplace of ideas" origin of this passage "points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion"). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact.

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts

upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'" See *Cianci*, *supra*, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to "a false statement of fact, whether it was expressly stated or implied from an expression of opinion." Restatement (Second) of Torts, § 566, Comment *a* (1977).

Apart from their reliance on the *Gertz* dictum, respondents do not really contend that a statement such as, "In my opinion John Jones is a liar," should be protected by a separate privilege for "opinion" under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is "opinion" or "fact," and that only the latter statements may be actionable. They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the *Gertz* dictum) be considered in deciding which is which. But we think the "'breathing space'" which "'[f]reedoms of expression require in order to survive,'" *Hepps*, 475 U. S., at 772 (quoting *New York Times*, *supra*, at 272), is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact.

Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defend-

ant is involved.[6] Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.[7]

Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U. S., at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id.*, at 53–55.

The *New York Times-Butts-Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *New York Times*, 376 U. S., at 270. Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault

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[6] In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, see 475 U. S., at 779, n. 4, and accordingly we do the same. Prior to *Hepps*, of course, where public-official or public-figure plaintiffs were involved, the *New York Times* rule already required a showing of falsity before liability could result. 475 U. S., at 775.

[7] We note that the issue of falsity relates to the *defamatory* facts implied by a statement. For instance, the statement, "I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery.

as required by *Gertz*.[8] Finally, the enhanced appellate review required by *Bose Corp.* provides assurance that the foregoing determinations will be made in a manner so as not to "constitute a forbidden intrusion of the field of free expression." *Bose Corp.*, 466 U. S., at 499 (quotation omitted).

We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed: "[T]he clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.'" *Scott*, 25 Ohio St. 3d, at 251, 496 N. E. 2d, at 707. This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination whether petitioner lied in this instance can be made on a core of objective evidence by comparing, *inter alia*, petitioner's testimony before the OHSAA board with his subsequent testimony before the trial court. As the *Scott* court noted regarding the plaintiff in that case: "[W]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at

[8] Of course, the limitations on presumed or punitive damages established by *New York Times* and *Gertz* also apply to the type of statements at issue here.

the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an objectively verifiable event." *Id.*, at 252, 496 N. E. 2d, at 707. So too with petitioner Milkovich.[9]

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer*, 383 U. S. 75, 86 (1966). Justice Stewart in that case put it with his customary clarity:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.
>
> . . . . .
>
> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to re-

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[9] In their brief, *amici* Dow Jones et al. urge us to view the disputed statements "[a]gainst the background of a high profile controversy in a small community," and says that "[t]hey related to a matter of pressing public concern in a small town." Brief for Dow Jones et al. as *Amici Curiae* 27. We do not have the same certainty as do *amici* that people in a "small town" view statements such as these differently from people in a large city. Be that as it may, however, *amici* err in their factual assumption. Maple Heights is located in Cuyahoga County, Ohio, and in the 1980 census had a population of 29,735. Mentor is located in Lake County, Ohio, and in the 1980 census had a population of 42,065. Lake County adjoins Cuyahoga County on the east, and in the 1980 census had a population of 212,801. Both Maple Heights and Mentor are included in the Cleveland standard consolidated statistical area, which in 1980 had a population of 2,834,062. The high schools of both Mentor and Maple Heights played in the Greater Cleveland Conference.

deem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Id.*, at 92–93 (concurring opinion).

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Since this Court first hinted that the First Amendment provides some manner of protection for statements of opinion,[1] notwithstanding any common-law protection, courts and commentators have struggled with the contours of this protection and its relationship to other doctrines within our First Amendment jurisprudence. Today, for the first time, the Court addresses this question directly and, to my mind, does so cogently and almost entirely correctly. I agree with the Court that under our line of cases culminating in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767, 777 (1986), only defamatory statements that are capable of being proved false are subject to liability under state libel law. See *ante*, at 16.[2] I also agree with the Court that the "state-

[1] See, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 292, n. 30 (1964) ("Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact"); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 339–340 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

[2] The defendant in the *Hepps* case was a major daily newspaper and, as the majority notes, see *ante*, at 16, the Court declined to decide whether the rule it applied to the newspaper would also apply to a nonmedia defendant. See 475 U. S., at 779, n. 4. I continue to believe that "such a distinction is 'irreconcilable with the fundamental First Amendment principle

ment" that the plaintiff must prove false under *Hepps* is not invariably the literal phrase published but rather what a reasonable reader would have understood the author to have said. See *ante*, at 16–17 (discussing *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U. S. 6 (1970); *Letter Carriers* v. *Austin*, 418 U. S. 264 (1974); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988)).

In other words, while the Court today dispels any misimpression that there is a so-called opinion privilege *wholly in addition* to the protections we have already found to be guaranteed by the First Amendment, it determines that a protection for statements of pure opinion is dictated by *existing* First Amendment doctrine. As the Court explains, "full constitutional protection" extends to any statement relating to matters of public concern "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Ante*, at 20. Among the circumstances to be scrutinized by a court in ascertaining whether a statement purports to state or imply "actual facts about an individual," as shown by the Court's analysis of the statements at issue here, see *ante*, at 22, and n. 9, are the same indicia that lower courts have been relying on for the past decade or so to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made. See, *e. g.*, *Potomac Valve & Fitting Inc.* v. *Crawford Fitting Co.*, 829 F. 2d 1280 (CA4 1987); *Janklow* v. *Newsweek, Inc.*, 788 F. 2d 1300 (CA8 1986); *Ollman* v. *Evans*, 242 U. S. App. D. C. 301, 750 F. 2d 970 (1984), cert. denied, 471 U. S. 1127 (1985).

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that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual."'" *Id.*, at 780 (BRENNAN, J., concurring) (citations omitted).

With all of the above, I am essentially in agreement. I part company with the Court at the point where it applies these general rules to the statements at issue in this case because I find that the challenged statements cannot reasonably be interpreted as either stating or implying defamatory facts about petitioner. Under the rule articulated in the majority opinion, therefore, the statements are due "full constitutional protection." I respectfully dissent.

I

As the majority recognizes, the kind of language used and the context in which it is used may signal readers that an author is not purporting to state or imply actual, known facts. In such cases, this Court has rejected claims to the contrary and found that liability may not attach "as a matter of constitutional law." *Ante*, at 17. See, *e. g.*, *Bresler*, *supra* (metaphor); *Letter Carriers*, *supra* (hyperbole); *Falwell*, *supra* (parody). In *Bresler*, for example, we found that Bresler could not recover for being accused of "blackmail" because the readers of the article would have understood the author to mean only that Bresler was manipulative and extremely unreasonable. See *ante*, at 16–17. In *Letter Carriers*, we found that plaintiffs could not recover for being accused of being "traitor[s]" because the newsletter's readers would have understood that the author meant that plaintiffs' accurately reported actions were reprehensible and destructive to the social fabric, not that plaintiffs committed treason. See *ante*, at 17.

Statements of belief or opinion are like hyperbole, as the majority agrees, in that they are not understood as actual assertions of fact about an individual, but they may be actionable if they *imply* the existence of false and defamatory facts. See *ante*, at 18–19. The majority provides some general guidance for identifying when statements of opinion imply assertions of fact. But it is a matter worthy of further attention

in order "to confine the perimeters of [an] unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 505 (1984). Although statements of opinion *may* imply an assertion of a false and defamatory fact, they do not *invariably* do so. Distinguishing which statements do imply an assertion of a false and defamatory fact requires the same solicitous and thorough evaluation that this Court has engaged in when determining whether particular exaggerated or satirical statements could reasonably be understood to have asserted such facts. See *Bresler*, *supra*; *Letter Carriers*, *supra*; *Falwell*, *supra*. As Justice Holmes observed long ago: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne* v. *Eisner*, 245 U. S. 418, 425 (1918).

For instance, the statement that "Jones is a liar," or the example given by the majority, "In my opinion John Jones is a liar"—standing alone—can reasonably be interpreted as implying that there are facts known to the speaker to cause him to form such an opinion. See *ante*, at 18–19. But a different result must obtain if the speaker's comments had instead been as follows: "Jones' brother once lied to me; Jones just told me he was 25; I've never met Jones before and I don't actually know how old he is or anything else about him, but he looks 16; I think Jones lied about his age just now." In the latter case, there are at least six statements, two of which may arguably be actionable. The first such statement is factual and defamatory and may support a defamation action by Jones' brother. The second statement, however, that "I think Jones lied about his age just now," can be reasonably interpreted in context only as a statement that the speaker infers, from the facts stated, that Jones told a particular lie. It is clear to the listener that the speaker does

not actually know whether Jones lied and does not have any other reasons for thinking he did.[3] Thus, the only fact implied by the second statement is that the speaker drew this inference. If the inference is sincere or nondefamatory, the speaker is not liable for damages.[4]

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[3] The Restatement (Second) of Torts § 566, Comment *c* (1977), makes a similar observation. It explains that a statement that "I think C must be an alcoholic" is potentially libelous because a jury might find that it implies the speaker knew undisclosed facts to justify the statement. In contrast, it finds that the following statement could not be found to imply any defamatory facts:

"A writes to B about his neighbor C: 'He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.' "

Yet even though clear disclosure of a comment's factual predicate precludes a finding that the comment implies other defamatory facts, this does not signify that a statement, preceded by only a partial factual predicate or none at all, necessarily implies other facts. The operative question remains whether reasonable readers would have actually interpreted the statement as implying defamatory facts. See *ante*, at 20, n. 7; see generally Note, 13 Wm. Mitchell L. Rev. 545 (1987); Comment, 74 Calif. L. Rev. 1001 (1986); Zimmerman, Curbing the High Price of Loose Talk, 18 U. C. D. L. Rev. 359 (1985).

[4] See *ante*, at 20, n. 7 (noting that under *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767 (1986), "the issue of falsity relates to the defamatory facts *implied* by a statement" (emphasis changed)). *Hepps* mandates protection for speech that does not actually state or imply false and defamatory facts—independently of the *Bresler-Letter Carriers-Falwell* line of cases. Implicit in the constitutional rule that a plaintiff must prove a statement false to recover damages is a requirement to determine first what statement was actually made. The proof that *Hepps* requires from the plaintiff hinges on what the statement can reasonably be interpreted to mean. For instance, if Riley tells his friends that Smith cheats at cards and Smith then proves that he did not rob a convenience store, Smith cannot recover damages for libel on that basis because he has proved the wrong assertion false. Likewise, in the example in text, Jones cannot recover for defamation for the statement "I think Jones lied about his age just now" by producing proof that he did not lie about his age because, like Smith, he would have proved the wrong assertion false. The assertion

II

The majority does not rest its decision today on any finding that the statements at issue explicitly state a false and defamatory fact. Nor could it. Diadiun's assumption that Milkovich must have lied at the court hearing is patently conjecture.[5] The majority finds Diadiun's statements actionable, however, because it concludes that these statements imply a factual assertion that Milkovich perjured himself at the judicial proceeding. I disagree. Diadiun not only reveals the facts upon which he is relying but he makes it clear at which point he runs out of facts and is simply guessing. Read in context, the statements cannot reasonably be interpreted as implying such an assertion as fact. See *ante*, at 5–7, n. 2 (reproducing the column).

Diadiun begins the column by noting that, on the day before, a Court of Common Pleas had overturned the decision by the Ohio High School Athletic Association (OHSAA) to suspend the Maple Heights wrestling team from that year's state tournament. He adds that the reversal was based on due process grounds. Diadiun emphasizes to the audience that he was present at the wrestling meet where the brawl that led to the team's suspension took place and that he was present at the hearing before the OHSAA. He attributes the brawl to Maple Heights coach Milkovich's wild gestures, ranting and egging the crowd on against the competing team from Mentor. He then describes Milkovich's testimony before the OHSAA, characterizing it as deliberate misrepresen-

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Jones must prove false is that the speaker had, in fact, drawn the inference that Jones lied.

[5] Conjecture, when recognizable as such, alerts the audience that the statement is one of belief, not fact. The audience understands that the speaker is merely putting forward a hypothesis. Although the hypothesis involves a factual question, it is understood as the author's "best guess." Of course, if the speculative conclusion is preceded by stated factual premises, and one or more of them is false and defamatory, an action for libel may lie *as to them*. But the speculative conclusion itself is actionable only if it implies the existence of another false and defamatory fact.

tation "attempting not only to convince the board of [his] own innocence, but, incredibly, shift the blame of the affair to Mentor." *Ante*, at 6, n. 2. Diadiun then quotes statements allegedly made by Milkovich to the commissioners to the effect that his wrestlers had not been involved in the fight and his gestures had been mere shrugs.

At that point in the article, the author openly begins to surmise. Diadiun says that it "*seemed*" that Milkovich's and another official's story contained enough contradictions and obvious untruths that the OHSAA board was able to see through it and that "*[p]robably*" the OHSAA's suspension of the Maple Heights team reflected displeasure as much at the testimony as at the melee. *Ante*, at 7, n. 2 (emphasis added). Then Diadiun guesses that by the time of the court hearing, the two officials "*apparently* had their version of the incident polished and reconstructed, and the judge *apparently* believed them." *Ibid.* (emphasis added). For the first time, the column quotes a third party's version of events. The source, an OHSAA commissioner, is described—in evident contrast to Diadiun—as having attended the proceeding. The column does not quote any testimony from the court proceeding, nor does it describe what Milkovich said in court. There is only a vague statement from the OHSAA commissioner that the testimony "sounded pretty darned unfamiliar."[6] For the first time, Diadiun fails

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[6] The commissioner is quoted as having said: "'I can say that some of the stories told to the judge sounded pretty darned unfamiliar . . . . It certainly sounded different from what they told us.'" *Ante*, at 7, n. 2. This quotation might also be regarded as a stated factual premise on which Diadiun's speculation is based. However, Milkovich did not complain of the quotation in his pleadings. In any event, it is unlikely that it would be found defamatory. Diadiun had already characterized the testimony of the two officials before the OHSAA as "obvious untruths." Thus, the commissioner's alleged assertion that the testimony in court was different is quite nebulous. It might indicate that the officials told the truth in court, in contrast to the version given to the commissioners, or that the

to claim any firsthand knowledge, after stressing that he had personally attended both the meet and the OHSAA hearing. After noting again that the judge ruled in Milkovich's and Maple Heights' favor, Diadiun proclaims: "Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Ibid.*

No reasonable reader could understand Diadiun to be impliedly asserting—as fact—that Milkovich had perjured himself. Nor could such a reader infer that Diadiun had further information about Milkovich's court testimony on which his belief was based. It is plain from the column that Diadiun did not attend the court hearing. Diadiun also clearly had no detailed secondhand information about what Milkovich had said in court. Instead, what suffices for "detail" and "color" are quotations from the OHSAA hearing—old news compared to the court decision which prompted the column—and a vague quotation from an OHSAA commissioner. Readers could see that Diadiun was focused on the court's reversal of the OHSAA's decision and was angrily supposing what must have led to it.[7]

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officials discussed entirely different issues, rather than that they told a new lie.

[7] Both state and federal courts have found that audiences can recognize conjecture that neither states nor implies any assertions of fact, just as they can recognize hyperbole. For example, in *Potomac Valve & Fitting Inc.* v. *Crawford Fitting Co.*, 829 F. 2d 1280, 1290 (CA4 1987), the court found that a disparaging statement about a product test in an industry newsletter, set forth following a list of seven observations about the test's methodology, "readily appears to be nothing more than the author's personal inference from the test results. The premises are explicit, and the reader is by no means required to share [the author's] conclusion." For the same reason, the court in *Dunlap* v. *Wayne*, 105 Wash. 2d 529, 540, 716 P. 2d 842, 849 (1986), concluded: "Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves." See also *National Assn. of Government Employees, Inc.* v. *Cen-*

Even the insinuation that Milkovich had repeated, in court, a more plausible version of the misrepresentations he had made at the OHSAA hearing is preceded by the cautionary term "apparently"—an unmistakable sign that Diadiun did not know what Milkovich had actually said in court. "[C]autionary language or interrogatories of this type put the reader on notice that what is being read is opinion and thus weaken any inference that the author possesses knowledge of damaging, undisclosed facts. . . . In a word, when the reasonable reader encounters cautionary language, he tends to 'discount that which follows.'" *Ollman* v. *Evans*, 242 U. S. App. D. C., at 314, 750 F. 2d, at 983, quoting *Burns* v. *McGraw-Hill Broadcasting Co.*, 659 P. 2d 1351, 1360 (Colo. 1983). See also B. Sanford, Libel and Privacy: The Prevention and Defense of Litigation 145 (1987) (explaining that many courts have found that words like "apparent" reveal "that the assertion is qualified or speculative and is not to be understood as a declaration of fact"); *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F. 2d 781, 784 (CA9 1980) (explaining that a statement phrased in language of apparency "is less likely to be understood as a statement of

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tral Broadcasting Corp., 379 Mass. 220, 226, 396 N. E. 2d 996, 1000 (1979) (finding that, as listeners were told the facts upon which a radio talk show host based her conclusion, they "could make up their own minds and generate their own opinions or ideas which might or might not accord with [the host's]").

The common-law doctrine of fair comment was also premised on such an observation. Where the reader knew or was told the factual foundation for a comment and could therefore independently judge whether the comment was reasonable, a defendant's unreasonable comment was held to defame "'himself rather than the subject of his remarks.'" Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205, 1229 (1976) (quoting *Popham* v. *Pickburn*, 7 H. & N. 891, 898, 158 Eng. Rep. 730, 733 (Ex. 1862) (Wilde, B.)). "As Thomas Jefferson observed in his first Inaugural Address . . . error of opinion need not and ought not be corrected by the courts 'where reason is left free to combat it.'" *Potomac*, *supra*, at 1288–1289, quoting Thomas Jefferson's first Inaugural Address (The Complete Jefferson 385 (S. Padover ed. 1943)).

fact rather than as a statement of opinion"); *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 603, 552 P. 2d 425, 429 (1976) (finding a letter "cautiously phrased in terms of apparency" did not imply factual assertions); *Stewart* v. *Chicago Title Ins. Co.*, 151 Ill. App. 3d 888, 894, 503 N. E. 2d 580, 583 (1987) (finding a letter "couched in language of opinion rather than firsthand knowledge" did not imply factual assertions). Thus, it is evident from what Diadiun actually wrote that he had no unstated reasons for concluding that Milkovich perjured himself.

Furthermore, the tone and format of the piece notify readers to expect speculation and personal judgment. The tone is pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage. Diadiun never says, for instance, that Milkovich committed perjury. He says that "[a]nyone who attended the meet . . . knows in his heart" that Milkovich lied—obvious hyperbole as Diadiun does not purport to have researched what everyone who attended the meet knows in his heart.

The format of the piece is a signed editorial column with a photograph of the columnist and the logo "TD Says." Even the headline on the page where the column is continued—"Diadiun says Maple told a lie," *ante*, at 4—reminds readers that they are reading one man's commentary. While signed columns may certainly include statements of fact, they are also the "well recognized home of opinion and comment." *Mr. Chow of New York* v. *Ste. Jour Azur S. A.*, 759 F. 2d 219, 227 (CA2 1985). Certain formats—editorials, reviews, political cartoons, letters to the editor—signal the reader to anticipate a departure from what is actually known by the author as fact. See *Ollman* v. *Evans*, *supra*, at 317, 750 F. 2d, at 986 ("The reasonable reader who peruses [a] column on the editorial or Op-Ed page is fully aware that the statements found there are not 'hard' news like those printed on the front page or elsewhere in the news sections of the newspaper"); R. Smolla, Law of Defamation § 6.12(4), n. 252 (1990) (col-

lecting cases); Zimmerman, Curbing the High Price of Loose Talk, 18 U. C. D. L. Rev. 359, 442 (1985) (stressing the need to take into account "the cultural common sense of the ordinary listener or reader").[8]

III

Although I agree with the majority that statements must be scrutinized for implicit factual assertions, the majority's scrutiny in this case does not "hol[d] the balance true," *ante*, at 23, between protection of individual reputation and freedom of speech. The statements complained of neither state nor imply a false assertion of fact, and, under the rule the Court reconfirms today, they should be found not libel "'as a matter of constitutional law.'" *Ante*, at 17, quoting *Bresler*, 398 U. S., at 13. Readers of Diadiun's column are signaled repeatedly that the author does not actually know what Milkovich said at the court hearing and that the author is surmising, from factual premises made explicit in the column, that Milkovich must have lied in court.[9]

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[8] The readers of Diadiun's column would also have been alerted to regard any implicit claim of impartiality by Diadiun with skepticism because Diadiun's newspaper is published in the county in which Mentor High School—home to the team that was allegedly mauled at the wrestling meet—is located. Where readers know that an author represents one side in a controversy, they are properly warned to expect that the opinions expressed may rest on passion rather than factual foundation. See, *e. g.*, *Potomac Valve & Fitting Inc.* v. *Crawford Fitting Co.*, 829 F. 2d, at 1290 (explaining that the contents of a company's newsletter would be understood as reflecting the professional interests of the company rather than as "a dispassionate and impartial assessment" of a test of a competitor's product); *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F. 2d 781, 784 (CA9 1980) (recognizing that statements in the early weeks of litigation by one side about the other were likely to include unsubstantiated charges, but that these "are highly unlikely to be understood by their audience as statements of fact").

[9] Milkovich does not challenge the accuracy of any of Diadiun's stated premises. Nor does he complain or proffer proof that Diadiun had not, in fact, concluded from the stated premises that Milkovich must have lied in court. There is, therefore, no call to consider under what circumstances

Like the "imaginative expression" and the "rhetorical hyperbole" which the Court finds have "traditionally added much to the discourse of our Nation," *ante*, at 18, conjecture is intrinsic to "the free flow of ideas and opinions on matters of public interest and concern" that is at "the heart of the First Amendment." *Falwell*, 485 U. S., at 50. The public and press regularly examine the activities of those who affect our lives. "One of the perogatives of American citizenship is the right to criticize men and measures." *Id.*, at 51 (quoting *Baumgartner* v. *United States*, 322 U. S. 665, 673–674 (1944)). But often only some of the facts are known, and solely through insistent prodding—through conjecture as well as research—can important public questions be subjected to the "uninhibited, robust, and wide-open" debate to which this country is profoundly committed. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964).

Did NASA officials ignore sound warnings that the Challenger Space Shuttle would explode? Did Cuban-American

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an insincere speculation would constitute a false and defamatory statement under *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U. S. 767 (1986). However, I would think that documentary or eyewitness testimony that the speaker did not believe his own professed opinion would be required before a court would be permitted to decide that there was sufficient evidence to find that the statement was false and submit the question to a jury. Without such objective evidence, a jury's judgment might be too influenced by its view of what was said. As we have long recognized, a jury "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971) (quoting *New York Times*, 376 U. S., at 270). See also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 510–511, and n. 29 (1984) (discussing the risks of submitting various questions to juries where freedom of speech is at stake); *Gertz*, 418 U. S., at 349 (expressing concern about juries punishing unpopular opinion rather than compensating individuals for injuries sustained by the publication of a false fact); R. Smolla, Law of Defamation §§ 6.05(3)(a)–(c) (1990); Zimmerman, 18 U. C. D. L. Rev., at 430.

leaders arrange for John Fitzgerald Kennedy's assassination? Was Kurt Waldheim a Nazi officer? Such questions are matters of public concern long before all the facts are unearthed, if they ever are. Conjecture is a means of fueling a national discourse on such questions and stimulating public pressure for answers from those who know more. "'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'" *Id.*, at 269 (quoting *Stromberg* v. *California*, 283 U. S. 359, 369 (1931)).

What may be more disturbing to some about Diadiun's conjecture than, say, an editorial in 1960 speculating that Francis Gary Powers was in fact a spy, despite the Government's initial assurances that he was not, is the naiveté of Diadiun's conclusion. The basis of the court decision that is the subject of Diadiun's column was that Maple Heights had been denied its right to due process by the OHSAA. Diadiun, as it happens, not only knew this but included it in his column. But to anyone who knows what "due process" means, it does not follow that the court must have believed some lie about what happened at the wrestling meet, because what happened at the meet would not have been germane to the questions at issue. There may have been testimony about what happened, and that testimony may have been perjured, but to anyone who understands the patois of the legal profession there is no reason to assume—from the court's decision—that such testimony must have been given.

Diadiun, therefore, *is* guilty. He is guilty of jumping to conclusions, of benightedly assuming that court decisions are always based on the merits, and of looking foolish to lawyers. He is not, however, liable for defamation. Ignorance, without more, has never served to defeat freedom of speech. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are

offered.'" *New York Times*, *supra*, at 271 (quoting *NAACP* v. *Button*, 371 U. S. 415, 445 (1963)).

I appreciate this Court's concern with redressing injuries to an individual's reputation. But as long as it is clear to the reader that he is being offered conjecture and not solid information, the danger to reputation is one we have chosen to tolerate in pursuit of "'individual liberty [and] the common quest for truth and the vitality of society as a whole.'" *Falwell*, *supra*, at 50–51 (quoting *Bose Corp.*, 466 U. S., at 503–504). Readers are as capable of independently evaluating the merits of such speculative conclusions as they are of evaluating the merits of pure opprobrium. Punishing such conjecture protects reputation only at the cost of expunging a genuinely useful mechanism for public debate. "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." *Edwards* v. *National Audubon Society, Inc.*, 556 F. 2d 113, 115 (CA2), cert. denied *sub nom. Edwards* v. *New York Times Co.*, 434 U. S. 1002 (1977).

It is, therefore, imperative that we take the most particular care where freedom of speech is at risk, not only in articulating the rules mandated by the First Amendment, but also in applying them. "'Whatever is added to the field of libel is taken from the field of free debate.'" *New York Times*, *supra*, at 272 (quoting *Sweeney* v. *Patterson*, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458, cert. denied, 317 U. S. 678 (1942)). Because I would affirm the Ohio Court of Appeals' grant of summary judgment to respondents, albeit on somewhat different reasoning, I respectfully dissent.

Syllabus

COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION *v.* YOUNGBLOOD

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

No. 89–742. Argued March 19, 1990—Decided June 21, 1990

Respondent was convicted in a Texas state court of aggravated sexual abuse and sentenced to life imprisonment and a $10,000 fine. After his conviction and sentence were affirmed on direct appeal, he applied for a writ of habeas corpus in state court, arguing that Texas law did not authorize both a fine and prison term for his offense, and thus that his judgment and sentence were void and he was entitled to a new trial. The court, bound by a State Court of Criminal Appeals' decision, recommended that the writ be granted. Before the writ was considered by the Court of Criminal Appeals, however, a new statute was passed allowing an appellate court to reform an improper verdict assessing a punishment not authorized by law. Thus, the Court of Criminal Appeals reformed the verdict by ordering that the fine be deleted and denied the request for a new trial. Arguing that the new Texas law's retroactive application violated the *Ex Post Facto* Clause of Art. 1, § 10, of the Federal Constitution, respondent sought a writ of habeas corpus in Federal District Court, which was denied. The Court of Appeals reversed. Relying on the statement in *Thompson* v. *Utah*, 170 U. S. 343, that retroactive procedural statutes violate the *Ex Post Facto* Clause unless they "leave untouched all the substantial protections with which existing law surrounds the . . . accused," the court held that respondent's right to a new trial under former Texas law was a "substantial protection."

Held:

1. Although the rule of *Teague* v. *Lane*, 489 U. S. 288—which prohibits the retroactive application of new rules to cases on collateral review—is grounded in important considerations of federal-state relations, it is not jurisdictional in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue *sua sponte*. Since Texas has chosen not to rely on *Teague*, the merits of respondent's claim will be considered. Pp. 40–41.

2. The application of the Texas statute to respondent is not prohibited by the *Ex Post Facto* Clause. Pp. 41–52.

(a) The definition of an *ex post facto* law as one that (1) punishes as a crime an act previously committed, which was innocent when done, (2)

makes more burdensome the punishment for a crime, after its commission, or (3) deprives one charged with a crime of any defense available according to law at the time when the act was committed, *Beazell* v. *Ohio*, 269 U. S. 167, is faithful to this Court's best knowledge of the original understanding of the Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts. Respondent concedes that Texas' statute does not fall within the *Beazell* categories, since it is a procedural change in the law. However, he errs in arguing that this Court's decisions have not limited the Clause's scope to those categories, but have stated more broadly that retroactive legislation contravenes the Clause if it deprives an accused of a "substantial protection" under law existing at the time of the crime, and that the new trial guaranteed by Texas law is such a protection. When cases have described as "procedural" those changes that do not violate the Clause even though they work to the accused's disadvantage, see, *e. g.*, *Beazell*, *supra*, at 171, it is logical to presume that "procedural" refers to changes in the procedures by which a criminal case is adjudicated as opposed to substantive changes in the law. The "substantial protection" discussion in *Beazell*, *Duncan* v. *Missouri*, 152 U. S. 377, 382–383, and *Malloy* v. *South Carolina*, 237 U. S. 180, 183, has imported confusion into the Clause's interpretation and should be read to mean that a legislature does not immunize a law from scrutiny under the Clause simply by labeling the law "procedural." It should not be read to adopt without explanation an undefined enlargement of the Clause. Pp. 41–46.

(b) *Kring* v. *Missouri*, 107 U. S. 221, and *Thompson* v. *Utah*, *supra*, are inconsistent with the understanding of the term "*ex post facto* law" at the time the Constitution was adopted, rely on reasoning that this Court has not followed since *Thompson* was decided, and have caused confusion in state and lower federal courts about the Clause's scope. *Kring* and *Thompson* are therefore overruled. Pp. 47–52.

882 F. 2d 956, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 52.

Charles A. Palmer, Assistant Attorney General of Texas, argued the cause for petitioner. With him on the brief were *Jim Mattox*, Attorney General, *Mary F. Keller*, First Assistant Attorney General, and *Michael P. Hodge*, Assistant Attorney General.

Jon R. Farrar argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case, violates the *Ex Post Facto* Clause of Art. I, § 10. We hold that it does not.

Respondent Carroll Youngblood was convicted in a Texas court of aggravated sexual abuse. The jury imposed punishment of life imprisonment and a fine of $10,000. After his conviction and sentence were affirmed by the Texas Court of Criminal Appeals, Youngblood applied for a writ of habeas corpus in the State District Court. He argued that the Texas Code of Criminal Procedure did not authorize a fine in addition to a term of imprisonment for his offense, and, thus, under the decision of the Court of Criminal Appeals in *Bogany* v. *State*, 661 S. W. 2d 957 (1983), the judgment and sentence were void, and he was entitled to a new trial.[1] In April 1985, the District Court, feeling bound by *Bogany*, recommended that the writ be granted.

Before the habeas application was considered by the Texas Court of Criminal Appeals, which has the exclusive power under Texas law to grant writs of habeas corpus, see Tex. Code Crim. Proc. Ann., Art. 11.07 (Vernon 1977 and Supp. 1990), a new Texas statute designed to modify the *Bogany*

**Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *James A. Feldman* filed a brief for the United States as *amicus curiae* urging reversal.

Arthur F. Mathews and *Thomas F. Connell* filed a brief for Wilbert Lee Evans as *amicus curiae*.

[1] In *Bogany*, the Texas Court of Criminal Appeals held that a jury verdict which included a punishment unauthorized by law was void at its inception and had to be set aside. It concluded that Texas law at that time did not give appellate courts authority to reform such verdicts.

decision became effective. Article 37.10(b), as of June 11, 1985, allows an appellate court to reform an improper verdict that assesses a punishment not authorized by law. Tex. Code Crim. Proc. Ann., Art. 37.10(b) (Vernon Supp. 1990); see *Ex parte Johnson*, 697 S. W. 2d 605 (Tex. Crim. App. 1985). Relying on that statute, the Court of Criminal Appeals reformed the verdict in Youngblood's case by ordering deletion of the $10,000 fine and denied his request for a new trial.

Youngblood then sought a writ of habeas corpus from the United States District Court for the Eastern District of Texas, arguing that the retroactive application of Art. 37.10(b) violated the *Ex Post Facto* Clause of Art. I, § 10, of the Federal Constitution. The District Court concluded that since Youngblood's "punishment . . . was not increased (but actually decreased), and the elements of the offense or the ultimate facts necessary to establish guilt were not changed," there was no *ex post facto* violation. App. to Pet. for Cert. C–6.

The Court of Appeals reversed. *Youngblood* v. *Lynaugh*, 882 F. 2d 956 (CA5 1989). It relied on the statement in this Court's decision in *Thompson* v. *Utah*, 170 U. S. 343 (1898), that retroactive procedural statutes violate the *Ex Post Facto* Clause unless they "'leave untouched all the substantial protections with which existing law surrounds the person accused of crime,'" *Lynaugh*, *supra*, at 959 (quoting 170 U. S., at 352). It held that Youngblood's right to a new trial under the *Bogany* decision was such a "substantial protection," and therefore ordered that a writ of habeas corpus be issued. We granted certiorari. 493 U. S. 1001 (1989).

Because respondent is before us on collateral review, we are faced with a threshold question whether the relief sought by Youngblood would constitute a "new rule," which would not apply retroactively under our decisions in *Teague* v. *Lane*, 489 U. S. 288 (1989), and *Butler* v. *McKellar*, 494 U. S. 407 (1990). Generally speaking, "[r]etroactivity is

properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague*, *supra*, at 300. The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on *Teague*. Tr. of Oral Arg. 4–5. Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue *sua sponte*. Cf. *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 515, n. 19 (1982) (Eleventh Amendment defense need not be raised and decided by the Court on its own motion). We granted certiorari to consider the merits of respondent's *ex post facto* claim, and we proceed to do so.

Although the Latin phrase "*ex post facto*" literally encompasses any law passed "after the fact," it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes which disadvantage the offender affected by them. *Calder* v. *Bull*, 3 Dall. 386, 390–392 (1798) (opinion of Chase, J.); *id.*, at 396 (opinion of Paterson, J.); *id.*, at 400 (opinion of Iredell, J.). See *Miller* v. *Florida*, 482 U. S. 423, 430 (1987).[2] As early opinions in this Court explained, "*ex post facto* law" was a term of art with an established meaning at the time of the framing of the Constitution. *Calder*, 3 Dall., at 391 (opinion of Chase, J.); *id.*, at 396 (opinion of Paterson, J.). Justice Chase's now familiar opinion in *Calder* expounded those leg-

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[2] Although there has been some debate within the Court about the accuracy of the historical discussion in *Calder* v. *Bull*, see *Satterlee* v. *Matthewson*, 2 Pet. 380, 381 (1829) (note by Johnson, J.), the Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in *Calder* that the *Ex Post Facto* Clause applies only to penal statutes.

islative Acts which in his view implicated the core concern of the *Ex Post Facto* Clause:

> "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Id.*, at 390 (emphasis in original).

Early opinions of the Court portrayed this as an exclusive definition of *ex post facto* laws. *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810); *Cummings* v. *Missouri*, 4 Wall. 277, 325–326 (1867); *id.*, at 391 (Miller, J., dissenting) ("This exposition of the nature of *ex post facto* laws has never been denied, nor has any court or any commentator on the Constitution added to the classes of laws here set forth, as coming within that clause"); *Gut* v. *State*, 9 Wall. 35, 38 (1870). So well accepted were these principles that the Court in *Beazell* v. *Ohio*, 269 U. S. 167 (1925), was able to confidently summarize the meaning of the Clause as follows:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*." *Id.*, at 169–170.

See also *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977).[3]

The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts. Several early State Constitutions employed this definition of the term, and they appear to have been a basis for the Framers' understanding of the provision. See The Federalist No. 44, p. 301 (J. Cooke ed. 1961) (J. Madison); 2 M. Farrand, Records of the Federal Convention of 1787, p. 376 (1911); *Calder*, 3 Dall., at 391–392 (opinion of Chase, J.); *id.*, at 396–397 (opinion of Paterson, J.). The Constitutions of Maryland and North Carolina, for example, declared that "retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made." See Constitution of Maryland, Declaration of Rights, Art. XV (1776); Constitution of North Carolina, Declaration of Rights, Art. XXIV (1776). Other State Constitutions, though not using the phrase "*ex post facto*," included similar articles. See Declaration of Rights and Fundamental Rules of the Delaware State § 11 (1776); Constitution or Form of Government for the Commonwealth of Massachusetts, Declaration of Rights, Art. XXIV (1780).

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[3] The *Beazell* definition omits the reference by Justice Chase in *Calder* v. *Bull*, 3 Dall. 386, 390 (1798), to alterations in the "legal rules of evidence." See also *Hopt* v. *Utah*, 110 U. S. 574, 590 (1884) (approving procedural changes "leaving untouched the nature of the crime and the amount or degree of proof essential to conviction"). As cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. *Thompson* v. *Missouri*, 171 U. S. 380, 386–387 (1898) (rejecting *ex post facto* challenge to retroactive application of statute making admissible handwritten documents as handwriting exemplars); *Hopt*, *supra*, at 588–590 (upholding retroactive application of statute making felons competent to testify).

Another historical reference, Blackstone's Commentaries, which was discussed by the Framers during debates on the *Ex Post Facto* Clause, see 2 M. Farrand, Records of the Federal Convention of 1787, pp. 448–449 (1911), and deemed an authoritative source of the technical meaning of the term in *Calder*, see 3 Dall., at 391 (opinion of Chase, J.); *id.*, at 396 (opinion of Paterson, J.), buttresses this understanding. According to Blackstone, a law is *ex post facto* "when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." 1 W. Blackstone, Commentaries *46. Although increased punishments are not mentioned explicitly in the historical sources, the Court has never questioned their prohibition, apparently on the theory that "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty." *Calder*, *supra*, at 397 (opinion of Paterson, J.). The *Beazell* definition, then, is faithful to the use of the term "*ex post facto* law" at the time the Constitution was adopted.

Respondent concedes that Tex. Code Crim. Proc. Ann., Art. 37.10(b) (Vernon Supp. 1990), does not fall within any of the *Beazell* categories and, under that definition, would not constitute an *ex post facto* law as applied to him. The new statute is a procedural change that allows reformation of improper verdicts. It does not alter the definition of the crime of aggravated sexual abuse, of which Youngblood was convicted, nor does it increase the punishment for which he is eligible as a result of that conviction. Nevertheless, respondent maintains that this Court's decisions have not limited the scope of the *Ex Post Facto* Clause to the finite *Beazell* categories, but have stated more broadly that retroactive legislation contravenes Art. I, § 10, if it deprives an accused of a "substantial protection" under law existing at the time of the crime. He argues that the new trial guaranteed him by former Texas law is such a protection.

Several of our cases have described as "procedural" those changes which, even though they work to the disadvantage of the accused, do not violate the *Ex Post Facto* Clause. *Dobbert* v. *Florida*, *supra*, at 292–293, and n. 6; *Beazell* v. *Ohio*, 269 U. S., at 171; *Mallett* v. *North Carolina*, 181 U. S. 589, 597 (1901). While these cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes. Respondent correctly notes, however, that we have said that a procedural change may constitute an *ex post facto* violation if it "affect[s] matters of substance," *Beazell*, *supra*, at 171, by depriving a defendant of "substantial protections with which the existing law surrounds the person accused of crime," *Duncan* v. *Missouri*, 152 U. S. 377, 382–383 (1894), or arbitrarily infringing upon "substantial personal rights." *Malloy* v. *South Carolina*, 237 U. S. 180, 183 (1915); *Beazell*, *supra*, at 171.

We think this language from the cases cited has imported confusion into the interpretation of the *Ex Post Facto* Clause. The origin of the rather amorphous phrase, "substantial protections," appears to lie in a 19th-century treatise on constitutional law by Professor Thomas Cooley. T. Cooley, Constitutional Limitations *272. According to Cooley, who notably assumed the *Calder* construction of the *Ex Post Facto* Clause to be correct, Constitutional Limitations *265, a legislature "may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." *Id.*, at *272.

This Court's decision in *Duncan* v. *Missouri*, *supra*, subsequently adopted that phraseology:

> "[A]n *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed; or an additional punishment to that then

> prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required; or, in short, in relation to the offence or its consequences, alters the situation of a party to his disadvantage; but the prescribing of different modes or procedure and the abolition of courts and creation of new ones, *leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime*, are not considered within the constitutional inhibition. Cooley Const. Lim. (5th ed.) 329." *Id.*, at 382–383 (other citations omitted) (emphasis added).

Later, in *Malloy* v. *South Carolina*, *supra*, we stated that even with regard to procedural changes, the *Ex Post Facto* Clause was "intended to secure substantial personal rights against arbitrary and oppressive legislative action." *Id.*, at 183. We repeated that recognition in *Beazell* itself, while also emphasizing that the provision was "not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell*, *supra*, at 171.

We think the best way to make sense out of this discussion in the cases is to say that by simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. See *Gibson* v. *Mississippi*, 162 U. S. 565, 590 (1896). Subtle *ex post facto* violations are no more permissible than overt ones. In *Beazell*, *supra*, we said that the constitutional prohibition is addressed to laws, "whatever their form," which make innocent acts criminal, alter the nature of the offense, or increase the punishment. *Id.*, at 170. But the prohibition which may not be evaded is the one defined by the *Calder* categories. See *Duncan*, *supra*, at 382; *Malloy*, *supra*, at 183–184. The references in *Duncan* and *Malloy* to "substantial protections" and "personal rights" should not be read to adopt without explanation an undefined enlargement of the *Ex Post Facto* Clause.

Two decisions of this Court, relied upon by respondent, do not fit into this analytical framework. In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court said "it is not to be supposed that the opinion in *[Calder* v. *Bull]* undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable." *Id.*, at 228. It defined an *ex post facto* law, *inter alia*, as one which, "'in relation to the offence or its consequences, alters the situation of a party to his disadvantage.'" *Id.*, at 228–229 (quoting *United States* v. *Hall*, 26 F. Cas. 84, 86 (No. 15,285) (D Pa. 1809)) (emphasis deleted). And in *Thompson* v. *Utah*, 170 U. S. 343 (1898), the Court held that a change in Utah law reducing the size of juries in criminal cases from 12 persons to 8 deprived Thompson of "a substantial right involved in his liberty" and violated the *Ex Post Facto* Clause. *Id.*, at 352.

Neither of these decisions, in our view, is consistent with the understanding of the term "*ex post facto* law" at the time the Constitution was adopted. Nor has their reasoning been followed by this Court since *Thompson* was decided in 1898. These cases have caused confusion in state and lower federal courts about the scope of the *Ex Post Facto* Clause, as exemplified by the opinions of the District Court and Court of Appeals in this case. See also *Murphy* v. *Kentucky*, 465 U. S. 1072, 1073 (1984) (WHITE, J., dissenting from denial of certiorari) (noting "the evident confusion among lower courts concerning the application of the *Ex Post Facto* Clause to changes in rules of evidence and procedure"); *United States* v. *Kowal*, 596 F. Supp. 375, 377 (Conn. 1984) (Supreme Court jurisprudence applying *ex post facto* prohibition to retroactive procedural changes "is not all of one piece"); L. Tribe, American Constitutional Law 638 (2d ed. 1988) (procedural changes upheld by the Court "can hardly be distinguished in any functional way from those invalidated").

The earlier decision, *Kring* v. *Missouri*, was a capital case with a lengthy procedural history. Kring was charged with first-degree murder, but pursuant to a plea agreement, he

pleaded guilty to second-degree murder. The plea was accepted by the prosecutor and the trial court, and he was sentenced to 25 years in prison. He appealed the judgment, however, on the ground that his plea agreement provided for a sentence of no more than 10 years. The State Supreme Court reversed the judgment and remanded for further proceedings. In the trial court, Kring refused to withdraw his guilty plea to second-degree murder and refused to renew his plea of not guilty to first-degree murder, insisting instead that the acceptance of his earlier plea constituted an acquittal on the greater charge. The trial court, over Kring's objection, directed a general plea of not guilty to be entered, and upon retrial, he was convicted of first-degree murder and sentenced to death.

At the time the crime was committed, Missouri law provided that a defendant's plea of guilty to second-degree murder, if accepted by the prosecutor and the court, served as an acquittal of the charge of first-degree murder. After the crime, but before Kring made his plea, a new Missouri Constitution abrogated that rule. The State was thus free, as a matter of Missouri law, to retry Kring for first-degree murder after his conviction and the 25-year sentence for second-degree murder were vacated. The Supreme Court of Missouri held that the new law did not violate the *Ex Post Facto* Clause, because it effected only a change in criminal procedure.

This Court reversed by a vote of 5 to 4. As support for the view that *Calder* did not define an exclusive list of legislative Acts falling within the constitutional prohibition, Justice Miller's opinion for the Court quoted a jury charge given by Justice Washington sitting in the District Court: "'[A]n *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed; or which increases the punishment, *or, in short, which, in relation to the offence or its consequences, alters the situation of a party to his disadvantage.*'" *Kring, supra,* at 228–229

(quoting *United States* v. *Hall*, *supra*, at 86) (emphasis in original). Applying that test, the Court concluded that because the new Missouri Constitution denied Kring the benefit of an implied acquittal which the previous law provided, it "altered the situation to his disadvantage," and his conviction for first-degree murder was void. *Kring*, *supra*, at 235–236.

The Court's departure from *Calder*'s explanation of the original understanding of the *Ex Post Facto* Clause was, we think, unjustified. The language in the *Hall* case, heavily relied upon in *Kring* and repeated in other decisions thereafter, does not support a more expansive definition of *ex post facto* laws.

In *Hall*, a vessel owner was sued by the United States for forfeiture of an embargo bond obliging him to deliver certain cargo to Portland, Me. As a legal excuse, the defendant argued that a severe storm had disabled his vessel and forced him to land in Puerto Rico, where he was forced by the Puerto Rican government to sell the cargo. In dicta, Justice Washington hypothesized that, according to the law in effect at the time Hall forfeited the cargo, an "unavoidable accident" was an affirmative defense to a charge of failing to deliver cargo. His jury instruction then explained that a subsequent law imposing an additional requirement for the affirmative defense—that the vessel or cargo actually *be lost at sea* as a result of the unavoidable accident—would deprive Hall of a defense of his actions available at the time he sold the cargo and thus be an invalid *ex post facto* law.

This analysis is consistent with the *Beazell* framework. A law that abolishes an affirmative defense of justification or excuse contravenes Art. I, § 10, because it expands the scope of a criminal prohibition after the act is done. It appears, therefore, that Justice Washington's reference to laws "relat[ing] to the offence or its consequences," was simply shorthand for legal changes altering the definition of an offense or increasing a punishment. His jury charge should not be read to mean that the Constitution prohibits retrospective

laws, other than those encompassed by the *Calder* categories, which "alte[r] the situation of a party to his disadvantage." Nothing in the *Hall* case supports the broad construction of the *ex post facto* provision given by the Court in *Kring*.

It is possible to reconcile *Kring* with the numerous cases which have held that "procedural" changes do not result in *ex post facto* violations by saying that the change in Missouri law did take away a "defense" available to the defendant under the old procedure. But this use of the word "defense" carries a meaning quite different from that which appears in the quoted language from *Beazell*, where the term was linked to the prohibition on alterations in "the legal definition of the offense" or "the nature or amount of the punishment imposed for its commission." *Beazell*, 269 U. S., at 169–170. The "defense" available to Kring under earlier Missouri law was not one related to the definition of the crime, but was based on the law regulating the effect of guilty pleas. Missouri had not changed any of the elements of the crime of murder, or the matters which might be pleaded as an excuse or justification for the conduct underlying such a charge; it had changed its law respecting the effect of a guilty plea to a lesser included offense. The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.

The second case, *Thompson* v. *Utah*, must be viewed in historical context. Thompson was initially charged with his crime—grand larceny committed by stealing a calf—in 1895, when Utah was a Territory. He was tried by a jury of 12 persons and convicted. A new trial was subsequently granted, however, and in the meantime Utah was admitted

into the Union as a State. The Constitution of the State of Utah provided that juries in noncapital cases would consist of 8 persons, not 12, and Thompson was retried and convicted by a panel of 8.

This Court reversed the conviction. It reasoned first that while Utah was a Territory, the Sixth Amendment applied to actions of the territorial government and guaranteed Thompson a right to a 12-person jury. 170 U. S., at 349–350. The Court then held that "the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States." *Id.*, at 350–351. Because the State Constitution "deprive[d] him of a substantial right involved in his liberty" and "materially alter[ed] the situation to his disadvantage," the Court concluded that Thompson's conviction was prohibited by the *Ex Post Facto* Clause. *Id.*, at 352–353.

The result in *Thompson* v. *Utah* foreshadowed our decision in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which held that the Sixth Amendment right to trial by jury—then believed to mean a jury of 12, see, *e. g.*, *Patton* v. *United States*, 281 U. S. 276, 288–289 (1930)—was incorporated and made applicable by the Fourteenth Amendment against the States. The Court held that since Utah was a Territory when Thompson's crime was committed, and therefore obligated to provide a 12-person jury by the Sixth Amendment, the *Ex Post Facto* Clause prevented the State from taking away that substantial right from him when it became a State and was no longer bound by the Sixth Amendment as then interpreted. The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause. To the extent that *Thompson* v. *Utah*

rested on the *Ex Post Facto* Clause and not the Sixth Amendment, we overrule it.[4]

The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause of Art. I, § 10.

The judgment of the Court of Appeals is

Reversed.

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

The "*Ex Post Facto*" Clause of the Constitution[1] has been construed to embrace any law that deprives a person accused of crime of a "substantial protection" that the law afforded at the time of the alleged offense. Thus, the Clause prohibits not only the retroactive creation of new criminal offenses and more harsh penalties, but also substantial changes in procedure that are designed to protect the defendant from a wrongful conviction. The question in this case is whether a law that changed a postconviction remedy for an erroneous sentence—by conforming it to the law in effect at the time of the offense instead of affording the defendant a new trial on all issues—effected a "substantial" deprivation within the meaning of our cases. I agree with the Court's conclu-

[4] The Court's holding in *Thompson* v. *Utah*, 170 U. S. 343 (1898), that the Sixth Amendment requires a jury panel of 12 persons is also obsolete. *Williams* v. *Florida*, 399 U. S. 78 (1970).

[1] Art. I, § 10, of the Constitution provides in part:

"No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

sion that the new law did not violate the *Ex Post Facto* Clause, but I believe that conclusion is entirely consistent with our precedents.

I

Respondent committed a crime that was punishable by a maximum sentence of life imprisonment and was convicted on March 17, 1982. Under Texas law, it was the jury's task to impose sentence as well as to determine guilt or innocence. By consequence of a faulty instruction, respondent was improperly sentenced to life imprisonment *and* a fine of $10,000. The following year, in *Bogany* v. *State*, 661 S. W. 2d 957 (1983), the Texas Court of Criminal Appeals held in a somewhat similar case that the fine was not authorized by law, and that no reviewing court had authority to correct such an erroneous sentence. Instead, the entire judgment was deemed "void" and the defendant was entitled to a new trial.[2] Understandably, the Texas Legislature recognized that corrective legislation was in order, for it is difficult to understand why an error in sentencing should necessitate a second trial on the issue of guilt or innocence.

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[2] At the time of respondent's offense, it apparently was well established under Texas law that, as a general proposition, when a criminal jury rendered a verdict not authorized by law the verdict was void at its inception. See, *e. g.*, *Ex parte McIver*, 586 S. W. 2d 851, 854 (Tex. Crim. App. 1979); *Ocker* v. *State*, 477 S. W. 2d 288, 290 (Tex. Crim. App. 1972). However, until the Court of Criminal Appeals decided *Bogany*, there was some doubt both as to whether that general rule would apply to the error in this case and as to whether the sentence imposed by the jury in this case was in fact unlawful. See, *e. g.*, *Adams* v. *State*, 642 S. W. 2d 211, 213–214 (Tex. App. 1982) (reforming jury's sentence); *Bogany* v. *State*, 646 S. W. 2d 663, 664–665 (Tex. App.) (stating that jury's sentence could be reformed), rev'd, 661 S. W. 2d 957 (Tex. Crim. App. 1983); *id.*, at 960 (McCormick, J., dissenting) (contending that supplementary fine was authorized by law). For purposes of this opinion, I assume that both the substantive limitation upon respondent's sentence and the procedural limitation on the remedial powers of reviewing courts were law at the time that respondent's offense was committed.

Theoretically, the legislature might have remedied the situation in either of two ways. It might have authorized a punishment of both life imprisonment and a $10,000 fine for respondent's offense or, alternatively, it might have authorized a court to correct the sentence by eliminating the fine. The former option would plainly have violated the *Ex Post Facto* Clause because it would have increased respondent's punishment beyond the penalty authorized at the time of his offense. The second option, which the Texas Legislature adopted, is not subject to that defect; nor does it criminalize previously innocent conduct or make any change in the procedures used to convict or to sentence respondent. It created a new remedy designed to conform respondent's sentence to that authorized by law at the time of his offense. Such legislation does not violate the *Ex Post Facto* Clause.

The argument to the contrary is based on our cases holding that the Clause applies to procedural, as well as substantive, changes that deprive a defendant of "substantial personal rights" and a claim that respondent's right to a new trial after an erroneous sentence was such a right. The argument misreads our precedents and overlooks the critical importance of evaluating the procedural right at issue by reference to the time of the offense.

II

In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court rejected the argument that the *Ex Post Facto* Clause has no application to procedural changes. At the time of Kring's offense, Missouri law provided that the acceptance of a plea of guilty to second-degree murder constituted an acquittal of first-degree murder. A subsequent amendment to the Missouri Constitution abrogated that rule and Kring was thereafter convicted of first-degree murder and sentenced to death. The Missouri Supreme Court held that there was no violation of the *Ex Post Facto* Clause because the retroactive

amendment was merely a procedural change.[3] This Court's reversal of that holding demonstrates that the Clause applies to some procedural changes, but our decision rested on the fact that the change had deprived the defendant of a complete defense to the charge of first-degree murder and to the imposition of the death penalty. We wrote:

> "Whatever may be the essential nature of the change, it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the change cannot be denied." *Id.*, at 224.
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> "In the case before us the Constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts

[3] The Missouri Supreme Court relied upon the reasoning of the St. Louis Court of Appeals. See *State* v. *Kring*, 74 Mo. 612, 631 (1881). The relevant passage from the Court of Appeals opinion was quoted (and then disavowed) by this Court in *Kring* v. *Missouri*, 107 U. S. 221, 223–224 (1883):

"'Formerly it was held in Missouri (*State* v. *Ross*, 29 Mo. 32) that, when a conviction is had of murder in the second degree on an indictment charging murder in the first degree, if this be set aside, the defendant cannot again be tried for murder in the first degree. A change introduced by sect. 23 of art. 2 of the Constitution of 1875 has abrogated this rule. On the oral argument something was said by counsel for the defendant to the effect that under the old rule defendant could not be put on his trial for murder in the first degree, and that he could not be affected by the change of the constitutional provision, the crime having been committed whilst the old constitution was in force. There is, however, nothing in this; this change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*. *Gut* v. *State*, 9 Wall. 35; *Cummings* v. *Missouri*, 4 id. 326.'"

that he may be so punished, notwithstanding the former conviction." *Id.*, at 228.

Thompson v. *Utah*, 170 U. S. 343 (1898), involved an offense committed while Utah was a Territory, but the case was tried after Utah became a State. At the time of the offense, the defendant was entitled to a trial by a 12-person jury, but under the new State's law only 8 jurors were required. We held that this retrospective procedural change deprived Thompson of "a substantial right belonging to him when the offense was committed," and therefore violated the *Ex Post Facto* Clause.

> "We are of opinion that the State did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a Territory, that they should be tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a State could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the State not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offence was committed.
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> "It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and 'in its relation to the offence, or its consequences, alters the situation of the accused to his disadvantage.' *United States* v. *Hall*, 2 Wash. C. C. 366; *Kring* v. *Missouri*, 107 U. S. 221, 228; *Medley, Petitioner*, 134 U. S.

160, 171. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offence was committed." *Id.*, at 350–351.

In *Beazell* v. *Ohio*, 269 U. S. 167 (1925), we made it clear that the question whether a particular procedural change has a sufficiently drastic impact on a defendant to be characterized as "substantial" is a matter of degree. In that case we held that the rule applied in *Kring* and *Thompson* did not preclude the retrospective application of a rule allowing two codefendants to be tried jointly for a noncapital offense. We summarized our earlier cases construing the *Ex Post Facto* Clause and explained:

> "The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." 269 U. S., at 170.
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> "And there may be procedural changes which operate to deny to the accused a defense available under the laws in force at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition. *Kring* v. *Missouri*, 107 U. S. 221; *Thompson* v. *Utah*, 170 U. S. 343. But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited." *Ibid.*

"Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see *Malloy* v. *South Carolina*, 237 U. S. 180, 183, and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Id.*, at 171.

III

The foregoing cases make it clear that the mere fact that this case involves a procedural change in Texas law is not sufficient to exclude it from the coverage of the *Ex Post Facto* Clause. But it is equally clear that our analysis should focus on the impact of the change upon the "right belonging to [the defendant] when the offense was committed." *Thompson*, 170 U. S., at 351. In this case, neither the defendant's right to a fair trial nor his right to be protected against unauthorized or excessive punishment has been impaired in the slightest by the new Texas rule.

This conclusion follows immediately from an observation which is both sensible and evident from precedent: A procedural protection is likely to be substantial, when viewed from the time of the commission of the offense, only if it affects the modes of procedure by which a valid conviction or sentence may be imposed. The claims in *Kring* and *Thompson* both satisfy this threshold test. In *Kring*, the procedural change—which deprived Kring of a defense based upon an earlier trial or plea—made it easier for the State to obtain a first-degree murder charge against a defendant who had never been subject to any valid conviction for the crime in question, much less a valid conviction for first-degree murder. In *Thompson*, the reduction in the size of the jury made it easier for the State to obtain a unanimous verdict

against a defendant who, before the verdict, likewise had not been convicted.

Mallett v. *North Carolina*, 181 U. S. 589 (1901), is, however, distinguishable from *Kring* and *Thompson* because it fails to meet the threshold test. In *Mallett*, a valid conviction had been obtained against the defendant. Under the defendant's theory in that case, however, the State would have been prohibited from relying upon this conviction because it had been vacated by an intermediate appellate court. Although the North Carolina Supreme Court reinstated the conviction, Mallett claimed that it lacked power to do so. At the time Mallett committed his crime, the State was prohibited by state law from appealing the adverse decisions of intermediate appellate courts in criminal cases. This restriction had been removed, but Mallett contended that the State had thereby enacted an *ex post facto* law. As the case came to this Court, it was conceded that Mallett was convicted after a trial which afforded him all the procedural and substantive protections guaranteed by North Carolina law at the time he committed his offense. Nevertheless, according to Mallett's theory, the State was prohibited from relying upon his conviction because of the combination of an intervening—and, for this Court's purposes, erroneous—appellate decision and a restriction upon the State's access to the appellate processes. Not surprisingly, we rejected this claim.

This case is comparable to *Mallett*. Respondent does not claim that he was denied any procedural protections relevant to the determination of his guilt or innocence. Nor does he claim that his life sentence was unauthorized by law or that it was the consequence of improper procedures. Finally, he does not argue that he has been deprived of any avenue of review for correcting errors that may have vitiated the validity of his conviction or sentence. For example, respondent does not contend—and we do not see how he could plausibly contend—that the State has deprived him of any opportunity to challenge his conviction on the ground that the improper

sentencing instruction somehow infected the jury's deliberations about his guilt or about the propriety of life imprisonment. Respondent instead claims, as did the defendant in *Mallett*, that an unrelated error must bar the State from relying upon his concededly valid conviction, and predicates this claim solely on a restriction upon the State's access to appellate—or, more precisely in this case, postconviction—remedies.[4] Unlike the defendants in *Thompson* and *Kring*, Youngblood wishes to have a new trial according to the same procedures, regulated by the same laws, open to the same evidence, and capped by the same sentencing limitations that resulted in his conviction and his life sentence.[5]

Obviously, as our decision in *Beazell* itself makes clear, a procedural protection does not become substantial merely because it meets the low threshold that I have discussed. It does, however, become insubstantial by failing to do so. Whatever else may be said of the factors that determine whether a procedural protection affects substantial rights, it is difficult to imagine how a retroactive law could, when viewed from the standpoint of the date the offense was committed, implicate substantial rights of any defendant if the law does no more than expand the flexibility of postconviction processes available to the State with respect to a defendant

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[4] In *Mallett* v. *North Carolina*, 181 U. S. 589 (1901), the unrelated intervening error was an incorrect decision by the intermediate appellate court; in this case, it was the imposition of a supplementary fine in addition to the life sentence. In *Mallett*, the restriction upon the review process prohibited the State from taking an appeal; in this case, it prohibits the courts from saving the conviction and sentence by removing the improper supplement.

[5] Indeed, this case is *a fortiori* by comparison to *Mallett*. In that case, the defendant would benefit from an evidentiary exclusion at the secondary trial, although that exclusion would be entirely the consequence of the appellate court's incorrect interpretation of state law and not a consequence of the trial procedures established by North Carolina law in effect at the time of the offense. By contrast, in this case the procedures at the second trial would be in all relevant respects identical.

who is subject to a valid conviction and sentence. Indeed, respondent has barely even attempted to articulate any justification for the Texas procedure that the legislature abolished. The mere possibility of a capricious and unlikely windfall is not the sort of procedural protection that could reasonably be judged substantial from the perspective of the defendant at the time the offense was committed.

Accordingly, I concur in the Court's judgment, but not in its opinion.

RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL.

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

No. 88–1872. Argued January 16, 1990—Decided June 21, 1990*

The Illinois Governor issued an executive order instituting a hiring freeze, whereby state officials are prohibited from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the Governor's "express permission." Petitioners in No. 88–1872 and cross-respondents in No. 88–2074—an applicant for employment, employees who had been denied promotions or transfers, and former employees who had not been recalled after layoffs—brought suit in the District Court, alleging that, by means of the freeze, the Governor was operating a political patronage system; that they had suffered discrimination in state employment because they had not been Republican Party supporters; and that this discrimination violates the First Amendment. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted. The Court of Appeals affirmed in part and reversed in part. Noting that *Elrod* v. *Burns*, 427 U. S. 347, and *Branti* v. *Finkel*, 445 U. S. 507, had found that the patronage practice of discharging public employees on the basis of their political affiliation violates the First Amendment, the court held that other patronage practices violate the Amendment only when they are the "substantial equivalent of a dismissal," *i. e.*, when they would lead reasonable persons to resign. The court concluded, based on *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, that rejecting an employment application did not impose a hardship comparable to the loss of a job. Thus, it dismissed the hiring claim, but remanded the others for further proceedings.

Held: The rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support, and petitioners and cross-respondents have stated claims upon which relief may be granted. Pp. 68–79.

(a) Promotions, transfers, and recalls based on political affiliation or support are an impermissible infringement on public employees' First Amendment rights. Even though petitioners and cross-respondents

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*Together with No. 88–2074, *Frech et al.* v. *Rutan et al.*, also on certiorari to the same court.

have no legal entitlement to the promotions, transfers, and recalls, the government may not rely on a basis that infringes their constitutionally protected interests to deny them these valuable benefits. *Perry* v. *Sindermann*, 408 U. S. 593, 597. Significant penalties are imposed on those employees who exercise their First Amendment rights. Those who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the shorter commuting hours and lower maintenance expenses incident to transfers to more convenient work locations, and even the jobs themselves in the case of recalls. As in *Elrod* and *Branti*, these patronage practices are not narrowly tailored to serve vital government interests. A government's interest in securing effective employees can be met by discharging, demoting, or transferring persons whose work is deficient, and its interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views. Likewise, the "preservation of the democratic process" is not furthered by these patronage decisions, since political parties are nurtured by other, less intrusive and equally effective methods, and since patronage decidedly impairs the elective process by discouraging public employees' free political expression. Pp. 71–75.

(b) The standard used by the Court of Appeals to measure alleged patronage practices in government employment is unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. Pp. 75–76.

(c) Patronage hiring places burdens on free speech and association similar to those imposed by patronage promotions, transfers, and recalls. Denial of a state job is a serious privation, since such jobs provide financial, health, and other benefits; since there may be openings with the State when business in the private sector is slow; and since there are occupations for which the government is the sole or major employer. Under this Court's sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See, *e. g.*, *Branti*, *supra*, at 515–516. There is no such government interest here, for the same reasons that the government lacks justification for patronage promotions, transfers, and recalls. It is inappropriate to rely on *Wygant* to distinguish hiring from dismissal in this context, since that case was concerned with the least harsh means of remedying past wrongs and did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. Here, however, it is unnecessary to consider whether not being hired is less burdensome

than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. Pp. 76–79.

868 F. 2d 943, affirmed in part, reversed in part, and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 79. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, and in which O'CONNOR, J., joined as to Parts II and III, *post*, p. 92.

Mary Lee Leahy argued the cause for petitioners in No. 88–1872 and respondents in No. 88–2074. With her on the briefs were *Michael R. Berz*, *Cheryl R. Jansen*, and *Kathryn E. Eisenhart*.

Thomas P. Sullivan argued the cause for respondents in No. 88–1872 and petitioners in No. 88–2074. With him on the briefs were *Jeffrey D. Colman*, *Michael J. Hayes*, and *Roger P. Flahaven*.†

JUSTICE BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Branti* v. *Finkel*, 445 U. S. 507 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved.

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†Briefs of *amici curiae* urging reversal in both cases were filed for the American Federation of Labor and Congress of Industrial Organizations by *George Kaufmann* and *Laurence Gold;* and for the North Carolina Professional Fire Fighters Association by *J. Michael McGuinness*. *C. Richard Johnson* filed a brief for the Independent Voters of Illinois-Independent Precinct Organization et al. as *amici curiae* urging reversal in No. 88–1872. *Robert H. Chanin* and *Jeremiah A. Collins* filed a brief for the National Education Association as *amicus curiae* urging reversal in No. 88–1872 and affirmance in No. 88–2074.

Hector Rivera Cruz, Secretary of Justice of Puerto Rico, *Jorge E. Perez Diaz*, Solicitor General, and *Lino J. Saldaña* filed a brief for the Commonwealth of Puerto Rico as *amicus curiae* urging affirmance in both cases.

Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

I

The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois.[1] On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that "*no* exceptions" are permitted without the Governor's "express permission after submission of appropriate requests to [his] office." Governor's Executive Order No. 5 (Nov. 12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

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[1] The cases come to us in a preliminary posture, and the question is limited to whether the allegations of petitioners Rutan et al. state a cognizable First Amendment claim sufficient to withstand respondents' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Therefore, for purposes of our review we must assume that petitioners' well-pleaded allegations are true. *Berkovitz* v. *United States*, 486 U. S. 531, 540 (1988).

Three of the five original plaintiffs who brought the lawsuit—Rutan, Taylor, and Moore—are petitioners in No. 88–1872, and we refer to them as "petitioners." The defendants in the lawsuit are various Illinois and Republican Party officials. We refer to them as "respondents" because they are the respondents in No. 88–1872. They are also the cross-petitioners in No. 88–2074. Four of the five original plaintiffs—Rutan, Taylor, Standefer, and O'Brien—are named as cross-respondents in No. 88–2074.

Requests for the Governor's "express permission" have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois.[2] They alleged that they had suffered discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B.

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[2] The five originally brought this action both individually and on behalf of those similarly situated. The Seventh Circuit, noting that the District Court had failed to address the class-action questions, reviewed the case as one brought by individuals only. 868 F. 2d 943, 947 (1989). We therefore have only the claims of the individuals before us.

Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

The District Court dismissed the complaint with prejudice, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. 641 F. Supp. 249 (1986). The United States Court of Appeals for the Seventh Circuit initially issued a panel opinion, 848 F. 2d 1396 (1988), but then reheard the appeal en banc. The court affirmed the District Court's decision in part and reversed in part. 868 F. 2d 943 (1989). Noting that this Court had previously determined that the patronage practice of discharg-

ing public employees on the basis of their political affiliation violates the First Amendment, the Court of Appeals held that other patronage practices violate the First Amendment only when they are the "substantial equivalent of a dismissal." *Id.*, at 955. The court explained that an employment decision is equivalent to a dismissal when it is one that would lead a reasonable person to resign. *Ibid.* The court affirmed the dismissal of Moore's claim because it found that basing hiring decisions on political affiliation does not violate the First Amendment, but remanded the remaining claims for further proceedings.[3]

Rutan, Taylor, and Moore petitioned this Court to review the constitutional standard set forth by the Seventh Circuit and the dismissal of Moore's claim. Respondents cross-petitioned this Court, contending that the Seventh Circuit's remand of four of the five claims was improper because the employment decisions alleged here do not, as a matter of law, violate the First Amendment. We granted certiorari, 493 U. S. 807 (1989), to decide the important question whether the First Amendment's proscription of patronage dismissals recognized in *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Branti* v. *Finkel*, 445 U. S. 507 (1980), extends to promotion, transfer, recall, or hiring decisions involving public employment positions for which party affiliation is not an appropriate requirement.

II

A

In *Elrod*, *supra*, we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of

[3] The Seventh Circuit explained that Standefer's and O'Brien's claims might be cognizable if there were a formal or informal system of rehiring employees in their positions, 868 F. 2d, at 956–957, but expressed considerable doubt that Rutan and Taylor would be able to show that they suffered the "substantial equivalent of a dismissal" by being denied promotions and a transfer. *Id.*, at 955–956.

his own party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." *Id.*, at 351, 373 (plurality opinion), and 375 (Stewart, J., joined by BLACKMUN, J., concurring in judgment). The plurality explained that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." *Id.*, at 359. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as "tantamount to coerced belief." *Id.*, at 355 (citing *Buckley* v. *Valeo*, 424 U. S. 1, 19 (1976)). At the same time, employees are constrained from joining, working for, or contributing to the political party and candidates of their own choice. *Elrod*, *supra*, at 355–356. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," the plurality emphasized. 427 U. S., at 356. Both the plurality and the concurrence drew support from *Perry* v. *Sindermann*, 408 U. S. 593 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See *Elrod*, *supra*, at 359 (plurality opinion) and 375 (Stewart, J., concurring in judgment); see also *Branti*, *supra*, at 514–516.

The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See *Elrod*, *supra*, at 372–373 (plurality opinion) and 375 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It ex-

pressed doubt, however, that "mere difference of political persuasion motivates poor performance" and concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 U. S., at 365–366. The plurality also found that a government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions. *Id.*, at 367. Finally, although the plurality recognized that preservation of the democratic process "may in some instances justify limitations on First Amendment freedoms," it concluded that the "process functions as well without the practice, perhaps even better." Patronage, it explained, "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." *Id.*, at 368–370.[4]

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[4] JUSTICE SCALIA's lengthy discussion of the appropriate standard of review for restrictions the government places on the constitutionally protected activities of its employees to ensure efficient and effective operations, see *post*, at 94–102, is not only questionable, it offers no support for his conclusion that patronage practices pass muster under the First Amendment. The interests that JUSTICE SCALIA regards as potentially furthered by patronage practices are not interests that the government has in its capacity as an employer. JUSTICE SCALIA describes the possible benefits of patronage as follows: "patronage stabilizes political parties and prevents excessive political fragmentation," *post*, at 104; patronage is necessary to strong, disciplined party organizations, *post*, at 104–105; patronage "fosters the two-party system," *post*, at 106; and patronage is "a powerful means of achieving the social and political integration of excluded groups," *post*, at 108. These are interests the government might have in the structure and functioning of society as a whole. That the government attempts to use public employment to further such interests does not render those interests employment related. Therefore, even were JUSTICE SCALIA correct that less-than-strict scrutiny is appropriate when the government takes measures to ensure the proper functioning of its internal op-

Four years later, in *Branti*, *supra*, we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod*, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." 445 U. S., at 516. "In sum," we said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.*, at 517. To prevail, we concluded, public employees need show only that they were discharged because they were not affiliated with or sponsored by the Democratic Party. *Ibid.*[5]

B

We first address the claims of the four current or former employees. Respondents urge us to view *Elrod* and *Branti*

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erations, such a rule has no relevance to the restrictions on freedom of association and speech at issue in these cases.

[5] *Branti* v. *Finkel*, 445 U. S. 507 (1980), also refined the exception created by *Elrod* v. *Burns*, 427 U. S. 347 (1976), for certain employees. In *Elrod*, we suggested that policymaking and confidential employees probably could be dismissed on the basis of their political views. *Id.*, at 367 (plurality opinion) and 375 (Stewart, J., concurring in judgment). In *Branti*, we said that a State demonstrates a compelling interest in infringing First Amendment rights only when it can show that "party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, *supra*, at 518. The scope of this exception does not concern us here as respondents concede that the five employees who brought this suit are not within it.

as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod*, 427 U. S., at 359–360 (plurality opinion) and 375 (Stewart, J., concurring in judgment), and *Branti*, 445 U. S., at 514–515, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In *Perry*, 408 U. S., at 596–598, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U. S. 513, 526 [(1958)]. Such interference with constitutional rights is impermissible." *Id.*, at 597 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal entitlement to promotion, transfer, or recall beside the point.

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees.[6] This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[7]

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[6] Respondents' reliance on *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616 (1987), to this effect is misplaced. The question in *Johnson* was whether the Santa Clara County affirmative-action program violated the antidiscrimination requirement of Title VII of the Civil Rights Act of 1964. In that context, we said that the denial of a promotion did not unsettle any legitimate, firmly rooted expectations. We did not dispute, however, that it placed a burden on the person to whom the promotion was denied. We considered Johnson's expectations in discussing whether the plan unnecessarily trammeled the rights of male employees—*i. e.*, whether its goal was pursued with an excessive, rather than reasonable, amount of dislocation. Our decision that promotion denials are not such an imposition that Title VII prevented Santa Clara from considering gender in order to redress past discrimination does not mean that promotion denials are not enough of an imposition to pressure employees to affiliate with the favored party.

[7] The complaint in this case states that Dan O'Brien was driven to do exactly this. After being rejected for recall by the Governor's Office, he allegedly pursued the support of a Republican Party official, despite his previous interest in the Democratic Party.

The same First Amendment concerns that underlay our decisions in *Elrod*, *supra*, and *Branti*, *supra*, are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See *Elrod*, *supra*, at 362–363 (plurality opinion) and 375 (Stewart, J., concurring in judgment); *Branti*, *supra*, at 515–516.

We find, however, that our conclusions in *Elrod*, *supra*, and *Branti*, *supra*, are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See *Elrod*, *supra*, at 365–368 (plurality opinion); *Branti*, *supra*, at 518, and 520, n. 14. Likewise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." *Elrod*, *supra*, at 372–373 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See *Elrod*, *supra*, at 369, and n. 23 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) ("The number of patronage positions has significantly decreased in virtually every state"); Congressional Quarterly Inc., State Govern-

ment, CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989–1990) ("Linkage[s] between political parties and government office-holding . . . have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising"); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 118–120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See *Elrod*, 427 U. S., at 372 (plurality opinion) (explaining that the proper functioning of a democratic system "is indispensably dependent on the unfettered judgment of each citizen on matters of political concern"). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. 868 F. 2d, at 954–957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See *Elrod*, *supra*, at 356–357 (plurality opinion); *West Virginia Bd. of Education* v. *Barnette*, 319 U. S. 624, 642 (1943).[8]

[8] The Seventh Circuit's proffered test was not based on that court's determination that other patronage practices do not burden the free exer-

The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

Whether the four employees were in fact denied promotions, transfers, or rehires for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 U. S. C. § 1983 (1982 ed.) for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

C

Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amend-

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cise of First Amendment rights. Rather, the court chose to defer to the political process in an area in which it felt this Court had not yet spoken clearly. 868 F. 2d, at 953–954. The court also expressed concern that the opposite conclusion would open state employment to excessive interference by the Federal Judiciary. *Ibid.* We respect but do not share this concern.

Our decision does not impose the Federal Judiciary's supervision on any state government activity that is otherwise immune. The federal courts have long been available for protesting unlawful state employment decisions. Under Title VII, 42 U. S. C. §§ 2000e(a), (f), and 2000e–2(a) (1982 ed.), it is a violation of federal law to discriminate in any way in state employment (excepting certain high-level positions) on the basis of race, color, religion, sex, or national origin. Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." 868 F. 2d, at 954, n. 4.

ment. Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude.[9] Decades of decisions by this Court belie such a claim. We premised *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." *Id.*, at 496. In *Keyishian* v. *Board of Regents of Univ. of New York*, 385 U. S. 589, 609–610 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt* v. *Russell*, 384 U. S. 11, 19 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican . . . shall be appointed to federal office." *Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947). What the

[9] To the extent that respondents also argue that Moore has not been penalized for the exercise of protected speech and association rights because he had no claim of right to employment in the first place, that argument is foreclosed by *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). See *supra*, at 72.

First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. See *Perry*, 408 U. S., at 597 (citing *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)); see *supra*, at 72. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See *Elrod*, 427 U. S., at 362–363 (plurality opinion) and 375 (Stewart, J., concurring in judgment); *Branti*, 445 U. S., at 515–516; see also *Sherbert* v. *Verner*, 374 U. S. 398 (1963) (unemployment benefits); *Speiser* v. *Randall*, *supra* (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls. See *supra*, at 71–76.

The court below, having decided that the appropriate inquiry in patronage cases is whether the employment decision at issue is the substantial equivalent of a dismissal, affirmed the trial court's dismissal of Moore's claim. See 868 F. 2d, at 954. The Court of Appeals reasoned that "rejecting an employment application does not impose a hardship upon an employee comparable to the loss of [a] job." *Ibid.*, citing *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267 (1986) (plurality opinion). Just as we reject the Seventh Circuit's proffered test, see *supra*, at 75–76, we find the Seventh Circuit's reliance on *Wygant* to distinguish hiring from dismissal unavailing. The court cited a passage from the plurality opinion in *Wygant* explaining that school boards attempting to redress past discrimination must choose methods that broadly distribute the disadvantages imposed by affirmative-action plans among innocent parties. The plurality said that race-based layoffs placed too great a burden on individual members of the nonminority race, but suggested that discriminatory hiring was permissible, under certain circumstances, even though it burdened white applicants, because the burden was less intrusive than the loss of an existing job.

476 U. S., at 282–284. See also *id.*, at 294–295 (WHITE, J., concurring in judgment).

Wygant has no application to the question at issue here. The plurality's concern in that case was identifying the least harsh means of remedying past wrongs. It did not question that *some* remedy was permissible when there was sufficient evidence of past discrimination. In contrast, the Governor of Illinois has not instituted a remedial undertaking. It is unnecessary here to consider whether not being hired is less burdensome than being discharged, because the government is not pressed to do *either* on the basis of political affiliation. The question in the patronage context is not which penalty is more acute but whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights.

If Moore's employment application was set aside because he chose not to support the Republican Party, as he asserts, then Moore's First Amendment rights have been violated. Therefore, we find that Moore's complaint was improperly dismissed.

III

We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Seventh Circuit's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, these additional comments are prompted by three propositions advanced by JUSTICE SCALIA in his dissent. First, he implies that prohibiting im-

position of an unconstitutional condition upon eligibility for government employment amounts to adoption of a civil service system. Second, he makes the startling assertion that a long history of open and widespread use of patronage practices immunizes them from constitutional scrutiny. Third, he assumes that the decisions in *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Branti* v. *Finkel*, 445 U. S. 507 (1980), represented dramatic departures from prior precedent.

Several years before either *Elrod* or *Branti* was decided, I had occasion as a judge on the Court of Appeals for the Seventh Circuit to evaluate each of these propositions. *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL–CIO* v. *Lewis*, 473 F. 2d 561 (1972), cert. denied, 410 U. S. 928 (1973). With respect to the first, I wrote:

> "Neither this court nor any other may impose a civil service system upon the State of Illinois. The General Assembly has provided an elaborate system regulating the appointment to specified positions solely on the basis of merit and fitness, the grounds for termination of such employment, and the procedures which must be followed in connection with hiring, firing, promotion, and retirement. A federal court has no power to establish any such employment code.
>
> "However, recognition of plaintiffs' claims will not give every public employee civil service tenure and will not require the state to follow any set procedure or to assume the burden of explaining or proving the grounds for every termination. It is the former employee who has the burden of proving that his discharge was motivated by an impermissible consideration. It is true, of course, that a prima facie case may impose a burden of explanation on the State. But the burden of proof will remain with the plaintiff employee and we must assume that the trier of fact will be able to differentiate between those discharges which are politically motivated and

those which are not. There is a clear distinction between the grant of tenure to an employee—a right which cannot be conferred by judicial fiat—and the prohibition of a discharge for a particular impermissible reason. The Supreme Court has plainly identified that distinction on many occasions, most recently in Perry v. Sindermann, 408 U. S. 593 (1972).

"Unlike a civil service system, the Fourteenth Amendment to the Constitution does not provide job security, as such, to public employees. If, however, a discharge is motivated by considerations of race, religion, or punishment of constitutionally protected conduct, it is well settled that the State's action is subject to federal judicial review. There is no merit to the argument that recognition of plaintiffs' constitutional claim would be tantamount to foisting a civil service code upon the State." 473 F. 2d, at 567–568 (footnotes and citations omitted).

Denying the Governor of Illinois the power to require every state employee, and every applicant for state employment, to pledge allegiance and service to the political party in power is a far cry from a civil service code. The question in this case is simply whether a Governor may adopt a rule that would be plainly unconstitutional if enacted by the General Assembly of Illinois.[1]

Second, JUSTICE SCALIA asserts that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down." *Post*, at 95; *post*, at 102 (a "clear and continuing tradition of our peo-

[1] Despite JUSTICE SCALIA's imprecise use of the term, *post*, at 114, the legal issue presented in this litigation is plainly not a "political question." See *Elrod* v. *Burns*, 427 U. S. 347, 351–353 (1976) (plurality opinion); *Illinois State Employees Union, Council 34, Am. Federation of State, Cty., and Municipal Employees, AFL–CIO* v. *Lewis*, 473 F. 2d 561, 566–567 (1972), cert. denied, 410 U. S. 928 (1973).

ple" deserves "*dispositive* effect"). The argument that traditional practices are immune from constitutional scrutiny is advanced in two plurality opinions that JUSTICE SCALIA has authored, but not by any opinion joined by a majority of the Members of the Court.[2]

In the *Lewis* case, I noted the obvious response to this position: "[I]f the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure." 473 F. 2d, at 568, n. 14. See, *e. g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1954).[3] I then added

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[2] See *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989) (plurality opinion); *Burnham* v. *Superior Court of California, Marin County*, 495 U. S. 604 (1990) (plurality opinion). JUSTICE SCALIA's additional reliance on *Bowers* v. *Hardwick*, 478 U. S. 186 (1986), *post*, at 103, is misplaced because in that case the Court used a history of state criminal prohibitions to support its refusal to extend the doctrine of substantive due process to previously unprotected conduct. The question in these cases is whether mere longevity can immunize from constitutional review state conduct that would otherwise violate the First Amendment.

[3] Ironically, at the time of the adoption of the Bill of Rights, the party system itself was far from an "accepted political nor[m]." *Post*, at 95. Our founders viewed it as a pathology:

"Political discussion in eighteenth-century England and America was pervaded by a kind of anti-party cant. Jonathan Swift, in his *Thoughts on Various Subjects*, had said that 'Party is the madness of many, for the gain of the few.' This maxim, which was repeated on this side of the Atlantic by men like John Adams and William Paterson, plainly struck a deep resonance in the American mind. Madison and Hamilton, when they discussed parties or factions (for them the terms were usually interchangeable) in *The Federalist*, did so only to arraign their bad effects. In the great debate over the adoption of the Constitution both sides spoke ill of parties. The popular sage, Franklin (who was not always consistent on the subject), gave an eloquent warning against factions and 'the infinite mutual abuse of parties, tearing to pieces the best of characters.' George Washington devoted a large part of his political testament, the Farewell Address, to stern warnings against 'the baneful effects of the Spirit of Party.' His successor, John Adams, believed that 'a division of the republic into two great parties . . . . is to be dreaded as the greatest political evil under our Constitution.' Similar admonitions can be found in the writings of the arch-

this comment on the specific application of that argument to patronage practices:

> "Finally, our answer to the constitutional question is not foreclosed by the fact that the 'spoils system has been entrenched in American history for almost two hundred years.' Alomar v. Dwyer, 447 F. 2d 482, 483 (2d Cir. 1971). For most of that period it was assumed, without serious question or debate, that since a public employee has no constitutional right to his job, there can be no valid constitutional objection to his summary removal. See Bailey v. Richardson, 86 U. S. App. D. C. 248, 182 F. 2d 46, 59 (1950), affirmed per curiam by an equally divided Court, 341 U. S. 918; Adler v. Board of Education, 342 U. S. 485 [(1952)]. But as Mr. Justice Marshall so forcefully stated in 1965 when he was a circuit judge, 'the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents, 345 F. 2d 236, 239 (2d Cir. 1965). The development of constitutional law subsequent to the Supreme Court's unequivocal repudiation of the line of cases ending with Bailey v.

Federalist Fisher Adams and the 'philosopher of Jeffersonian democracy,' John Taylor of Caroline. If there was one point of political philosophy upon which these men, who differed on so many things, agreed quite readily, it was their common conviction about the baneful effects of the spirit of party." R. Hofstadter, The Idea of a Party System 2–3 (1969) (footnote omitted).

Our contemporary recognition of a state interest in protecting the two major parties from damaging intraparty feuding or unrestrained factionalism, see, *e. g.*, *Storer* v. *Brown*, 415 U. S. 724 (1974); *post*, at 106–107, has not disturbed our protection of the rights of individual voters and the role of alternative parties in our government. See, *e. g.*, *Anderson* v. *Celebrezze*, 460 U. S. 780, 793 (1983) (burdens on new or small parties and independent candidates impinge on associational choices); *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968) (there is "no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them").

Richardson and Adler v. Board of Education is more relevant than the preceding doctrine which is now 'universally rejected.'" 473 F. 2d, at 568 (footnotes and citations omitted).

With respect to JUSTICE SCALIA's view that until *Elrod* v. *Burns* was decided in 1976, it was unthinkable that patronage could be unconstitutional, see *post*, at 96–97, it seems appropriate to point out again not only that my views in *Lewis* antedated *Elrod* by several years, but, more importantly, that they were firmly grounded in several decades of decisions of this Court. As explained in *Lewis:*

"[In 1947] a closely divided Supreme Court upheld a statute prohibiting federal civil service employees from taking an active part in partisan political activities. United Public Workers v. Mitchell, 330 U. S. 75. The dissenting Justices felt that such an abridgment of First Amendment rights could not be justified. The majority, however, concluded that the government's interests in not compromising the quality of public service and in not permitting individual employees to use their public offices to advance partisan causes were sufficient to justify the limitation on their freedom.

"There was no dispute within the Court over the proposition that the employees' interests in political action were protected by the First Amendment. The Justices' different conclusions stemmed from their different appraisals of the sufficiency of the justification for the restriction. That justification—the desirability of political neutrality in the public service and the avoidance of the use of the power and prestige of government to favor one party or the other—would condemn rather than support the alleged conduct of defendant in this case. Thus, in dicta, the Court unequivocally stated that the Legislature could not require allegiance to a particular political faith as a condition of public employment:

" 'Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but, because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid.' 330 U. S. 75, 100.

"In 1952 the Court quoted that dicta in support of its holding that the State of Oklahoma could not require its employees to profess their loyalty by denying past association with Communists. Wieman v. Updegraff, 344 U. S. 183, 191–192. That decision did not recognize any special right to public employment; rather, it rested on the impact of the requirement on the citizen's First Amendment rights. We think it unlikely that the Supreme Court would consider these plaintiffs' interest in freely associating with members of the Democratic Party less worthy of protection than the Oklahoma employees' interest in associating with Communists or former Communists.

"In 1961 the Court held that a civilian cook could be summarily excluded from a naval gun factory. Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO v. McElroy, 367 U. S. 886. The government's interest in maintaining the security of the military installation outweighed the cook's interest in working at a particular location. Again, however, the Court explicitly assumed that the sovereign could not deny employment for the reason that the citizen was a member of a particular political party or religious faith—'that she could not have been kept out because she was a Democrat or a Methodist.' 367 U. S. at 898.

"In 1968 the Court held that 'a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.' Pickering v. Board of Education, 391 U. S. 563, 574. The Court noted that although criminal sanctions 'have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.' *Ibid.* The holding in *Pickering* was a natural sequel to Mr. Justice Frankfurter's comment in dissent in Shelton v. Tucker that a scheme to terminate the employment of teachers solely because of their membership in unpopular organizations would run afoul of the Fourteenth Amendment. 364 U. S. 479, 496 [(1960)].

"In 1972 the Court reaffirmed the proposition that a nontenured public servant has no constitutional right to public employment, but nevertheless may not be dismissed for exercising his First Amendment rights. Perry v. Sindermann, 408 U. S. 593. The Court's explanation of its holding is pertinent here:

" 'For at least a quarter century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Speiser v. Randall, 357 U. S. 513, 526. Such interference with constitutional rights is impermissible.'

" 'We have applied this general principle to denials of tax exemptions, Speiser v. Randall, *supra*, unemployment benefits, Sherbert v. Verner, 374 U. S. 398, 404–405 [(1963)], and welfare payments, Shapiro v. Thompson, 394 U. S. 618, 627 n. 6 [(1969)]; Graham v. Richardson, 403 U. S. 365, 374 [(1971)]. But, most often, we have applied the principle to denials of public employment. United Public Workers v. Mitchell, 330 U. S. 75, 100 [(1947)]; Wieman v. Updegraff, 344 U. S. 183, 192 [(1952)]; Shelton v. Tucker, 364 U. S. 479, 485–486 [(1960)]; Torcaso v. Watkins, 367 U. S. 488, 495–496 [(1961)]; Cafeteria and Restaurant Workers, etc. v. McElroy, 367 U. S. 886, 894 [(1961)]; Cramp v. Board of Public Instruction, 368 U. S. 278, 288 [(1961)]; Baggett v. Bullitt, 377 U. S. 360 [(1964)]; Elfbrandt v. Russell, 384 U. S. [11,] 17 [(1966)]; Keyishian v. Board of Regents, 385 U. S. 589, 605–606 [(1967)]; Whitehill v. Elkins, 389 U. S. 54 [(1967)]; United States v. Robel, 389 U. S. 258 [(1967)]; Pickering v. Board of Education, 391 U. S. 563, 568 [(1968)]. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare Pickering v. Board of Education, *supra*, with Shelton v. Tucker, *supra*.'

" 'Thus the respondent's lack of a contractual or tenure "right" to reemployment for the 1969–1970 academic year is immaterial to his free speech claim. . . .' 408 U. S. at 597.

"This circuit has given full effect to this principle." 473 F. 2d, at 569–572 (footnotes and citations omitted).

See also *American Federation of State, Cty. and Municipal Employees, AFL–CIO* v. *Shapp*, 443 Pa. 527, 537–545, 280 A. 2d 375, 379–383 (1971) (Barbieri, J., dissenting).

To avoid the force of the line of authority described in the foregoing passage, JUSTICE SCALIA would weigh the supposed general state interest in patronage hiring against the

aggregated interests of the many employees affected by the practice. This defense of patronage obfuscates the critical distinction between partisan interest and the public interest.[4] It assumes that governmental power and public re-

[4] Although JUSTICE SCALIA's defense of patronage turns on the benefits of fostering the two-party system, *post*, at 106–107, his opinion is devoid of reference to meaningful evidence that patronage practices have played a significant role in the preservation of the two-party system. In each of the examples that he cites—"the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines," *post*, at 93—patronage practices were used solely to protect the power of an entrenched majority. See Laycock, Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights, 99 Yale L. J. 1711, 1722 (1990) (describing the "hopelessness of contesting elections" in Chicago's "one-party system" when "half a dozen employees of the city and of city contractors were paid with public funds to work [a precinct] for the other side"); Johnson, Successful Reform Litigation: The *Shakman* Patronage Case, 64 Chi.-Kent L. Rev. 479, 481 (1988) (the "massive Democratic patronage employment system" maintained a "noncompetitive political system" in Cook County in the 1960's).

Without repeating the Court's studied rejection of the policy arguments for patronage practices in *Elrod*, 427 U. S., at 364–373, I note only that many commentators agree more with JUSTICE SCALIA's admissions of the systemic costs of patronage practices—the "financial corruption, such as salary kickbacks and partisan political activity on government-paid time," the reduced efficiency of government, and the undeniable constraint upon the expression of views by employees, *post*, at 108–110—than with his belief that patronage is necessary to political stability and integration of powerless groups. See, *e. g.*, G. Pomper, Voters, Elections, and Parties 282–304 (1988) (multiple causes of party decline); D. Price, Bringing Back the Parties 22–25 (1984) (same); Comment, 41 U. Chi. L. Rev. 297, 319–328 (1974) (same); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 398 (1972) (absence of machine politics in California); J. James, American Political Parties in Transition 85 (1974) (inefficient and antiparty effects of patronage); Johnston, Patrons and Clients, Jobs and Machines: A Case Study of the Uses of Patronage, 73 Am. Pol. Sci. Rev. 385 (1979) (same); Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15 (1989) (same); Comment, 49 U. Chi. L. Rev. 181, 197–200 (1982) (same); Freedman, Doing Battle with the Patronage Army: Politics, Courts and

sources—in this case employment opportunities—may appropriately be used to subsidize partisan activities even when the political affiliation of the employee or the job applicant is entirely unrelated to his or her public service.[5] The premise on which this position rests would justify the use of public funds to compensate party members for their campaign work, or, conversely, a legislative enactment denying public employment to nonmembers of the majority party. If such legislation is unconstitutional—as it clearly would be—an equally pernicious rule promulgated by the executive must also be invalid.

JUSTICE SCALIA argues that distinguishing "inducement and compulsion" reveals that a patronage system's impairment of the speech and associational rights of employees and would-be employees is insignificant. *Post*, at 109–110. This analysis contradicts the harsh reality of party discipline that is the linchpin of his theory of patronage. *Post*, at 105 (emphasizing the "link between patronage and party discipline, and between that and party success").[6] More impor-

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Personnel Administration in Chicago, 48 Pub. Admin. Rev. 847 (1988) (race and machine politics).

Incidentally, although some might suggest that Jacob Arvey was "best known as the promoter of Adlai Stevenson," *post*, at 104, that connection is of interest only because of Mr. Arvey's creative and firm leadership of the powerful political organization that was subsequently led by Richard J. Daley. M. Tolchin & S. Tolchin, To the Victor 36 (1971).

[5] Neither JUSTICE SCALIA nor any of the parties suggests that party affiliation is relevant to any of the positions at stake in this litigation—rehabilitation counselor, road equipment operator, prison guard, dietary manager, and temporary garage worker. Reliance on the difficulty of precisely dividing the positions in which political affiliation is relevant to the quality of public service from those in which it is not an appropriate requirement of the job is thus inapposite. See *post*, at 110–114. Difficulty in deciding borderline cases does not justify imposition of a loyalty oath in the vast category of positions in which it is irrelevant.

[6] The iron fist inside the velvet glove of JUSTICE SCALIA's "inducements" and "influences" is apparent from his own descriptions of the essen-

tantly, it rests on the long-rejected fallacy that a privilege may be burdened by unconstitutional conditions. See, *e. g.*, *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972). There are a few jobs for which an individual's race or religion may be relevant, see *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 314–315 (1986) (STEVENS, J., dissenting); there are many jobs for which political affiliation is relevant to the employee's ability to function effectively as part of a given administration. In those cases—in other words, cases in which "the efficiency of the public service," *Public Workers* v. *Mitchell*, 330 U. S. 75, 101 (1947), would be advanced by hiring workers who are loyal to the Governor's party—such hiring is permissible under the holdings in *Elrod* and *Branti*. These cases, however, concern jobs in which race, religion, and political affiliation are all equally and entirely irrelevant to the public service to be performed. When an individual has

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tial features of a patronage system. See, *e. g.*, *post*, at 109 (the worker may "urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless"); *post*, at 105 (quoting M. Tolchin & S. Tolchin, To the Victor, at 123 (reporting that Montclair, New Jersey, Democrats provide fewer services than Cook County, Illinois, Democrats, while "the rate of issue participation is much higher among Montclair Democrats who are not bound by the fear displayed by the Cook County committeemen")); *post*, at 105 (citing W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989) (reporting that Mayor Daley "sacked" a black committeeman for briefly withholding support for a school board nominee whom civil rights activists opposed)).

Of course, we have firmly rejected any requirement that aggrieved employees "prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Branti*, 445 U. S. 507, 517 (1980). What is at issue in these cases is not whether an employee is actually coerced or merely influenced, but whether the attempt to obtain his or her support through "party discipline" is legitimate. To apply the relevant question to JUSTICE SCALIA's example, *post*, at 109–110, the person who attempts to bribe a public official is guilty of a crime regardless of whether the official submits to temptation; likewise, a political party's attempt to maintain loyalty through allocation of government resources is improper regardless of whether any employee capitulates.

been denied employment for an impermissible reason, it is unacceptable to balance the constitutional rights of the individual against the political interests of the party in power. It seems to me obvious that the government may not discriminate against particular individuals in hopes of advancing partisan interests through the misuse[7] of public funds.

The only systemic consideration permissible in these circumstances is not that of the controlling party, but that of the aggregate of burdened individuals. By impairing individuals' freedoms of belief and association, unfettered patronage practices undermine the "free functioning of the electoral process." *Elrod*, 427 U. S., at 356. As I wrote in 1972:

> "Indeed, when numbers are considered, it is appropriate not merely to consider the rights of a particular janitor who may have been offered a bribe from the public treasury to obtain his political surrender, but also the impact on the body politic as a whole when the free political choice of millions of public servants is inhibited or manipulated by the selective award of public benefits. While the patronage system is defended in the name of democratic tradition, its paternalistic impact on the political

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[7] I use the term "misuse" deliberately because the entire rationale for patronage hiring as an economic incentive for partisan political activity rests on the assumption that the patronage employee filling a government position must be paid a premium to reward him for his partisan services. Without such a premium, the economic incentive rationale on which JUSTICE SCALIA relies does not exist. It has been clear to Congress and this Court for over a century that refusal to contribute "may lead to putting good men out of the service, liberal payments may be made the ground for keeping poor ones in," and "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." *Ex parte Curtis*, 106 U. S. 371, 375 (1882) (upholding constitutionality of Act of Aug. 15, 1876, § 6, ch. 287, 19 Stat. 169, prohibiting nonappointed federal employees from requesting or receiving any thing of value for political purposes).

Petitioners Rutan and Taylor both allege that they are more qualified than the persons who were promoted over them.

process is actually at war with the deeper traditions of democracy embodied in the First Amendment." *Lewis*, 473 F. 2d, at 576.[8]

The tradition that is relevant in these cases is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution. The inspirational command by our President in 1961 is entirely consistent with that tradition: "Ask not what your country can do for you—ask what you can do for your country." These cases involve a contrary command: "Ask not what job applicants can do for the State—ask what they can do for our party." Whatever traditional support may remain for a command of that ilk, it is plainly an illegitimate excuse for the practices rejected by the Court today.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." *Ante*, at 64. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where

[8] A decade later, in *Anderson* v. *Celebrezze*, 460 U. S., at 794, this Court decided that a law burdening independent candidates, by "limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group," would burden associational choices and thereby "threaten to reduce diversity and competition in the marketplace of ideas." We concluded that "the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964)—are served when election campaigns are not monopolized by the existing political parties." *Ibid.*

partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury* v. *Madison*, 1 Cranch 137 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall:

> "I ain't up on sillygisms, but I can give you some arguments that nobody can answer.
>
> "First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay." W. Riordon, Plunkitt of Tammany Hall 13 (1963).

It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by "party discipline," before the demands of small and cohesive interest groups.

The choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod* v. *Burns*, 427 U. S. 347 (1976), the Court did that. *Elrod* was limited however, as was the later decision of *Branti* v. *Finkel*, 445 U. S. 507 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

I

The restrictions that the Constitution places upon the government in its capacity as lawmaker, *i. e.*, as the regulator of private conduct, are not the same as the restrictions that it places upon the government in its capacity as employer. We have recognized this in many contexts, with respect to many different constitutional guarantees. Private citizens perhaps cannot be prevented from wearing long hair, but policemen can. *Kelley* v. *Johnson*, 425 U. S. 238, 247 (1976). Private citizens cannot have their property searched without probable cause, but in many circumstances government employees can. *O'Connor* v. *Ortega*, 480 U. S. 709, 723 (1987) (plurality opinion); *id.*, at 732 (SCALIA, J., concurring in judgment). Private citizens cannot be punished for refusing to provide the government information that may incriminate them, but government employees can be dismissed when the incriminating information that they refuse to provide relates to the performance of their jobs. *Gardner* v. *Broderick*, 392

U. S. 273, 277–278 (1968). With regard to freedom of speech in particular: Private citizens cannot be punished for speech of merely private concern, but government employees can be fired for that reason. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983). Private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that reason. *Public Workers* v. *Mitchell*, 330 U. S. 75, 101 (1947); *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 556 (1973); *Broadrick* v. *Oklahoma*, 413 U. S. 601, 616–617 (1973).

Once it is acknowledged that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as employer in the same way that it does to laws enacted in the government's capacity as regulator of private conduct, it may sometimes be difficult to assess what employment practices are permissible and what are not. That seems to me not a difficult question, however, in the present context. The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.[1] Such a venerable and accepted tradition is not to

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[1] The customary invocation of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), as demonstrating the dangerous consequences of this principle, see *ante*, at 82 (STEVENS, J., concurring), is unsupportable. I argue for the role of tradition in giving content only to *ambiguous* constitutional text; no tradition can supersede the Constitution. In my view the Fourteenth Amendment's requirement of "equal protection of the laws," combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid. Moreover, even if one does not regard the Fourteenth Amendment as crystal clear on this point, a tradition of *un-*

be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of *other* practices is to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such a landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.

I will not describe at length the claim of patronage to landmark status as one of our accepted political traditions. Justice Powell discussed it in his dissenting opinions in *Elrod* and *Branti*. *Elrod*, *supra*, at 378–379; *Branti*, *supra*, at 522, n. 1. Suffice it to say that patronage was, without any thought that it could be unconstitutional, a basis for government employment from the earliest days of the Republic until *Elrod*—and has continued unabated *since Elrod*, to the extent still permitted by that unfortunate decision. See, *e. g.*, D. Price, Bringing Back the Parties 24, 32 (1984); Gardner, A Theory of the Spoils System, 54 Public Choice 171, 181 (1987); Toinet & Glenn, Clientelism and Corruption in the "Open" Society: The Case of the United States, in Private Patronage and Public Power 193, 202 (C. Clapham ed.

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challenged validity did not exist with respect to the practice in *Brown*. To the contrary, in the 19th century the principle of "separate-but-equal" had been vigorously opposed on constitutional grounds, litigated up to this Court, and upheld only over the dissent of one of our historically most respected Justices. See *Plessy* v. *Ferguson*, 163 U. S. 537, 555–556 (1896) (Harlan, J., dissenting).

1982). Given that unbroken tradition regarding the application of an ambiguous constitutional text, there was in my view no basis for holding that patronage-based dismissals violated the First Amendment—much less for holding, as the Court does today, that even patronage hiring does so.[2]

II

Even accepting the Court's own mode of analysis, however, and engaging in "balancing" a tradition that ought to be part of the scales, *Elrod*, *Branti*, and today's extension of them seem to me wrong.

A

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. *Ante*,

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[2] JUSTICE STEVENS seeks to counteract this tradition by relying upon the supposed "unequivocal repudiation" of the right-privilege distinction. *Ante*, at 83. That will not do. If the right-privilege distinction was once used to explain the practice, and if that distinction is to be repudiated, then one must simply devise some other theory to explain it. The order of precedence is that a constitutional theory must be wrong if its application contradicts a clear constitutional tradition; not that a clear constitutional tradition must be wrong if it does not conform to the current constitutional theory. On JUSTICE STEVENS' view of the matter, this Court examines a historical practice, endows it with an intellectual foundation, and later, by simply undermining that foundation, relegates the constitutional tradition to the dustbin of history. That is not how constitutional adjudication works. Cf. *Burnham* v. *Superior Court of California, Marin County*, 495 U. S. 604 (1990) (opinion of SCALIA, J.). I am not sure, in any event, that the right-privilege distinction has been as unequivocally rejected as JUSTICE STEVENS supposes. It has certainly been recognized that the fact that the government need not confer a certain benefit does not mean that it can attach any conditions whatever to the conferral of that benefit. But it remains true that certain conditions can be attached to benefits that cannot be imposed as prescriptions upon the public at large. If JUSTICE STEVENS chooses to call this something other than a right-privilege distinction, that is fine and good—but it is in any case what explains the nonpatronage restrictions upon federal employees that the Court continues to approve, and there is no reason why it cannot support patronage restrictions as well.

at 68–72. The opinion indicates that the government may prevail only if it proves that the practice is "narrowly tailored to further vital government interests." *Ante*, at 74.

That strict-scrutiny standard finds no support in our cases. Although our decisions establish that government employees do not lose all constitutional rights, we have consistently applied a lower level of scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage [its] internal operatio[ns] . . . ." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896 (1961). When dealing with its own employees, the government may not act in a manner that is "patently arbitrary or discriminatory," *id.*, at 898, but its regulations are valid if they bear a "rational connection" to the governmental end sought to be served, *Kelley* v. *Johnson*, 425 U. S., at 247.

In particular, restrictions on speech by public employees are not judged by the test applicable to similar restrictions on speech by nonemployees. We have said that "[a] governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government." *Brown* v. *Glines*, 444 U. S. 348, 356, n. 13 (1980). In *Public Workers* v. *Mitchell*, 330 U. S., at 101, upholding provisions of the Hatch Act which prohibit political activities by federal employees, we said that "it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." We reaffirmed *Mitchell* in *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S., at 556, over a dissent by Justice Douglas arguing against application of a special standard to Government employees, except insofar as their "job performance" is concerned, *id.*, at 597. We did not say that the Hatch Act was narrowly tailored to meet

the government's interest, but merely deferred to the judgment of Congress, which we were not "in any position to dispute." *Id.*, at 567. Indeed, we recognized that the Act was not indispensably necessary to achieve those ends, since we repeatedly noted that "Congress at some time [may] come to a different view." *Ibid.*; see also *id.*, at 555, 564. In *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), we upheld similar restrictions on state employees, though directed "at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments," *id.*, at 616.

To the same effect are cases that specifically concern adverse employment action taken against public employees because of their speech. In *Pickering* v. *Board of Education of Township High School Dist.*, 391 U. S. 563, 568 (1968), we recognized:

> "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Because the restriction on speech is more attenuated when the government conditions employment than when it imposes criminal penalties, and because "government offices could not function if every employment decision became a constitutional matter," *Connick* v. *Myers*, 461 U. S., at 143, we have held that government employment decisions taken on the basis of an employee's speech do not "abridg[e] the freedom of speech," U. S. Const., Amdt. 1, merely because they fail

the narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not subjected such decisions to strict scrutiny, but have accorded "a wide degree of deference to the employer's judgment" that an employee's speech will interfere with close working relationships. 461 U. S., at 152.

When the government takes adverse action against an employee on the basis of his political affiliation (an interest whose constitutional protection is derived from the interest in speech), the same analysis applies. That is why both the *Elrod* plurality, 427 U. S., at 359, and the opinion concurring in the judgment, *id.*, at 375, as well as *Branti*, 445 U. S., at 514–515, and the Court today, *ante*, at 72, rely on *Perry* v. *Sindermann*, 408 U. S. 593 (1972), a case that applied the test announced in *Pickering*, not the strict-scrutiny test applied to restrictions imposed on the public at large. Since the government may dismiss an employee for political *speech* "reasonably deemed by Congress to interfere with the efficiency of the public service," *Public Workers* v. *Mitchell*, *supra*, at 101, it follows, *a fortiori*, that the government may dismiss an employee for political *affiliation* if "reasonably necessary to promote effective government." *Brown* v. *Glines*, *supra*, at 356, n. 13.

While it is clear from the above cases that the normal "strict scrutiny" that we accord to government regulation of speech is not applicable in this field,[3] the precise test that re-

[3] The Court calls our description of the appropriate standard of review "questionable," and suggests that these cases applied strict scrutiny ("even *were* JUSTICE SCALIA correct that less-than-strict scrutiny is appropriate"). *Ante*, at 70, n. 4 (emphasis added). This suggestion is incorrect, does not aid the Court's argument, and if accepted would eviscerate the strict-scrutiny standard. It is incorrect because even a casual perusal of the cases reveals that the governmental actions were sustained, not because they were shown to be "narrowly tailored to further vital government interests," *ante*, at 74, but because they were "reasonably" deemed necessary to promote effective government. It does not aid the Court's argument, moreover, because *whatever* standard those cases applied must

places it is not so clear; we have used various formulations. The one that appears in the case dealing with an employment practice closest in its effects to patronage is whether the

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be applied here, and if the asserted interests in patronage are as weighty as those proffered in the previous cases, then *Elrod* and *Branti* were wrongly decided. It eviscerates the standard, finally, because if the practices upheld in those cases survived strict scrutiny, then the so-called "strict-scrutiny" test means nothing. Suppose a State made it unlawful for an employee of a privately owned nuclear powerplant to criticize his employer. Can there be any doubt that we would reject out of hand the State's argument that the statute was justified by the compelling interest in maintaining the appearance that such employees are operating nuclear plants properly, so as to maintain public confidence in the plants' safety? But cf. *Civil Service Comm'n* v. *Letter Carriers*, 413 U. S. 548, 565 (1973) (Hatch Act justified by need for Government employees to "appear to the public to be avoiding [political partiality], if confidence in the system of representative Government is not to be eroded"). Suppose again that a State prohibited a private employee from speaking on the job about matters of private concern. Would we even hesitate before dismissing the State's claim that the compelling interest in fostering an efficient economy overrides the individual's interest in speaking on such matters? But cf. *Connick* v. *Myers*, 461 U. S. 138, 147 (1983) ("[W]hen a public employee speaks . . . upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior"). If the Court thinks that strict scrutiny is appropriate in all these cases, then it should forthrightly admit that *Public Workers* v. *Mitchell*, 330 U. S. 75 (1947), *Letter Carriers*, *supra*, *Pickering* v. *Board of Education of Township High School Dist.*, 391 U. S. 563 (1968), *Connick*, *supra*, and similar cases were mistaken and should be overruled; if it rejects that course, then it should admit that those cases applied, as they said they did, a reasonableness test.

The Court's further contention that these cases are limited to the "interests that the government has in its capacity as an employer," *ante*, at 70, n. 4, as distinct from its interests "in the structure and functioning of society as a whole," *ibid.*, is neither true nor relevant. Surely a principal reason for the statutes that we have upheld preventing political activity by government employees—and indeed the *only* substantial reason, with respect to those employees who are permitted to be hired and fired on a political basis—is to prevent the party in power from obtaining what is considered an unfair advantage in political campaigns. That is precisely the

practice could be "reasonably deemed" by the enacting legislature to further a legitimate goal. *Public Workers* v. *Mitchell*, 330 U. S., at 101. For purposes of my ensuing discussion, however, I will apply a less permissive standard that seems more in accord with our general "balancing" test: Can the governmental advantages of this employment practice reasonably be deemed to outweigh its "coercive" effects?

B

Preliminarily, I may observe that the Court today not only declines, in this area replete with constitutional ambiguities, to give the clear and continuing tradition of our people the *dispositive* effect I think it deserves, but even declines to give it substantial weight in the balancing. That is contrary to what the Court has done in many other contexts. In eval-

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type of governmental interest at issue here. But even if the Court were correct, I see no reason in policy or principle why the government would be limited to furthering *only* its interests "as an employer." In fact, we have seemingly approved the furtherance of broader governmental interests through employment restrictions. In *Hampton* v. *Mow Sun Wong*, 426 U. S. 88 (1976), we held unlawful a Civil Service Commission regulation prohibiting the hiring of aliens on the ground that the Commission lacked the requisite authority. We were willing, however, to "assume . . . that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes." *Id.*, at 105. Three months after our opinion, the President adopted the restriction by Executive Order. Exec. Order No. 11935, 3 CFR 146 (1976 Comp.). On remand, the lower courts denied the *Mow Sun Wong* plaintiffs relief on the basis of this new Executive Order and relying upon the interest in providing an incentive for citizenship. *Mow Sun Wong* v. *Hampton*, 435 F. Supp. 37 (ND Cal. 1977), aff'd, 626 F. 2d 739 (CA9 1980). We denied certiorari *sub nom. Lum* v. *Campbell*, 450 U. S. 959 (1981). In other cases, the lower federal courts have uniformly reached the same result. See, *e. g.*, *Jalil* v. *Campbell*, 192 U. S. App. D. C. 4, 7, n. 3, 590 F. 2d 1120, 1123, n. 3 (1978); *Vergara* v. *Hampton*, 581 F. 2d 1281 (CA7 1978), cert. denied, 441 U. S. 905 (1979); *Santin Ramos* v. *United States Civil Service Comm'n*, 430 F. Supp. 422 (PR 1977) (three-judge court).

uating so-called "substantive due process" claims we have examined our history and tradition with respect to the asserted right. See, *e. g.*, *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989); *Bowers* v. *Hardwick*, 478 U. S. 186, 192–194 (1986). In evaluating claims that a particular procedure violates the Due Process Clause we have asked whether the procedure is traditional. See, *e. g.*, *Burnham* v. *Superior Court of California, Marin County*, 495 U. S. 604 (1990). And in applying the Fourth Amendment's reasonableness test we have looked to the history of judicial and public acceptance of the type of search in question. See, *e. g.*, *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 537 (1967). See also *Press-Enterprise Co.* v. *Superior Court of California, Riverside County*, 478 U. S. 1, 8 (1986) (tradition of accessibility to judicial proceedings implies judgment of experience that individual's interest in access outweighs government's interest in closure); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 589 (1980) (BRENNAN, J., concurring in judgment) ("Such a tradition [of public access] commands respect in part because the Constitution carries the gloss of history"); *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 678 (1970) ("unbroken practice of according the [property tax] exemption to churches" demonstrates that it does not violate Establishment Clause).

But even laying tradition entirely aside, it seems to me our balancing test is amply met. I assume, as the Court's opinion assumes, that the balancing is to be done on a generalized basis, and not case by case. The Court holds that the governmental benefits of patronage cannot reasonably be thought to outweigh its "coercive" effects (even the lesser "coercive" effects of patronage hiring as opposed to patronage firing) not merely in 1990 in the State of Illinois, but at any time in any of the numerous political subdivisions of this vast country. It seems to me that that categorical pronouncement reflects a naive vision of politics and an inadequate appreciation of the systemic effects of patronage in promoting political sta-

bility and facilitating the social and political integration of previously powerless groups.

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation—both of which are results in which States have a strong governmental interest. Party strength requires the efforts of the rank and file, especially in "the dull periods between elections," to perform such tasks as organizing precincts, registering new voters, and providing constituent services. *Elrod*, 427 U. S., at 385 (dissenting opinion). Even the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. "For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties." *Ibid.* Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is "'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization.'" Quoted in M. Tolchin & S. Tolchin, To the Victor 36 (1971). A major study of the patronage system describes the reality as follows:

> "[A]lthough men have many motives for entering political life . . . the vast underpinning of both major parties is made up of men who seek practical rewards. Tangible advantages constitute the unifying thread of most successful political practitioners" *Id.*, at 22.

> "With so little patronage cement, party discipline is relatively low; the rate of participation and amount of service the party can extract from [Montclair] county committeemen are minuscule compared with Cook County. The party considers itself lucky if 50 percent of its committeemen show up at meetings—even those labeled 'urgent'—while even lower percentages turn out at functions intended to produce crowds for visiting candidates." *Id.*, at 123.

See also W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989); G. Pomper, Voters, Elections, and Parties 255 (1988); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 384 (1972).

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success. It relies (as did the plurality in *Elrod*, *supra*, at 369, n. 23) on a single study of a rural Pennsylvania county by Professor Sorauf, *ante*, at 75—a work that has been described as "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings." Wolfinger, *supra*, at 384, n. 39. It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. *Ante*, at 75. Those techniques have supplemented but not supplanted personal contacts. See Price, Bringing Back the Parties, at 25. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. See *Elrod*, *supra*, at 384 (Powell, J., dissenting); *Branti*, 445

U. S., at 528 (Powell, J., dissenting). Increased reliance on money-intensive campaign techniques tends to entrench those in power much more effectively than patronage—but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses—if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." *Ante*, at 74. This is almost verbatim what was said in *Elrod*, see 427 U. S., at 369. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p. A1, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for

party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See Toinet & Glenn, Clientelism and Corruption in the "Open" Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer* v. *Brown*, 415 U. S. 724, 736 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127–130. There is little doubt that our decisions in *Elrod* and *Branti*, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, *e. g.*, Fitts, The Vice of Virtue, 136 U. Pa. L. Rev. 1567, 1603–1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly in party discipline with one in which each officeholder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a

political party from enacting its programs into law." *Branti*, *supra*, at 531 (Powell, J., dissenting).[4]

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. See, *e. g.*, *Elrod*, 427 U. S., at 379 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195–197 (H. Bailey, Jr., & E. Katz eds. 1969). By supporting and ultimately dominating a particular party "machine," racial and ethnic minorities have—on the basis of their politics rather than their race or ethnicity—acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

> "'Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown."'" New York Amsterdam News, Apr. 1, 1978, p. A–4, quoted in Hamilton, The Patron-Recipient Relationship and Minority Politics in New York City, 94 Pol. Sci. Q. 211, 212 (1979).

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the effi-

[4] JUSTICE STEVENS discounts these systemic effects when he characterizes patronage as fostering partisan, rather than public, interests. *Ante*, at 88. But taking JUSTICE STEVENS at his word, one wonders why patronage can *ever* be an "appropriate requirement for the position involved," *ante*, at 64.

ciency of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgment of liberty, have been the major criticisms leading to enactment of the civil service laws—for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political "spoils." What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge *within the organization* the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage—to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general "'coercion of belief,'" *ante*, at 71, quoting *Branti*, 445 U. S., at 516; see also *ante*, at 75; *Elrod*, *supra*, at 355 (plurality opinion). Indeed, it greatly exaggerates them to call them "coercion" at all, since we generally make a distinction between inducement and compulsion. The public official

offered a bribe is not "coerced" to violate the law, and the private citizen offered a patronage job is not "coerced" to work for the party. In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

C

The last point explains why *Elrod* and *Branti* should be overruled, rather than merely not extended. Even in the field of constitutional adjudication, where the pull of *stare decisis* is at its weakest, see *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 543 (1962) (opinion of Harlan, J.), one is reluctant to depart from precedent. But when that precedent is not only wrong, not only recent, not only contradicted by a long prior

tradition, but also has proved unworkable in practice, then all reluctance ought to disappear. In my view that is the situation here. Though unwilling to leave it to the political process to draw the line between desirable and undesirable patronage, the Court has neither been prepared to rule that no such line exists (*i. e.*, that *all* patronage is unconstitutional) nor able to design the line itself in a manner that judges, lawyers, and public employees can understand. *Elrod* allowed patronage dismissals of persons in "policymaking" or "confidential" positions. 427 U. S., at 367 (plurality opinion); *id.*, at 375 (Stewart, J., concurring in judgment). *Branti* retreated from that formulation, asking instead "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U. S., at 518. What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when "affiliation is an appropriate requirement." See generally Martin, A Decade of *Branti* Decisions: A Government Officials' Guide to Patronage Dismissals, 39 Am. U. L. Rev. 11, 23–42 (1989). These interpretations of *Branti* are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision.

A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation,[5] but then again perhaps it can,[6] especially if he is called the "police captain."[7] A county cannot fire on that basis its attorney for the department of social

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[5] *Jones* v. *Dodson*, 727 F. 2d 1329, 1338 (CA4 1984).

[6] *McBee* v. *Jim Hogg County*, 730 F. 2d 1009, 1014–1015 (CA5 1984) (en banc).

[7] *Joyner* v. *Lancaster*, 553 F. Supp. 809, 818 (MDNC 1982), later proceeding, 815 F. 2d 20, 24 (CA4), cert. denied, 484 U. S. 830 (1987).

services,[8] nor its assistant attorney for family court,[9] but a city can fire its solicitor and his assistants,[10] or its assistant city attorney,[11] or its assistant state's attorney,[12] or its corporation counsel.[13] A city cannot discharge its deputy court clerk for his political affiliation,[14] but it can fire its legal assistant to the clerk on that basis.[15] Firing a juvenile court bailiff seems impermissible,[16] but it may be permissible if he is assigned permanently to a single judge.[17] A city cannot fire on partisan grounds its director of roads,[18] but it can fire the second in command of the water department.[19] A government cannot discharge for political reasons the senior vice president of its development bank,[20] but it can discharge the regional director of its rural housing administration.[21]

The examples could be multiplied, but this summary should make obvious that the "tests" devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatron-

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[8] *Layden* v. *Costello*, 517 F. Supp. 860, 862 (NDNY 1981).

[9] *Tavano* v. *County of Niagara*, 621 F. Supp. 345, 349–350 (WDNY 1985), aff'd mem., 800 F. 2d 1128 (CA2 1986).

[10] *Ness* v. *Marshall*, 660 F. 2d 517, 521–522 (CA3 1981); *Montaquila* v. *St. Cyr*, 433 A. 2d 206, 211 (R. I. 1981).

[11] *Finkelstein* v. *Barthelemy*, 678 F. Supp. 1255, 1265 (ED La. 1988).

[12] *Livas* v. *Petka*, 711 F. 2d 798, 800–801 (CA7 1983).

[13] *Bavoso* v. *Harding*, 507 F. Supp. 313, 316 (SDNY 1980).

[14] *Barnes* v. *Bosley*, 745 F. 2d 501, 508 (CA8 1984), cert. denied, 471 U. S. 1017 (1985).

[15] *Bauer* v. *Bosley*, 802 F. 2d 1058, 1063 (CA8 1986), cert. denied, 481 U. S. 1038 (1987).

[16] *Elrod* v. *Burns*, 427 U. S. 347, 351 (1976).

[17] *Balogh* v. *Charron*, 855 F. 2d 356 (CA6 1988).

[18] *Abraham* v. *Pekarski*, 537 F. Supp. 858, 865 (ED Pa. 1982), aff'd in part and dism'd in part, 728 F. 2d 167 (CA3), cert. denied, 467 U. S. 1242 (1984).

[19] *Tomczak* v. *Chicago*, 765 F. 2d 633 (CA7), cert. denied, 474 U. S. 946 (1985).

[20] *De Choudens* v. *Government Development Bank of Puerto Rico*, 801 F. 2d 5, 10 (CA1 1986) (en banc), cert. denied, 481 U. S. 1013 (1987).

[21] *Rosario Nevarez* v. *Torres Gaztambide*, 820 F. 2d 525 (CA1 1987).

age rule and the exception. The rule achieves its objective of preventing the "coercion" of political affiliation, see *supra*, at 97, only if the employee is confident that he can engage in (or refrain from) political activities without risking dismissal. Since the current doctrine leaves many employees utterly in the dark about whether their jobs are protected, they are likely to play it safe. On the other side, the exception was designed to permit the government to implement its electoral mandate. *Elrod*, *supra*, at 367 (plurality opinion). But unless the government is fairly sure that dismissal is permitted, it will leave the politically uncongenial official in place, since an incorrect decision will expose it to lengthy litigation and a large damages award, perhaps even against the responsible officials personally.

This uncertainty and confusion are not the result of the fact that *Elrod*, and then *Branti*, chose the wrong "line." My point is that there is no right line—or at least no right line that can be nationally applied and that is known by judges. Once we reject as the criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling (as any reasonable person must be) to replace it with the principle that party-based employment is entirely impermissible, we have left the realm of law and entered the domain of political science, seeking to ascertain when and where the undoubted benefits of political hiring and firing are worth its undoubted costs. The answer to that will vary from State to State, and indeed from city to city, even if one rejects out of hand (as the *Branti* line does) the benefits associated with party stability. Indeed, the answer will even vary from year to year. During one period, for example, it may be desirable for the manager of a municipally owned public utility to be a career specialist, insulated from the political system. During another, when the efficient operation of that utility or even its very existence has become a burning political issue, it may be desirable that he be hired and fired on a political basis. The appropriate "mix" of party-based

employment is a political question if there ever was one, and we should give it back to the voters of the various political units to decide, through civil service legislation crafted to suit the time and place, which mix is best.

III

Even were I not convinced that *Elrod* and *Branti* were wrongly decided, I would hold that they should not be extended beyond their facts, viz., actual discharge of employees for their political affiliation. Those cases invalidated patronage firing in order to prevent the "restraint it places on freedoms of belief and association." *Elrod*, 427 U. S., at 355 (plurality opinion); see also *id.*, at 357 (patronage "compels or restrains" and "inhibits" belief and association). The loss of one's current livelihood is an appreciably greater constraint than such other disappointments as the failure to obtain a promotion or selection for an uncongenial transfer. Even if the "coercive" effect of the former has been held always to outweigh the benefits of party-based employment decisions, the "coercive" effect of the latter should not be. We have drawn a line between firing and other employment decisions in other contexts, see *Wygant* v. *Jackson Bd. of Education*, 476 U. S. 267, 282–283 (1986) (plurality opinion), and should do so here as well.

I would reject the alternative that the Seventh Circuit adopted in this case, which allows a cause of action if the employee can demonstrate that he was subjected to the "substantial equivalent of dismissal." 868 F. 2d 943, 950, 954 (1989). The trouble with that seemingly reasonable standard is that it is so imprecise that it will multiply yet again the harmful uncertainty and litigation that *Branti* has already created. If *Elrod* and *Branti* are not to be reconsidered in light of their demonstrably unsatisfactory consequences, I would go no further than to allow a cause of action when the employee has lost his position, that is, his formal title and salary. That narrow ground alone is enough to resolve the con-

stitutional claims in the present case. Since none of the plaintiffs has alleged loss of his position because of affiliation,[22] I would affirm the Seventh Circuit's judgment insofar as it affirmed the dismissal of petitioner Moore's claim and would reverse the Seventh Circuit's judgment insofar as it reversed the dismissal of the claims of other petitioners and of cross-respondents.

The Court's opinion, of course, not only declines to confine *Elrod* and *Branti* to dismissals in the narrow sense I have proposed, but, unlike the Seventh Circuit, even extends those opinions beyond "constructive" dismissals—indeed, even beyond adverse treatment of current employees—to all hiring decisions. In the long run there may be cause to rejoice in that extension. When the courts are flooded with litigation under that most unmanageable of standards *(Branti)* brought by that most persistent and tenacious of suitors (the disappointed officeseeker) we may be moved to reconsider our intrusion into this entire field.

In the meantime, I dissent.

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[22] Standefer and O'Brien do not allege that their political affiliation was the reason they were laid off, but only that it was the reason they were not recalled. Complaint ¶¶ 9, 21–22, App. to Respondents' Brief in Opposition; 641 F. Supp. 249, 256, 257 (CD Ill. 1986). Those claims are essentially identical to the claims of persons wishing to be hired; neither fall within the narrow rule of *Elrod* and *Branti* against patronage firing.

MAISLIN INDUSTRIES, U. S., INC., ET AL. *v.* PRIMARY STEEL, INC., ET AL.

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

No. 89–624. Argued April 16, 1990—Decided June 21, 1990

The Interstate Commerce Act (Act) requires motor common carriers to publish their rates in tariffs filed with the Interstate Commerce Commission (ICC), 49 U. S. C. § 10762, and prohibits both carriers and shippers from deviating from those rates, § 10761. The Act also specifies that a carrier's rates must be nondiscriminatory, § 10741, and that its rates and practices must be reasonable, § 10701, and charges the ICC, upon determining that a rate or practice violates the statute, with prescribing the rate or practice to be followed, § 10704(b)(1). Purportedly pursuant to this authority, the ICC, in its recent *Negotiated Rates* decisions, has adopted a policy that relieves a shipper of the obligation to pay the filed rate when it has privately negotiated a lower rate with the carrier. From 1981 to 1983, Quinn Freight Lines, a motor common carrier and a subsidiary of petitioner Maislin Industries, U. S., Inc., privately negotiated interstate shipment rates with respondent Primary Steel, Inc., that were lower than Quinn's filed rates. Quinn never filed the negotiated rates with the ICC. In 1983, Maislin filed for bankruptcy, and the bankrupt estate issued balance due bills to Primary for the difference between the filed rates and the negotiated rates. When Primary refused to pay the undercharges, the estate brought suit in the District Court, which referred the matter to the ICC. Rejecting the argument that it lacked the statutory power to release a shipper from liability for such undercharges, the ICC relied on its *Negotiated Rates* policy to hold that § 10701 authorized it to consider all the circumstances surrounding an undercharge suit to determine whether collection of the filed rate would constitute an unreasonable practice. The ICC concluded that Maislin was not entitled to recover, since Quinn and Primary had negotiated other rates, and since Primary had relied on Quinn to file those rates, had reasonably believed that the amounts quoted and billed were the correct total charges, and had made full payment. The case returned to the District Court, which granted summary judgment for Primary on the basis of the ICC's decision. The Court of Appeals affirmed, agreeing with the District Court that the approach taken by the ICC was consistent with the Act.

Held: The ICC's *Negotiated Rates* policy is inconsistent with the Act and is therefore invalid. Pp. 126–136.

(a) Since the duty to file rates under § 10762 and the obligation to charge only those rates under § 10761 have always been considered essential to preventing price discrimination violative of § 10741, *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384, this Court has long held that the filed rate alone governs the legal rights of a shipper against a carrier, see, *e. g.*, *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163, and that the statute forbids equitable defenses to collection of the filed tariff, see, *e. g.*, *Texas & Pacific R. Co.* v. *Mugg*, 202 U. S. 242, 245, including the shipper's ignorance or the carrier's misquotation of rates, see, *e. g.*, *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97. Despite its sometimes harsh effects, this rigid "filed rate doctrine" has been strictly applied and consistently adhered to by the Court. See, *e. g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535. Pp. 126–128.

(b) Although, under the filed rate doctrine, the tariff rate is not enforceable if the ICC finds it to be unreasonable, see, *e. g.*, *Maxwell, supra*, at 97, that exception is not applicable here. The ICC's determination that a carrier engages in an "unreasonable practice" when it attempts to collect the filed rate after the parties have negotiated a lower rate is not entitled to deference, since it conflicts with this Court's interpretation, from which Congress has not diverged, that the secret negotiation and collection of rates lower than the filed rate is discriminatory under § 10741. See, *e. g.*, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81. Stripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the ICC's interpretation of "unreasonable practices," thus stand revealed as flatly inconsistent with the Act's scheme as a whole and §§ 10761 and 10762 in particular. Nor can the ICC's policy be justified on the ground that it prevents the carrier from receiving a windfall, *i. e.*, the higher filed rate, from its failure to comply with § 10762's directive to file the negotiated rate, since such "equities" are irrelevant to the application of § 10761, which *requires* the carrier to collect the filed rate. Compliance with §§ 10761 and 10762 is utterly central to the administration of the Act, and, by sanctioning adherence to *unfiled* rates, the *Negotiated Rates* policy effectively renders those sections nugatory and conflicts directly with the Act's core purposes. Pp. 128–133.

(c) The passage of the Motor Carrier Act of 1980 (MCA)—which substantially deregulated the motor carrier industry for the avowed purpose of promoting competitive and efficient transportation services—does not justify the ICC's *Negotiated Rates* policy. Although the ICC has both the authority and the expertise generally to adopt new policies when

faced with new developments in the industry, its power does not extend to a policy that directly conflicts with its governing statute. Nothing in the MCA repeals §§ 10761 and 10762, and generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the requirements of those sections as interpreted by this Court. Cf. *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 420. The fact that, even before the MCA's passage, Congress had allowed the ICC to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see § 10761(b), demonstrates that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers. Pp. 133–136.

879 F. 2d 400, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 136. STEVENS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 138.

Thomas M. Auchincloss, Jr., argued the cause for petitioners. With him on the briefs were *Brian L. Troiano* and *David G. Sperry*.

Deputy Solicitor General Merrill argued the cause for respondents. With him on the brief for the Interstate Commerce Commission, respondent under this Court's Rule 12.4, were *Solicitor General Starr*, *Michael R. Dreeben*, *Robert S. Burk*, and *Ellen D. Hanson*. *Henry M. Wick, Jr.*, *Charles J. Streiff*, and *Edward E. Schmitt* filed a brief for respondent Primary Steel, Inc.*

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*Briefs of *amici curiae* urging reversal were filed for McLean Trucking Co. et al. by *Paul O. Taylor;* for Oneida Motor Freight, Inc., by *Joseph L. Steinfeld, Jr.*, *Robert B. Walker*, and *Miles L. Kavaller;* for Overland Express, Inc., by *James A. Knauer* and *James M. Carr;* and for Robert Yaquinto, Jr., by *Louis J. Wade*.

Briefs of *amici curiae* urging affirmance were filed for the National-American Wholesale Grocers' Association et al. by *William H. Borghesani, Jr.*, and *Martin W. Bercovici;* for Shippers National Freight Claim Council, Inc., by *William J. Augello* and *Fritz R. Kahn;* for the National Industrial Transportation League et al. by *Frederic L. Wood*, *Nicholas J. DiMichael*, *Richard D. Fortin*, *Jan S. Amundson*, *Quentin Riegel*, and *Daniel J. Sweeney;* and for Supreme Beef Processors, Inc., by *John W. Bryant*.

JUSTICE BRENNAN delivered the opinion of the Court.

Under the Interstate Commerce Act (Act), 49 U. S. C. § 10101 *et seq.* (1982 ed.), motor common carriers must file their rates with the Interstate Commerce Commission (ICC or Commission), and both carriers and shippers must adhere to these rates. This case requires us to determine the validity of a policy recently adopted by the ICC that relieves a shipper of the obligation of paying the filed rate when the shipper and carrier have privately negotiated a lower rate. We hold that this policy is inconsistent with the Act.

I

A

The ICC regulates interstate transportation by motor common carriers to ensure that rates are both reasonable and nondiscriminatory. See 49 U. S. C. §§ 10101(a), 10701(a), 10741(b) (1982 ed.). The Act provides that a "common carrier . . . may not subject a person, place, port, or type of traffic to unreasonable discrimination." § 10741. In addition, the Act states that "[a] rate . . . , classification, rule, or practice related to transportation or service . . . must be reasonable." § 10701(a).[1] The ICC has primary responsibility for determining whether a rate or practice is reasonable. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440–442 (1907). The Commission may investigate the reasonableness of a rate "on its own initiative or on complaint." § 11701(a). When the Commission determines that a rate or practice violates the statute, it "shall prescribe the rate . . . or practice to be followed." § 10704(b)(1). Moreover, motor common carriers are liable "for damages resulting from the imposition of rates for transportation or service

[1] The Act states that when reviewing the reasonableness of a carrier's rates, the Commission "shall authorize revenue levels that are adequate under honest, economical, and efficient management to cover total operating expenses . . . plus a reasonable profit." 49 U. S. C. § 10701(e) (1982 ed.).

the Commission finds to be in violation" of the Act. 49 U. S. C. § 11705(b)(3) (1982 ed., Supp. V).

The Act requires a motor common carrier to "publish and file with the Commission tariffs containing the rates for transportation it may provide." 49 U. S. C. § 10762(a)(1) (1982 ed.). The Act also specifically prohibits a carrier from providing services at any rate other than the filed (also known as the tariff) rate:

> "Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." § 10761(a).

Deviation from the filed rate may result in the imposition of civil or criminal sanctions on the carrier or shipper. See §§ 11902–11904.[2]

As the Court has frequently stated, the statute does not permit either a shipper's ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate. See *Southern Pacific Transp. Co.* v.

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[2] Section 11902 provides that a shipper who knowingly receives a rebate or offset against the filed rate is liable to the Government for a civil penalty in an amount equal to three times the rebate. Section 11903(a) states that any person who "knowingly offers, grants, gives, solicits, accepts, or receives" service at less than the filed rate "shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both." A carrier who willfully fails to file and publish its tariffs is subject to the same penalty. See § 11903(b); see also § 11904 (corporate liability).

Commercial Metals Co., 456 U. S. 336, 352 (1982); *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915). In 1986, however, the ICC concluded that changes in the motor carrier industry "clearly warrant a tempering of the former harsh rule of adhering to the tariff rate in virtually all cases." *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I. C. C. 2d 99, 106 (1986) *(Negotiated Rates I)*. Under the new policy, when cases are referred to the Commission, it "decid[es] if the collection of undercharges would be an unreasonable practice." *Id.*, at 100.

In *Negotiated Rates I*, the Commission adverted to a growing trend in the motor carrier industry whereby carriers and shippers negotiate rates lower than those on file with the ICC, and the shippers are billed for and remit payment at the negotiated rate. In many instances, however, the negotiated rate is never filed with the ICC. In some of those cases, the carrier subsequently files for bankruptcy and the trustee bills the shipper for the difference between the tariff rate and the negotiated rate, arguing that § 10761 compels the collection of the filed rather than negotiated rate. *Id.*, at 99. The Commission concluded that, under such circumstances, "it could be fundamentally unfair not to consider a shipper's equitable defenses to a claim for undercharges." *Id.*, at 103. The Commission reasoned that the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application of § 10761 unnecessary to deter discrimination. 3 I. C. C. 2d, at 106. Moreover, the Commission asserted that it had authority under § 10701 to determine whether the collection of the undercharge in a particular case would constitute an unreasonable practice. *Id.*, at 103.[3]

[3] The Commission stated that its new policy did not "abrogate Section 10761. Rather, we emphasize that carriers must continue to charge the tariff rate, as provided in the statute. The issue here is simply whether

The ICC clarified its new policy in *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I. C. C. 2d 623 (1989) *(Negotiated Rates II)*. The Commission explained that its policy did not recognize "equitable defenses" but rather applied the "affirmative statutory requiremen[t] and obligatio[n]" of § 10701 that a carrier's practices be reasonable. *Id.*, at 631, n. 18.[4] "[T]he Commission is finding to be an unreasonable practice . . . a course of conduct consisting of: (1) negotiating a rate; (2) agreeing to a rate that the shipper reasonably relies upon as being lawfully filed; (3) failing, either willfully or otherwise, to publish the rate; (4) billing and accepting payment at the negotiated rate for (sometimes) numerous shipments; and (5) then demanding additional payment at higher rates." *Id.*, at 628, n. 11.

B

This case involves the application of the Commission's new *Negotiated Rates* policy. It arises from an action by petitioner Maislin Industries, U. S., Inc. (Maislin), to recover freight undercharges for 1,081 interstate shipments per-

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we have the authority to consider all the circumstances surrounding an undercharge suit." *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I. C. C. 2d 99, 103 (1986) (citations omitted). The Commission rejected a proposal by the National Industrial Transportation League (NITL) that would have declared the negotiated rate to be the maximum reasonable rate. The Commission concluded that the proposal conflicted with § 10761 because it created a "*per se* determination that, as a matter of law, the negotiated rate would apply." *Id.*, at 102.

[4] The Commission stated: "[O]ur *Negotiated Rates* policy does not represent a relaxed interpretation of § 10761, but rather a separate determination under § 10701. But even if it were viewed as a reinterpretation of a previously strict construction of § 10761, it would be . . . well within this agency's authority (and indeed duty) to reinterpret the Interstate Commerce Act, based on upon experience gained and changing circumstances." *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I. C. C. 2d 623, 631 (1989) (citing *American Trucking Assns., Inc.* v. *Atchison T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967)).

formed for a shipper, respondent Primary Steel (Primary), by petitioner's subsidiary, Quinn Freight Lines (Quinn). From 1981 to 1983, Quinn, a motor common carrier certificated by the ICC, privately negotiated rates with Primary that were lower than Quinn's rates then on file with the ICC. Quinn never filed the negotiated rates with the ICC.

In 1983, Maislin filed for bankruptcy, and a postpetition audit of its accounts revealed undercharges of $187,923.36 resulting from billing Primary at the negotiated, rather than filed, rates. The agents of the bankrupt estate, pursuant to the authorization of the Bankruptcy Court, issued balance due bills to Primary for these undercharges. When Primary refused to pay the amounts demanded, the estate brought suit in the United States District Court for the Western District of Missouri under 49 U. S. C. § 11706(a) (1982 ed.)[5] for the difference between the filed rates and the negotiated rates.

In its answer, Primary alleged that since the parties had negotiated lower rates, rebilling at the tariff rates would constitute an unreasonable practice in violation of § 10701; that the tariff rates themselves were not "reasonable" within the meaning of § 10701; and that the asserted tariff rates were otherwise inapplicable to the shipments at issue. The District Court, finding these matters to be within the primary jurisdiction of the ICC, stayed the proceeding at Primary's request and referred the case to the Commission. App. 6–8.

The ICC ruled in Primary's favor, rejecting Maislin's argument that the Commission lacked the statutory power to release a shipper from liability for such undercharges. Relying on *Negotiated Rates I*, the ICC reiterated that § 10701 authorized it to "consider all the circumstances surrounding an

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[5] Section 11706(a) provides:

"A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues."

undercharge suit" to determine whether collection of the filed rate would constitute an unreasonable practice. App. to Pet. for Cert. 35a. In the Commission's view, its role was "to undertake an analysis of whether a negotiated but unpublished rate existed, the circumstances surrounding assessment of the tariff rate, and any other pertinent facts." *Id.*, at 36a. With respect to the instant controversy, the ICC concluded that Quinn and Primary had negotiated rates other than the tariff rates[6] and that Primary had relied on Quinn to file the rates with the ICC.[7] "Primary reasonably believed that the amounts quoted and billed by Quinn were the correct total charges for the transportation services it performed, that the amounts were reached as the result of negotiations between Primary and Quinn, and that, since full pay-

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[6] See App. to Pet. for Cert. 36a–38a. The Commission relied primarily on two "rate sheets" to find that negotiated rates existed. According to the Commission, a three-page rate sheet prepared by Primary in 1981 demonstrated that Quinn, through its agent James McGowan, had negotiated a five percent across-the-board increase in rates above those in Quinn's tariff on file with the ICC. Sometime in 1982, when Primary notified Quinn that it would need relief from the rates in order to continue using Quinn, the parties orally negotiated a decrease in the rates. Primary prepared a new rate sheet which was sent to all the relevant individuals. Subsequently, whenever rates were needed for destinations other than those shown on the rate sheet, McGowan would set a new rate based on the mileage involved. The ICC concluded that "there is evidence of offers, acceptances, and approvals by the involved parties" before each of the shipments in question. *Id.*, at 36a; see also *id.*, at 38a.

[7] See *id.*, at 43a. This finding was based on the fact that McGowan represented that his superiors had approved the rates on the written rate sheets. See *id.*, at 40a. The Commission noted that Primary's representative was never given an actual tariff documenting that the agreed-upon rates had been filed with the ICC and that Primary's representative had no training with respect to tariffs, but the Commission concluded that the representative "understood that Quinn would do whatever was necessary to implement the agreed upon rates." *Id.*, at 32a. The Commission specifically found that "[w]hile Quinn may not have taken appropriate steps to legalize the quoted rates, it has not been demonstrated that this occurred as a result of any intent to engage in unlawful conduct." *Id.*, at 42a.

ment was made by [Primary]," Maislin was not entitled to recover the filed rates. *Id.*, at 43a.

The case returned to the District Court where both parties moved for summary judgment. The court granted summary judgment for Primary, rejecting Maislin's argument that the ICC's new policy was, in effect, an impermissible recognition of equitable defenses to the application of the filed rate. The District Court concluded that the ICC's policy of determining case by case whether the collection of undercharges would be an unreasonable practice under § 10701 was based on a permissible construction of the Act. 705 F. Supp. 1401, 1405–1406 (1988). The court also determined that the ICC's finding that Maislin had engaged in an unreasonable practice was supported by substantial evidence. *Id.*, at 1406–1407.

The Court of Appeals for the Eighth Circuit affirmed, agreeing that the approach taken by the ICC was consistent with the Act. The court reasoned that "[s]ection 10761(a), which mandates the collection of tariff rates, is only part of an overall regulatory scheme administered by the ICC, and there is no provision in the [Act] elevating this section over section 10701, which requires that tariff rates be reasonable." 879 F. 2d 400, 405 (1989). The court concluded: "[T]he proper authority to harmonize these competing provisions is the ICC. . . . The approach taken by the ICC does not abolish the filed rate doctrine, but merely allows the ICC to consider all of the circumstances, including equitable defenses, to determine if strict adherence to the filed rate doctrine would constitute an unreasonable practice." *Ibid.* (citation omitted). Because the Courts of Appeals have disagreed on the important issue whether the ICC's *Negotiated Rates* policy is consistent with the Act,[8] we granted certiorari. 493 U. S. 1041 (1990).

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[8] Compare *In re Caravan Refrigerated Cargo, Inc. (Supreme Beef Processors)*, 864 F. 2d 388 (CA5 1989), with *Delta Traffic Service, Inc.* v. *Transtop, Inc.*, 902 F. 2d 101 (CA1 1990); *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d 642 (CA7 1990); *West Coast Truck*

II

The Act requires a motor common carrier to publish its rates in a tariff filed with the Commission. 49 U. S. C. § 10762 (1982 ed.). This Court has long understood that the filed rate governs the legal relationship between shipper and carrier. In *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922), the Court explained:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." (Citations omitted.)

See *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 415–417 (1986); *Abilene Cotton Oil*, 204 U. S., at 439; *Texas & Pacific R. Co.* v. *Mugg*, 202 U. S. 242, 245 (1906); *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 98, 101 (1895). The duty to file rates with the Commission, see § 10762, and the obligation to charge only those rates, see § 10761, have always been considered essential to preventing price discrimination and stabilizing rates. "In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike." *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370, 384 (1932).

Given the close interplay between the duties imposed by §§ 10761–10762 and the statutory prohibition on discrimina-

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Lines, Inc. v. *Weyerhaeuser Co.*, 893 F. 2d 1016 (CA9 1990); *Delta Traffic Service, Inc.* v. *Appco Paper & Plastics Corp.*, 893 F. 2d 472 (CA2 1990).

tion, see § 10741, this Court has read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff. See *Mugg*, *supra*, at 245; *Hefley*, *supra*, at 101. The classic statement of the "filed rate doctrine," as it has come to be known, is explained in *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94 (1915). In that case, the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate by the railroad.

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Id.*, at 97.[9]

This rigid approach was deemed necessary to prevent carriers from intentionally "misquoting" rates to shippers as a means of offering them rebates or discounts. See S. Rep.

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[9] See also *Louisville & Nashville R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 65 (1924) ("No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor"); *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, 653 (1913) ("Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed").

No. 46, 49th Cong., 1st Sess., 181, 188–190, 198–200 (1886). As the Commission itself found: "[P]ast experience shows that billing clerks and other agents of carriers might easily become experts in the making of errors and mistakes in the quotation of rates to favored shippers, while other shippers, less fortunate in their relations with carriers and whose traffic is less important, would be compelled to pay the higher published rates." *Poor* v. *Chicago, B. & Q. R. Co.*, 12 I. C. C. 418, 421–422 (1907); see also *Western Transp. Co.* v. *Wilson & Co.*, 682 F. 2d 1227, 1230–1231 (CA7 1982). Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it. See, *e. g.*, *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U. S. 533, 535 (1983); *Southern Pacific Transp. Co.*, 456 U. S., at 343–344; *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478, 484–485 (1939); *Louisville & Nashville R. Co.* v. *Central Iron & Coal Co.*, 265 U. S. 59, 65 (1924).

The filed rate doctrine, however, contains an important caveat: The filed rate is not enforceable if the ICC finds the rate to be unreasonable. See *Maxwell*, *supra*, at 97 (filed rate applies "*unless it is found by the Commission to be unreasonable*") (emphasis added); see also *Keogh*, *supra*, at 163 ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside*, this rate is made, for all purposes, the legal rate") (emphasis added). The filed rate doctrine, therefore, follows from the requirement that only filed rates be collected, as commanded by §§ 10761 and 10762, the requirement that rates not be discriminatory, see § 10741, and the requirement of § 10701 that carriers adopt reasonable rates and practices. As we explained in *Arizona Grocery*, *supra*, although the filed rate is the *legal* rate, the Act

> "did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was

> reasonable. Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.
>
> "The Act altered the common law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts." *Id.*, at 384–385 (footnote omitted).

In the instant case, the Commission did not find that the rates were unreasonable,[10] but rather concluded that the carrier had engaged in an unreasonable practice in violation of § 10701 that should preclude it from collecting the filed rates. The Commission argues that under the filed rate doctrine, a finding that the carrier engaged in an unreasonable practice should, like a finding that the filed rate is unreasonable, disentitle the carrier to collection of the filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule.[11] But we need not

[10] The ICC did not determine whether the tariff rates were unreasonable even though primary respondent requested such a determination. We therefore must assume, for purposes of our decision today, that the rates were reasonable. The issue of the reasonableness of the tariff rates is open for exploration on remand.

[11] None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff. For example, in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 86 (1962), the Commission's finding that a carrier had engaged in an unreasonable practice by routing intrastate shipments over interstate routes required only the application of a different filed rate, *i. e.*, the intrastate rates, rather than departure from the tariff schedule entirely. See also *Adams* v. *Mills*, 286 U. S. 397, 412 (1932) (reparations ordered constituted difference between one filed rate and another). Likewise, the cases in which the ICC has determined that a carrier engaged in an unreasonable practice by requiring a certain notation attached to the bill of lading to qualify the shipper for a reduced tariff also

resolve this issue today because we conclude that the justification for departure from the filed tariff schedule that the ICC set forth in its *Negotiated Rates* policy rests on an interpretation of the Act that is contrary to the language and structure of the statute as a whole and the requirements that make up the filed rate doctrine in particular.

Under the *Negotiated Rates* policy, the ICC has determined that a carrier engages in an unreasonable practice when it attempts to collect the filed rate after the parties have negotiated a lower rate. The ICC argues that its conclusion is entitled to deference because § 10701 does not specifically address the types of practices that are to be considered unreasonable and because its construction is rational and consistent with the statute. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

We disagree. For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. See *supra*, at 126–128. By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent. See 49 U. S. C. § 10741 (1982 ed.). As we stated in *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81 (1908):

> "If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. . . . [The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other

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did not require deviation from the filed tariff. See *Standard Brands, Inc.* v. *Central R. Co. of New Jersey*, 350 I. C. C. 555 (1974); *Carriers Traffic Service, Inc.* v. *Anderson, Clayton & Co.*, 881 F. 2d 475, 481–482 (CA7 1989) (collecting cases).

> construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish."

Congress has not diverged from this interpretation and we decline to revisit it ourselves. See *California* v. *FERC*, 495 U. S. 490, 499 (1990) (recognizing the respect "this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes"). Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning. Labeling the carrier's conduct an "unreasonable practice" cannot disguise the fact that the ICC is justifying deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate. Stripped of its semantic cover, the *Negotiated Rates* policy and, more specifically, the Commission's interpretation of "unreasonable practices" thus stand revealed as flatly inconsistent with the statutory scheme as a whole, cf. *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 645 (1990); *Dole* v. *Steelworkers*, 494 U. S. 26, 32 (1990), and §§ 10761 and 10762 in particular.

Nor can the *Negotiated Rates* policy be justified as a remedy for the carrier's failure to comply with § 10762's directive to file the negotiated rate with the ICC. See *Negotiated Rates I*, 3 I. C. C. 2d, at 103. The Commission argues that the carrier should not receive a windfall, *i. e.*, the higher filed rate, from its failure to comply with the statute. See Brief for Federal Respondent 25–27. But § 10761 *requires* the carrier to collect the filed rate, and we have never accepted the argument that such "equities" are relevant to the application of § 10761.[12] See, *e. g.*, *Maxwell*, 237 U. S., at 97. Indeed,

[12] Even if the equities of the situation were relevant, it is difficult to see how the equities favor the shipper. One would think that a shipper who has the market power to require a carrier to reduce his tariffs could also

strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act. See *supra*, at 126–128.

Compliance with §§ 10761 and 10762 is "utterly central" to the administration of the Act. *Regular Common Carrier Conference* v. *United States*, 253 U. S. App. D. C. 305, 308, 793 F. 2d 376, 379 (1986). "Without [these provisions] . . . it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, . . . and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." *Ibid.* (citations omitted). Although the ICC argues that the *Negotiated Rates* policy does not "abolis[h] the requirement in section 10761 that carriers must continue to charge the tariff rate," App. to Pet. for Cert. 36a, the policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and

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require proof from a carrier that the negotiated rates had been filed before tendering the shipment, especially since there are commercial services providing up-to-the-minute details of the carrier's rate schedule. But see *Fort Howard Paper Co.* v. *Maislin Industries, U. S., Inc.*, No. MC–C–10983 (I. C. C. Aug. 4, 1987), p. 5 (unreasonable practice found even when the shipper had a copy of the tariff). Nevertheless, the Commission argues that if § 10761 "prevailed over the requirement of reasonable practices, a carrier could intentionally engage in 'bait and switch' tactics by negotiating one rate, fraudulently representing that it was properly filed, and then insisting upon collection of a higher tariff rate." Brief for Federal Respondent 30. We note first that the Commission determined that there was no intentional or fraudulent conduct in this case. Moreover, any carrier who engaged in such conduct could be punished under 49 U. S. C. § 11903(b) (1982 ed.). Finally, this risk of intentional misconduct on the part of a carrier has always existed and has never been considered sufficient to justify a less stringent interpretation of § 10761.

never disclosed to the ICC. Thus, although we agree that the Commission may have discretion to craft appropriate remedies for violations of the statute, see *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354, 364–365 (1984), the "remedy" articulated in the *Negotiated Rates* policy effectively renders nugatory the requirements of §§ 10761 and 10762 and conflicts directly with the core purposes of the Act.

The ICC maintains, however, that the passage of the Motor Carrier Act of 1980 (MCA), Pub. L. 96–296, 94 Stat. 793, justifies its *Negotiated Rates* policy. The MCA substantially deregulated the motor carrier industry in many ways in an effort to "promote competitive and efficient transportation services." Pub. L. 96–296, § 4, formerly codified at 49 U. S. C. § 10101(a)(7) (1976 ed., Supp. V). In addition to loosening entry controls, see § 5, codified at 49 U. S. C. § 10922 (1982 ed.), the MCA also created a zone of reasonableness within which carriers can raise rates without interference from the ICC. See § 11, codified at 49 U. S. C. § 10708 (1982 ed.). More importantly, the MCA also allows motor carriers to operate as both common carriers and contract carriers. See § 10(b)(1), amending 49 U. S. C. § 10930(a) (1982 ed.). A contract carrier transports property under exclusive agreements with a shipper, see § 10102(14), and the Commission has exempted all motor contract carriers from the requirements of §§ 10761 and 10762. See *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M. C. C. 150 (1983), aff'd *sub nom. Central & Southern Motor Freight Tariff Assn., Inc.* v. *United States*, 244 U. S. App. D. C. 226, 757 F. 2d 301, cert. denied, 474 U. S. 1019 (1985).[13] The Commission has also relaxed the

[13] The Act specifically provides that the Commission may "grant relief" from the filing requirements to motor contract carriers "when relief is consistent with the public interest and the transportation policy." §§ 10761(b), 10762(f); see also § 10702(b). The Commission concluded that granting a classwide exemption rather than individual exemptions was both in the public interest and consistent with the purpose behind the Act. See *Exemption of Motor Contract Carriers from Tariff Filing Require-*

regulations relating to motor common carriers, most significantly, by allowing decreased rates to go into effect one day after the filing of a tariff. See *Short Notice Effectiveness for Independently Filed Rates*, 1 I. C. C. 2d 146 (1984), aff'd *sub nom. Southern Motor Carriers Rate Conference* v. *United States*, 773 F. 2d 1561 (CA11 1985).[14] In *Negotiated Rates I* and *II*, the Commission concluded that in light of the more competitive environment, strict adherence to the filed rate doctrine "is inappropriate and unnecessary to deter discrimination today." *Negotiated Rates I*, 3 I. C. C., at 106. According to the Commission, "'the inability of a shipper to rely on a carrier's interpretation of a tariff is a greater evil than the remote possibility that a carrier might intentionally misquote an applicable tariff rate to discriminate illegally between shippers.'" *Ibid.*, quoting *Seaboard System R. Co.* v. *United States*, 794 F. 2d 635, 638 (CA11 1986).

We reject this argument. Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry, see *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967), it does not have the power

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ments, 133 M. C. C., at 156–158. The Commission has also allowed contract carriers to obtain permits to serve entire classes of unnamed shippers. See *Issuance of Permits Authorizing Industrywide Service*, 133 M. C. C. 298 (1983).

[14] The Act provides that rates will not go into effect until 30 days after the filing of a tariff, see § 10762(c)(3), but specifically allows the Commission to reduce the period if "cause exists." § 10762(d)(1). The Commission determined that cause existed to reduce the waiting period to one day after the filing of a tariff reducing rates and seven days after the filing of a tariff increasing rates. See *Short Notice Effectiveness for Independently Filed Rates*, 1 I. C. C. 2d, at 150–160. In addition, the Commission has determined that neither tariffs applicable to a single shipper nor rates providing volume discounts are *per se* discriminatory. See *Rates for a Named Shipper or Receiver*, 367 I. C. C. 2d 959 (1984); *Petition for Declaratory Order—Lawfulness of Volume Discount Rates by Motor Common Carriers of Property*, 365 I. C. C. 711 (1982). We express no view today on the validity of such policies.

to adopt a policy that directly conflicts with its governing statute. Nothing in the MCA repeals §§ 10761 and 10762 or casts doubt on our prior interpretation of those sections. Generalized congressional exhortations to "increase competition" cannot provide the ICC authority to alter the well-established statutory filed rate requirements. As we said in *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, with respect to a similarly longstanding judicial interpretation of the Act:

> "Congress must be presumed to have been fully cognizant of this interpretation of the statutory scheme, which had been a significant part of our settled law for over half a century, and . . . Congress did not see fit to change it when Congress carefully reexamined this area of the law in 1980. [Respondent has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task." 476 U. S., at 420 (footnotes omitted).

See also *California* v. *FERC*, 495 U. S., at 498, 499–500. Even before the passage of the MCA, Congress had allowed the Commission to exempt motor *contract* carriers from the requirement that they adhere to the published tariff, see 49 U. S. C. § 10761(b) (1982 ed.), demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.[15] If

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[15] Moreover, in the Household Goods Transportation Act of 1980, Pub. L. 96–454, 94 Stat. 2011, Congress provided that "motor common carrier[s] providing transportation of household goods . . . may, subject to the provisions of this chapter *(including the general tariff requirements of section 10762 of this title)*, establish a rate for the transportation of household goods which is based on the carrier's written, binding estimate of charges for providing such transportation." 49 U. S. C. § 10735(a)(1) (1982 ed., Supp. V) (emphasis added). This exception for household goods carriers also demonstrates that Congress is aware of, but has elected not to elimi-

strict adherence to §§ 10761 and 10762 as embodied in the filed rate doctrine has become an anachronism in the wake of the MCA, it is the responsibility of Congress to modify or eliminate these sections.

Accordingly, the judgment of the Court of Appeals is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion but add a few words in response to JUSTICE STEVENS' assertion that the Court has "fail[ed] to adhere today to the teaching of *Chevron* [*U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984)]." *Post*, at 152.

In my view, the Court correctly relies upon our prior "filed rate" decisions, which were based not on the "regulatory scheme as a whole," *post*, at 144—by which JUSTICE STEVENS appears to mean the regulatory climate within which the statute then operated, *post*, at 145–146—but rather on the text of the statute. JUSTICE STEVENS argues that there is no textual limitation on the scope of the term "reasonable," as that term is used in 49 U. S. C. § 10701(a) (1982 ed.) ("A . . . practice related to transportation or service provided by a carrier . . . must be reasonable"), and that we must therefore accord deference to the Commission's interpretation of that term. *Post*, at 140–141, 151–152. I do not agree. Whatever else may qualify as an unreasonable practice, under no sensible construction of that term could it consist of failing to do what the statute explicitly *prohibits* doing—viz., charging or receiving a rate different from the rate specified in a tariff. 49 U. S. C. § 10761(a) (1982 ed.).

Nor can the phrase "[e]xcept as provided in this subtitle," § 10761(a), carry the enormous weight that JUSTICE STE-

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nate as applied to other motor common carriers, the general requirements of §§ 10761 and 10762.

VENS places upon it. *Post*, at 142–143, and n. 6. That clause is affixed to only the *first* sentence of § 10761(a), which states that before providing transportation and services, certain carriers must place their rates on file. (What is referred to by the exception is obvious—such provisions as § 10762(a)(1), which states that certain motor contract carriers that serve only one shipper need file only minimum rates.) But it is the *second* sentence of § 10761(a) that contains the requirement that only filed rates can be charged. Of course the subject of the second sentence, "*[t]hat* carrier" (emphasis added), must reasonably be deemed to refer to a carrier covered by the first sentence—so that the obligation to charge the filed rate applies only to those carriers *required* to file "the rate for the transportation or service." (Thus, a motor contract carrier required to file only minimum rates under § 10762(a)(1) can charge rates higher than those minimums.) But there is no way in which the "[e]xcept as provided" clause can be imported directly into the second sentence, causing it to recite an exception to the obligation to charge the required-to-be-filed rate, which JUSTICE STEVENS asserts can refer to the "reasonable practices" requirement of § 10701(a) as readily as it can to the "reasonable rate" requirement. *Post*, at 141–142. The basis for the "unreasonable rate" exception to the "filed rate" rule is not the "[e]xcept as provided" language at all; rather it is the need to reconcile two textual provisions that would otherwise be categorically inconsistent (do not charge unreasonable rates, but charge whatever rates you have filed). While an "unreasonable rate" unavoidably means a rate that is economically unreasonable—so that where economic unreasonableness exists §§ 10701(a) and 10761(a) *need* to be reconciled by assuming an implicit but unexpressed exception to the filed rate requirement—an "unreasonable practice" does *not* unavoidably mean charging the filed rate when a different rate has been promised, so with respect to that term normal construction of § 10701(a) (as in the previous paragraph) avoids any difficulty.

Finally, JUSTICE STEVENS points to changes in the motor carrier industry occasioned in part by 1980 amendments to the statute, which amendments he says "represented a fundamental policy choice in favor of deregulation." *Post*, at 147. See also *post*, at 147–151. But the only amendments of any relevance to the requirement of § 10761(a) that a carrier collect no rate other than the filed rate are those that remove certain pre-existing barriers to motor contract carriage, see generally *Central & Southern Motor Freight Tariff Association, Inc.* v. *United States*, 244 U. S. App. D. C. 226, 757 F. 2d 301, 311–312 (1985) *(per curiam)*—which amendments have the practical effect of making more carriers eligible for the *pre-existing exception* to the filing requirement of § 10761(a), permitting the Commission to exempt them under certain circumstances. § 10761(b). While this plainly reflects an intent to deregulate, it reflects an intent to deregulate *within the framework of the existing statutory scheme.* Perhaps deregulation cannot efficiently be accomplished within that framework, but that is Congress' choice and not the Commission's or ours. It may well be, as JUSTICE STEVENS thinks, that after the 1980 amendments and the various administrative changes that the Commission has made by rule, "'[t]he skeleton of regulation remains; the flesh has been stripped away.'" *Post*, at 148, quoting *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d 642, 644–645 (CA7 1990). But it is the skeleton we are construing, and we must read it for what it says.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE joins, dissenting.

The "filed rate doctrine" was developed in the 19th century as part of a program to regulate the ruthless exercise of monopoly power by the Nation's railroads. Today the Court places an interpretation on that doctrine even more strict than the original version. In doing so, the Court misreads the text of the Interstate Commerce Act (Act), 49 U. S. C. § 10101 *et seq.* (1982 ed.), ignores the history of motor carrier

regulation in this country, and gives no deference to the sensible construction of the Act by six Courts of Appeals[1] and the administrative agency responsible for its enforcement. Most significantly, the majority fails to appreciate the significance of the "sea change" in the statutory scheme that has converted a regime of regulated monopoly pricing into a highly competitive market. Even wearing his famous blinders, old Dobbin would see through the tired arguments the Court accepts today.

I

As originally enacted in 1887, the Act provided, in part:

> "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force." 24 Stat. 381.

Read literally, this text commanded strict adherence to the tariffs filed by a carrier. From the beginning, however, the Court construed that command as subject to the unstated ex-

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[1] See *Delta Traffic Service, Inc.* v. *Transtop, Inc.*, 902 F. 2d 101 (CA1 1990); *Delta Traffic Service, Inc.* v. *Appco Paper & Plastics Corp.*, 893 F. 2d 472 (CA2 1990); *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d 642 (CA7 1990); 879 F. 2d 400 (CA8 1989) (case below); *West Coast Truck Lines, Inc.* v. *Weyerhaeuser Co.*, 893 F. 2d 1016 (CA9 1990); *Seaboard System R. Co.* v. *United States*, 794 F. 2d 635 (CA11 1986). The decision of the Court of Appeals for the Eleventh Circuit in *Seaboard System* involved railroad regulation rather than motor carrier regulation, but presented very similar issues.

The sole exception to this consensus is *In re Caravan Refrigerated Cargo, Inc.*, 864 F. 2d 388 (CA5 1989).

ception that a filed rate would not be enforced if the Interstate Commerce Commission (Commission) determined that the rates were "unreasonable."[2] Amendments to the Act incorporated language that expressly allows exceptions in cases in which the Commission determines that strict enforcement would be unreasonable.[3]

Thus, 49 U. S. C. § 10761(a) (1982 ed.) now provides:

> "*Except as provided in this subtitle*, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device." (Emphasis added.)

The emphasized language in the foregoing provision obviously refers, *inter alia*, to § 10701(a) which states, in part:

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[2] Thus, in the most frequently quoted statement of the filed rate doctrine, we wrote:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable*." *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915) (emphasis added).

Similarly, in *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922), we wrote:

"The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside*, this rate is made, for all purposes, the legal rate, as between carrier and shipper." (Emphasis added.)

[3] See, *e. g.*, 34 Stat. 587.

> "A *rate* (other than a rail rate), classification, rule, *or practice* related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title *must be reasonable*." (Emphasis added.)

Furthermore, § 10704(b) expressly authorizes the Commission, after finding that a rate or practice of a carrier is unreasonable, to prescribe the rate or practice that the carrier must follow.[4]

The action of the Commission in this case faithfully tracks its statutory grant of authority. After considering all of the relevant evidence, the Commission determined "that it would be an unreasonable practice now to require Primary to pay undercharges for the difference between the negotiated rates and the tariff rates." App. to Pet. for Cert. 44a. That determination was unquestionably consistent with the plain language of the statute governing the Commission's authority. A carrier's failure to file negotiated rates obviously does not make it reasonable for the carrier to quote low rates and collect higher ones; the Commission is free to find, as it has done, that a practice of misquotation, failure to file, and subsequent collection is unreasonable under § 10701(a).

The Court offers no reason whatsoever to doubt this conclusion. Indeed, the Court's discussion of the statutory text consists almost entirely of vague references to some unarticulated

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[4] Title 49 U. S. C. § 10704(b)(1) (1982 ed. and Supp. V) provides, in part:

"When the Commission decides that a rate charged or collected by—

"(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

. . . . . .

"or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed."

interplay between §§ 10761(a) and 10762(a)(1),[5] see *ante*, at 126–127, an interplay which the Court contends would be "render[ed] nugatory" if carriers are not permitted to obtain payment of the filed rate when they have led shippers to rely upon a lower negotiated rate. *Ante*, at 133. For the reasons I have already stated, the text of those provisions does not generate any "interplay" capable of sustaining so rigid an inference. The Court virtually concedes as much, for it recognizes that the unreasonableness of a rate is a longstanding ground for denying collection of the filed rate, *ante*, at 128–129, and n. 10, and refuses to hold that the unreasonableness of a practice can never bar collection of a filed rate, *ante*, at 129–130.

Having admitted that the doctrine synthesized from the "interplay" between §§ 10761(a) and 10762(a)(1) is susceptible of exceptions based upon the nature of a carrier's rates and practices, the Court can argue only that this particular exception is impermissible.[6] The source of the exceptions is,

[5] Section 10762(a)(1) provides:

"A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs."

[6] The Court attempts to make hay of the fact that under § 10761(a) carriers "may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff." According to the Court, this provision "*requires* the carrier to collect the filed rate." *Ante*, at 131. That is true if the Court means that the carrier is obligated to seek payment of the filed rate, but not if the Court means that the carrier is entitled to receive payment of the filed rate. The longstanding reasonableness exception to the filed rate doctrine—an exception not contested by the Court—makes this much clear. Moreover, as has already been noted, the clause that prefaces § 10761(a) allows for the existence of exceptions to the collection requirement. The Court's argument simply begs the question before us, which is under what conditions a valid defense to a carrier's suit may exist.

Even less persuasive than the Court's argument from the collection requirement is a related claim made by petitioners. They contend that because carriers are legally obligated to collect the filed rate, the practice of filing suit to collect that rate cannot be unreasonable. See, *e. g.*, Reply

however, not the "interplay" that dominates the majority's reasoning, but the combined effect of the "Except as otherwise provided" language of § 10761(a) and the express authority to determine reasonableness granted to the Commission by § 10701(a). This second "interplay" gets little attention from the majority, and it is difficult to see how the text of either component might yield the distinction which the majority insists upon drawing. Nor can the Court mean that the exception literally voids the obligations imposed by §§ 10761(a) and 10762(a)(1), because the Commission maintains, and the Court does not deny, that the filed rate doctrine would still provide an effective right to recover for undercharges in some cases. See, *e. g.*, *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I. C. C. 2d 623, 629, and n. 13 (1989). Moreover, even if the "filed rate doctrine" were discarded entirely, a knowing or willful failure to comply with §§ 10761(a) and 10762(a)(1) may subject a carrier to prosecution.[7]

Brief for Petitioners 7–8. This argument, too, ignores the exceptions clause at the beginning of § 10761(a). Moreover, the argument mischaracterizes the practice deemed unreasonable by the Commission: A collection suit is one component of that practice, even though the suit considered in isolation from the broader course of conduct is not itself unreasonable. See *NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I. C. C. 2d 623, 628, n. 11 (1989); see also *ante*, at 122.

JUSTICE SCALIA trots out the same argument again, this time harnessed to an assertion that the exceptions clause applies only to the first sentence of § 10761(a). *Ante*, at 137 (concurring opinion). Although that is perhaps a possible reading of § 10761(a), it is obviously not the only one. There is no reason to believe that it is an interpretation of the section that the Commission must accept. In any event, JUSTICE SCALIA admits that § 10701(a)—which imposes a reasonableness condition upon practices and rates alike—modifies the requirements of § 10761(a), and this admission renders moot his discussion of the exceptions clause. *Ibid.* (concurring opinion). In light of that admission, JUSTICE SCALIA's argument fails for exactly the reasons set out above.

[7] See, *e. g.*, 49 U. S. C. §§ 11903 and 11904 (1982 ed.).

The Court's assertion that the agency policy now before us "renders nugatory" the "interplay" between §§ 10761(a) and 10762(a)(1) therefore amounts to no more than an observation that the policy substantially diminishes the importance of the "filed rate doctrine" as a means for enforcing those sections. Consideration of the statute's structure makes all the more clear what should already be evident from the statutory text: The Court's observation is true but utterly irrelevant.

II

Because no particular provision of the statute supports the Court's position, its principal argument must be that the agency's construction of the Act is inconsistent with the regulatory scheme as a whole. See *ante*, at 131. There are, of course, important differences between markets in which prices are regulated, either by private cartels or by public authority, and those in which prices are the product of independent decisions by competitors. Rules requiring adherence to predetermined prices are characteristic of regulated markets, but are incompatible with independent pricing in a competitive market.[8] The "filed rate doctrine" has played an important role, not just in the segments of the transportation industry regulated by the Commission, but in other regulated markets as well.[9] It requires the courts to respect the public agency's control over

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[8] See, *e. g.*, *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 582–583 (1936) (regulation by private agreement in violation of the Sherman Act); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 99 (1980) (state regulation of wine prices); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 338 (1956) (federal regulation of natural gas prices).

[9] See, *e. g.*, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 251–252 (1951) (federal regulation of prices for electrical power); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U. S. 571, 577–578 (1981) (federal regulation of prices for natural gas); *H. J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U. S. 229, 234, n. 1 (1989) (state regulation of rates for telephone service).

market prices and industry practices; moreover, it significantly reduces the temptation of regulated parties to deviate from the marketwide rules formulated by the agency.

The filed rate doctrine has been a part of our law during the century of regulation of the railroad industry by the Commission. In 1935, when Congress decided to impose economic regulation on the motor carrier industry, partly if not primarily in order to protect the railroads from too much competition,[10] the filed rate doctrine was applied to their rates just as it had previously applied to the railroads. It had the same regulatory purpose.[11] In its applications dur-

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[10] "Though identical statutory standards govern both motor carrier and rail consolidations, their legislative backgrounds differ. The demand for motor carrier regulation came, not from shippers, as in railroads, but from the roads themselves, who urged that virtually unregulated motor carrier competition threatened railroad financial stability. This view was also supported by the Interstate Commerce Commission, and the Federal Coordinator of Transportation who, in his 1934 and 1935 reports, recommended legislation regulating interstate motor carriers. In addition, during hearings on proposed legislation, many truck operators, previously opposed to Federal regulation, favored such control because they feared the effects of unrestrained competition on the motor carrier industry itself. The result was legislation, enacted in 1935, which from the first placed considerable restraint on motor carrier competition.

"Entry was controlled by certificates of convenience and necessity; those already in the field were given a preferred position by the grandfather clauses, assuring not only the right to continue in operation, but also to expand within the areas or between the points which they already served. Moreover, the Commission was empowered to establish minimum as well as maximum rates. And this minimum rate power was soon utilized by the Commission both to protect the railroads from motor carrier competition as well as to safeguard the motor carrier industry from 'destructive' competition within its own ranks. Indeed, from the inception of motor carrier regulation to the present day, the power to fix minimum rates has been more significant than the authority to fix maximum charges." Report of the Attorney General's National Committee to Study the Antitrust Laws 265 (1955).

[11] "To understand the purpose of the filed-rate doctrine and hence the Commission's recent efforts to relax it, on which see *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated*

ing the period of regulatory control over motor carrier ratemaking, the doctrine was for the most part applied to reinforce the policies and the decisions of the regulatory agency.[12]

Motor Common Carrier Rates, 3 I. C. C. 2d 99 (1986); *Buckeye Cellulose Corp.* v. *Louisville & Nashville R. R.*, 1 I. C. C. 2d 767 (1985), affirmed as *Seaboard System R. R.* v. *United States*, *supra*; *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I. C. C. 2d 623 (1989), one must understand the history of federal regulation of common carriers. Railroads have heavy fixed costs, and in their heyday faced little effective competition from other modes of transportation. Naturally they tended to load the fixed costs onto those shippers who had poor competitive alternatives and to charge low prices to those shippers who had good alternatives by reason of (for example) being big enough to induce two or more railroads to serve their plants. This created a disparity in transportation costs painful to shippers who paid high railroad rates and were competing with shippers who paid low rates, and it also undermined the railroads' efforts to cartelize railroad transportation. The confluence of interests between railroads and weak shippers resulted in a regulatory scheme in which railroads were forbidden both to price off tariff and to refuse service to any shipper at the tariffed rate. *Western Transportation Co.* v. *Wilson & Co.*, *supra*, 682 F. 2d at 1230–31. The scheme would have been undermined if carriers had been permitted to negotiate secret discounts with favored shippers. *Regular Common Carrier Conference* v. *United States*, 793 F. 2d 376, 379 (D. C. Cir. 1986). To deter this was the office of the filed-rate doctrine. It authorized carriers to recover the discounts regardless, which meant that the shipper could not count on being able to keep any discount that the railroad might dangle before it. Motor carriers do not have heavy fixed costs, but they do not like competition any more than railroads do, so when in 1935 they were brought under federal regulation (in major part to protect the railroads from their competition) they were placed under the filed-rate doctrine too." *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d, at 643–644.

[12] As the Court's opinion makes clear, there was no tension between judicial interpretation and agency policy in the cases that developed the filed rate doctrine. See *ante*, at 128, citing *Poor* v. *Chicago, B. & Q. R. Co.*, 12 I. C. C. 418, 421–422 (1907). On the contrary, a recurring theme in those cases is that the Commission, rather than the courts, should have primary responsibility for administration of the statute. The filed rate doctrine was regarded in significant part as a means for ensuring that this allocation of responsibility was respected. See, *e. g.*, *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440–442 (1907); *Arizona Grocery Co.* v.

After years of debate over whether it was sound policy to substitute regulation for competition in the motor carrier industry, Congress decided to eliminate the regulatory barriers to free entry and individual ratemaking. The 1980 amendments to the Act represented a fundamental policy choice in favor of deregulation.[13] Overnight the application of the filed rate doctrine in that market became an anachronism. As Judge Posner has explained:

> "Many years later came deregulation, which has changed the trucking industry beyond recognition. As a result of amendments made to the Motor Carrier Act in 1980 and their interpretation by the Commission, the present regime is essentially one of free competition. No longer does the ICC seek to nurture and protect cartel pricing and division of markets. A motor carrier that wants to lower its price can file a new tariff effective the following day. *Short Notice Effectiveness for Independently Filed Motor Carrier and Freight Forwarder Rates*, 1 I. C. C. 2d 146 (1984), affirmed as *Southern Motor Carriers Rate Conference* v. *United States*, 773 F. 2d 1561 (11th Cir. 1985). No longer does the Commission seek to limit the number of motor carriers, which

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Atchison, T. & S. F. R. Co., 284 U. S. 370, 384–385 (1932); *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478, 483–485 (1939). The most notable exception to this pattern is the 5-to-4 decision in *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464 (1959), in which this Court prohibited district courts from staying collection proceedings pending agency review of the reasonableness of a filed rate. Although *T. I. M. E.* is strikingly similar to today's decision in a host of respects, the majority does not rely upon it. Its reluctance to place any substantial weight upon *T. I. M. E.* is easily understood because that precedent was greatly limited by this Court's subsequent decision in *Hewitt-Robins Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 88–89 (1962), and what remained of it was soon thereafter unambiguously repudiated by Congress. See Act of Sept. 6, 1965, Pub. L. 89–170, §§ 6–7, 79 Stat. 651–652 (codified at 49 U. S. C. § 11705(b)(3) (1982 ed. and Supp. V), 49 U. S. C. § 11706(c)(2) (1982 ed.)).

[13] Motor Carrier Act of 1980, Pub. L. 96–296, 94 Stat. 793.

has more than doubled in less than a decade. Most important, a carrier and shipper who want to get out from under tariff regulation altogether have only to negotiate a contract of carriage, and then the lawful price is the price in the contract rather than in any filed tariff. There used to be all sorts of restrictions on contract carriage, which greatly limited it as an escape hatch from regulation. There are no longer. *Wheaton Van Lines, Inc.* v. *ICC*, 731 F. 2d 1264 (7th Cir. 1984). The skeleton of regulation remains; the flesh has been stripped away." *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d 642, 644 (CA7 1990).

The significance of these fundamental changes was also noted and explained by Judge Alarcon:

"A variety of practices that previously would have been considered discriminatory are now allowed. For example, the ICC has recently ruled that volume discount rates are not per se unlawful and may be justified by cost savings to the carrier. *See Lawfulness of Volume Discount Rates by Motor Common Carrier of Property*, 365 I. C. C. 711, 715–16 (1982). Moreover, carriers may impose geographic or product line restrictions that must be met to obtain rate reductions. *See Rates for Named Shipper or Receiver*, 367 I. C. C. 959, 962–965 (1984).

"In addition to increased competitive pressures, statutory changes, and a relaxed regulatory climate, the ICC's *Negotiated Rates* decisions are a practical response to the information costs faced by shippers. The ease of filing tariffs and the sheer number filed no longer makes it appropriate to allocate the burden of discovering a filed rate to the shipper in all cases. Reduced tariff rates may now be filed to become effective on one day's notice." *West Coast Truck Lines, Inc.* v. *Weyerhaeuser Co.*, 893 F. 2d 1016, 1026 (CA9 1990).

The Court catalogs these reforms, *ante*, at 133–134, but fails to analyze their implications for the "reasonableness" requirement of § 10701(a) and, consequently, for the provisions of § 10761(a). What the Court now misses has been succinctly set forth by Judge Alarcon:

> "The ICC's determination that the collection of undercharges constitutes an unreasonable practice if the shipper is unaware of the filed rate is also a reflection of changing legislative goals. Congress modified national transportation policy when it amended 49 U. S. C. § 10101(a) in the Motor Carrier Act of 1980. Section 10101(a)(2) now directs the Commission, 'in regulating transportation by motor carrier, to promote competitive and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers, and consumers; [and] (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public . . . .' 49 U. S. C. § 10101(a)(1)(A), (B) (1982). In addition, § 10101(a)(1)(D) directs the ICC to encourage the establishment of reasonable transportation rates without 'unfair or destructive competitive practices.' 49 U. S. C. § 10101(a)(1)(D) (1982). Congress intended these sections of the Motor Carrier Act 'to emphasize the importance of competition and efficiency as the most desirable means for achieving transportation goals while, at the same time, providing the Commission with sufficient flexibility to promote the public interest.' H. R. Rep. No. 96–1069, 96th Cong., 2d Sess. 12, *reprinted in* 1980 U. S. Code Cong. & Admin. News 2283, 2294.
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> "Section 10701(a) provides the ICC with the mechanism to put into effect Congress' restated goals of national transportation policy. By declaring the adherence to filed rates unreasonable under the circumstances presented in this case, the ICC has demonstrated its intention to prevent carriers from engaging in unfair

competitive practices." *Weyerhaeuser*, 893 F. 2d, at 1026–1027.

Despite the Court's puzzling suggestion that the filed rate doctrine is essential to the "core purposes of the Act," *ante*, at 133, the doctrine is instead, as the Court elsewhere seems to concede, "an anachronism in the wake of the [Motor Carrier Act of 1980]," *ante*, at 136. If plain text is a poor basis for the Court's holding, statutory purpose is altogether worse. As Judge Posner has explained:

> "Counsel for the carrier in this case—which is to say for the carrier's trustee in bankruptcy—conceded at argument that the motor carrier industry is today highly competitive. But if so, the filed-rate doctrine has lost its raison d'etre. The classic explanations for the doctrine are from a different world. 'If a mistake in naming a rate between two given points is to be accepted as requiring the application of that rate by the carrier, the great principle of equality in rates, to secure which was the very purpose and object of the enactment of these several statutes, might as well be abandoned.' *Poor* v. *Chicago, Burlington & Quincy Ry.*, *supra*, 12 I. C. C. at 421. 'Stability and equality of rates are more important to commercial interests than reduced rates.' *Id.*, at 422. 'Occasional hardships may result from any inelastic rule of general application. The principle, however, is vital in our commercial life that there shall be one fixed and absolutely rigid rate governing the transportation at a given time of any given commodity between two given points.' *Id.*, at 423.
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> "*Cessante ratione legis, cessat et ipsa lex.* Firms in a competitive market cannot discriminate against weak shippers, for even the weak shipper has, by definition of competition, alternative sources of supply to which to turn if one of his suppliers tries to make a monopoly profit off him. 'In the more competitive, more flexible pricing atmosphere created by [deregulation], there is

> little likelihood of carriers using a rate misquotation as a means to discriminate in favor of particular shippers.' *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, *supra*, 5 I. C. C. 2d at 625. And since it is no longer the policy of Congress or the ICC to foster monopoly pricing in the motor carrier industry, no public object is served by forcing carriers to adhere to published price schedules regardless of circumstances. All this the Commission found and persuasively articulated in *National Industrial Transportation League*, *supra*, 3 I. C. C. 2d at 104–08." *Orscheln*, 899 F. 2d, at 644–645.

Judge Posner's conclusion that strict mechanical adherence to the filed rate doctrine produces absurd results and serves no social purpose, *id.*, at 645, is one that I share. It is likewise shared by the agency charged with administration of the Act.

III

A few years ago, in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we reiterated the importance of giving appropriate deference to an agency's reasonable interpretation of its governing statute. Indeed, long before our decision in *Chevron*, we recognized that even when faced with a "long history of the Commission's construction and application of the Act contrary to its present position," *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 415 (1967), we must defer to the Commission's interpretation of a statute which it is responsible for administering:

> "[W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . In fact, although we make no judgment as to the policy aspects of the Commission's action, this kind of flex-

ibility and adaptibility to changing needs and patterns of transportation is an essential part of the office of a regulatory agency." *Id.*, at 416.

Four Courts of Appeals have expressly invoked *Chevron* in the course of upholding the agency action challenged in this case,[14] but this Court does not deem *Chevron*—or any other case involving deference to agency action—worthy of extended discussion. The Court dismisses *Chevron* by means of a conclusory assertion that the agency's interpretation is inconsistent with "the statutory scheme as a whole." *Ante*, at 131. Insofar as the Court offers any justification for that result, it does so by relying on cases in which this Court's action was entirely consistent with the agency's interpretation of the Act.[15] The fact that the Court has strictly enforced the filed rate doctrine in the many cases in which it served the agency's regulatory purposes provides no justification for enforcing the doctrine in a competitive market in which it frustrates the agency's attempt to carry out the plainly expressed intent of Congress.

The Court's failure to adhere today to the teaching of *Chevron* is compounded by its misplaced reliance on *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409 (1986). See *ante*, at 134–135. In *Square D*, we adhered to a long-standing settled construction of § 4 of the Clayton Act that had not been affected by any subsequent statutory amendment. No question of agreeing or disagreeing with agency action, or with an agency's interpretation of a congressional policy choice, was presented. That case is therefore totally inapplicable to the question presented here. Even less persuasive authority for the Court's position is *California* v. *FERC*, 495 U. S. 490 (1990), see *ante*, at 131, 135, a case in which we up-

[14] *Delta Traffic Service, Inc.* v. *Transtop, Inc.*, 902 F. 2d, at 109; *Orscheln Bros. Truck Lines, Inc.* v. *Zenith Electric Corp.*, 899 F. 2d, at 646; 879 F. 2d, at 406 (case below); *West Coast Truck Lines, Inc.* v. *Weyerhaeuser Co.*, 893 F. 2d, at 1023, 1025–1026.

[15] See n. 12, *supra*.

held an agency interpretation that conformed to longstanding precedent.

IV

Finally, I must express my emphatic agreement with the Commission's conclusion, App. to Pet. for Cert. 44a, that an unreasonable practice would result if the carrier in this case were rewarded for violating its duty to file a new rate promptly. There is no evidence of discrimination in this record; nor is there any reason to believe that any shipper or any competing motor carrier was harmed by the negotiated rate or by the failure to file it. The only consequence of today's misguided decision is to produce a bonanza for the bankruptcy bar. "Now that off-tariff pricing is harmless to the (de)regulatory scheme, the only purpose served by making the statutory obligation to price in conformity with published tariffs draconian is to provide windfalls for unsecured creditors in bankruptcy." *Orscheln*, 899 F. 2d, at 646.

As Justice Black said more than 30 years ago in similar circumstances, "I am unable to understand why the Court strains so hard to reach so bad a result." *T. I. M. E. Inc.* v. *United States*, 359 U. S. 464, 481 (1959) (dissenting opinion). The Court's analysis is plausible only if read as a historical excursus about a statute that no longer exists. Nothing more than blind adherence to language in cases that have nothing to do with the present situation supports today's result.

I respectfully dissent.

PORTLAND GOLF CLUB *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 89–530. Argued April 17, 1990—Decided June 21, 1990

As a nonprofit corporation that owns and operates a private social club, petitioner's income derived from membership fees and other receipts from members is exempt from income tax. However, all other income is nonexempt "unrelated business taxable income," defined in § 512(a)(3)(A) of the Internal Revenue Code as "the gross income (excluding any exempt function income), less the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income)." Petitioner has nonexempt income from sales of food and drink to nonmembers and from return on its investments. During its 1980 and 1981 tax years, petitioner offset net losses on nonmember sales against the earnings from its investments and reported no unrelated business taxable income. In computing its losses, petitioner identified two categories of expenses incurred in nonmember sales: (1) variable (direct) expenses, such as the cost of food, which, in each year in question, were exceeded by gross income from nonmember sales; and (2) fixed (indirect) overhead expenses, which would have been incurred whether or not sales had been made to nonmembers. It determined what portions of fixed expenses were attributable to nonmember sales by employing an allocation formula known as the "gross-to-gross method," based on the ratio that nonmember sales bore to total sales. The total of these fixed expenses and variable costs exceeded petitioner's gross income from nonmember sales. On audit, the Commissioner determined that petitioner could deduct expenses associated with nonmember sales up to the amount of receipts from the sales themselves, but could not use losses from those activities to offset its investment income because it had failed to show that its nonmember sales were undertaken with an intent to profit. Petitioner sought redetermination, and the Tax Court ruled in petitioner's favor, concluding that petitioner had adequately demonstrated that it had a profit motive, since its gross receipts from nonmember sales consistently exceeded the variable costs associated with those activities. The Court of Appeals reversed, holding that the Tax Court had applied an incorrect legal standard in determining that petitioner had demonstrated an intent to profit, because profit in this context meant the production of gains in excess of all direct and indi-

rect costs. The court remanded the case for a determination whether petitioner engaged in its nonmember activities with the required intent to profit from those activities.

Held: Petitioner may use losses incurred in sales to nonmembers to offset investment income only if those sales were motivated by an intent to profit, which is to be determined by using the same allocation method as petitioner used to compute its actual profit or loss. Pp. 160–171.

(a) The statutory scheme for the taxation of social clubs was intended to achieve tax neutrality by ensuring that members are not subject to tax disadvantages as a consequence of their decision to pool their resources for the purchase of social or recreational services, but was not intended to provide clubs with a tax advantage. Pp. 160–163.

(b) By limiting deductions from unrelated business income to those expenses allowable as deductions under "this chapter," § 512(a)(3)(A) limits such deductions to expenses allowable under Chapter 1 of the Code. Since only § 162 of Chapter 1 serves as a basis for the deductions claimed here, and since a taxpayer's activities fall within § 162's scope only if an intent to profit is shown, see *Commissioner* v. *Groetzinger*, 480 U. S. 23, 35, petitioner's nonmember sales must be motivated by an intent to profit. Dispensing with the profit-motive requirement in this case would run counter to the principle of tax neutrality underlying the statutory scheme. Pp. 163–166.

(c) The Commissioner correctly concluded that the same allocation method must be used in determining petitioner's intent to profit as in computing its actual profit or loss. It is an inherent contradiction to argue that the same fixed expenses that are attributable to nonmember sales in calculating actual losses can also be attributed to membership activities in determining whether petitioner acted with the requisite intent to profit. Having chosen to calculate its actual losses on the basis of the gross-to-gross formula, petitioner is foreclosed from attempting to demonstrate its intent to profit based on some other allocation method. Pp. 166–170.

(d) Petitioner has failed to show that it intended to earn gross income from nonmember sales in excess of its total costs, where fixed expenses are allocated using the gross-to-gross method. P. 171.

876 F. 2d 897, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined, and in which O'CONNOR, SCALIA, and KENNEDY, JJ., joined except as to Parts III–B and IV. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 171.

Leonard J. Henzke, Jr., argued the cause for petitioner. With him on the briefs was *Allen B. Bush.*

Clifford M. Sloan argued the cause for respondent. On the brief were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Alan I. Horowitz,* and *Robert S. Pomerance.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us to determine the circumstances under which a social club, in calculating its liability for federal income tax, may offset losses incurred in selling food and drink to nonmembers against the income realized from its investments.

I

Petitioner Portland Golf Club is a nonprofit Oregon corporation, most of whose income is exempt from federal income tax under § 501(c)(7) of the Internal Revenue Code of 1954, 26 U. S. C. § 501(c)(7).[1] Since 1914 petitioner has owned and operated a private golf and country club with a golf course, restaurant and bar, swimming pool, and tennis courts. The great part of petitioner's income is derived from membership dues and other receipts from the club's members; that income is exempt from tax. Portland Golf also has two sources of nonexempt "unrelated business taxable income": sales of food and drink to nonmembers, and return on its investments.[2]

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[1] Section 501(c)(7) grants an exemption from federal income tax to "[c]lubs organized for pleasure, recreation, and other nonprofitable purposes, substantially all of the activities of which are for such purposes and no part of the net earnings of which inures to the benefit of any private shareholder."

[2] Section 511 of the Code provides that the "unrelated business taxable income" of an exempt organization shall be taxed at the ordinary corporate rate. The term "unrelated business taxable income," as applied to the income of a club such as petitioner, is defined in § 512(a)(3)(A). That definition encompasses all sources of income except receipts from the club's members.

The present controversy centers on Portland Golf's federal income tax liability for its fiscal years ended September 30, 1980, and September 30, 1981, respectively. Petitioner received investment income in the form of interest in the amount of $11,752 for fiscal 1980 and in the amount of $21,414 for fiscal 1981. App. 18. It sustained net losses of $28,433 for fiscal 1980 and $69,608 for fiscal 1981 on sales of food and drink to nonmembers. Petitioner offset these losses against the earnings from its investments and therefore reported no unrelated business taxable income for the two tax years. In computing these losses, petitioner identified two different categories of expenses incurred in selling food and drink to nonmembers. First, petitioner incurred *variable* (or direct) expenses, such as the cost of food, which varied depending on the amount of food and beverages sold (and therefore would not have been incurred had no sales to nonmembers been made). For each year in question, petitioner's gross income from nonmember sales exceeded these variable costs.[3] Petitioner also included as an unrelated business expense a portion of the *fixed* (or indirect) overhead expenses of the club—expenses which would have been incurred whether or not petitioner had made sales to nonmembers. In determining what portions of its fixed expenses were attributable to nonmember sales, petitioner employed an allocation formula, described as the "gross-to-gross method," based on the ratio that nonmember sales bore to total sales.[4] When fixed

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[3] For 1980, gross receipts from nonmember sales in the bar and dining room totaled $84,422, while variable expenses were $61,821. For 1981, gross receipts totaled $106,547, while variable expenses were $78,407. App. 85.

[4] For example, if 10% of petitioner's gross receipts were derived from nonmember sales, 10% of petitioner's fixed costs would be allocated to the nonexempt activity. That method of allocation appears rather generous to Portland Golf. The club charges nonmembers higher prices for food and drink than members are charged, even though nonmembers' meals presumably cost no more to prepare and serve. It therefore seems likely that the gross-to-gross method overstates the percentage of fixed costs prop-

expenses, so calculated, were added to petitioner's variable costs, the total exceeded Portland Golf's gross income from nonmember sales.[5]

On audit, the Commissioner took the position that petitioner could deduct expenses associated with nonmember sales up to the amount of receipts from the sales themselves, but that it could not use losses from those activities to offset its investment income. The Commissioner based that conclusion on the belief that a profit motive was required if losses from these activities were to be used to offset income from other sources, and that Portland Golf had failed to show that its sales to nonmembers were undertaken with an intent to profit.[6] The Commissioner therefore determined deficiencies of $1,828 for 1980 and $3,470 for 1981; these deficien-

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erly attributable to nonmember sales. The parties, however, stipulated that this allocation method was reasonable. *Id.*, at 17.

[5] The following table shows petitioner's losses when fixed costs are allocated using the gross-to-gross method:

	1980	*1981*
Gross income	$84,422	$106,547
Variable expenses	(61,821)	(78,407)
Allocated fixed expenses	(51,034)	(97,748)
Net loss	($28,433)	($69,608)

It is of interest to note that if petitioner's fixed costs had been allocated using an alternative formula, known as the "square foot and hours of actual use" method, see *id.*, at 29, its gross receipts exceeded the sum of variable and allocated fixed costs for both years:

	1980	*1981*
Gross income	$84,422	$106,547
Variable expenses	(61,821)	(78,407)
Allocated fixed expenses	(3,153)	(4,666)
Net profit	$19,448	$23,474

[6] The general rule under the Code is that losses incurred in a profit-seeking venture may be deducted from unrelated income; expenses of a not-for-profit activity may be offset against the income from that activity, but losses may not be applied against income from other sources. See 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶¶ 20.1.2, 22.5.4, pp. 20–6, 22–63 to 22–64 (2d ed. 1989).

cies reflected tax owed on petitioner's investment income. App. 48–51.

Portland Golf sought redetermination in the Tax Court. That court ruled in petitioner's favor. 55 TCM 212 (1988), ¶88,076 P–H Memo TC. The court assumed, without deciding, that losses incurred in the course of sales to nonmembers could be used to offset other nonexempt income only if the sales were undertaken with an intent to profit. The court, however, held that Portland Golf had adequately demonstrated a profit motive, since its gross receipts from sales to nonmembers consistently exceeded the variable costs associated with those activities.[7] The court therefore held that "petitioner is entitled to offset its unrelated business taxable income from interest by its loss from its nonmember food and beverage sales computed by allocating a portion of its fixed expenses to the nonmember food and beverage sales activity in a manner which respondent agrees is acceptable." *Id.*, at 217, ¶88,076 P–H Memo TC, at 413.

The United States Court of Appeals for the Ninth Circuit remanded. App. to Pet. for Cert. 1a, judgt. order reported at 876 F. 2d 897 (1989). The Court of Appeals held that the Tax Court had applied an incorrect legal standard in determining that Portland Golf had demonstrated an intent to profit from sales to nonmembers. The appellate court relied on its decision in *North Ridge Country Club* v. *Commissioner*, 877 F. 2d 750 (1989), where it had ruled that a social club "can properly deduct losses from a non-member activity only if it undertakes that activity with the intent to profit, where profit means the production of gains in excess of all direct and indirect costs." *Id.*, at 756. The same court in the

[7] The Tax Court stated that Portland Golf "did intend to make a profit, and did make a profit between the amount received from sales to nonmembers and the costs related to those sales which would not have been incurred absent those sales." 55 TCM, at 216, ¶88,076 P–H Memo TC, at 416. The Tax Court, in articulating this standard for determining whether intent to profit had been shown, relied on its earlier reviewed decision in *North Ridge Country Club* v. *Commissioner*, 89 T. C. 563 (1987). That decision subsequently was reversed. 877 F. 2d 750 (CA9 1989).

present case concluded: "Because Portland Golf Club could have reported gains in excess of direct and indirect costs, but did not do so, relying on a method of allocation stipulated to be reasonable by the Commissioner, we REMAND this case to the tax court for a determination of whether Portland Golf Club engaged in its non-member activities with the intent required under *North Ridge* to deduct its losses from those activities." App. to Pet. for Cert. 2a–3a.[8]

Because of a perceived conflict with the decision of the Sixth Circuit in *Cleveland Athletic Club, Inc.* v. *United States*, 779 F. 2d 1160 (1985),[9] and because of the importance of the issue, we granted certiorari. 493 U. S. 1041 (1990).

II

Virtually all tax-exempt business organizations are required to pay federal income tax on their "unrelated business taxable income." The law governing social clubs, however, is significantly different from that governing other tax-exempt entities. As to exempt organizations other than social clubs, the Code defines "unrelated business taxable income" as "the gross income derived by any organization from any unrelated trade or business (as defined in section 513) regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of

[8] The basis for the Court of Appeals' remand order is not entirely clear to us. It appears, however, that the court left open the possibility that petitioner could establish its intent to profit by using some other method of allocating fixed costs (such as the "actual use" method, see n. 5, *supra*), while continuing to use the gross-to-gross formula in computing actual losses. Both parties interpret the Court of Appeals' decision in this manner, and both express disapproval of that approach. See Brief for Respondent 47, n. 25 ("[T]his argument is untenable"); Brief for Petitioner 48 ("While the Ninth Circuit's formula is better than that of the Government, it is basically unprincipled"). Our disposition of the case makes unnecessary precise interpretation of the Court of Appeals' opinion.

[9] See also *Brook, Inc.* v. *Commissioner*, 799 F. 2d 833 (CA2 1986); Rev. Rul. 81–69, 1981–1 Cum. Bull. 351–352; A. Scialabba, The Unrelated Business Taxable Income of Social Clubs, 10 Campbell L. Rev. 249 (1988).

such trade or business." 26 U. S. C. § 512(a)(1).[10] As to social clubs, however, "unrelated business taxable income" is defined as "the gross income (excluding any exempt function income), less the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income)." § 512(a)(3)(A).[11] The salient point is that § 512(a)(1) (which applies to most exempt organizations) limits "unrelated business taxable income" to income derived from a "trade or business," while § 512(a)(3)(A) (which applies to social clubs) contains no such limitation. Thus, a social club's investment income is subject to federal income tax, while the investment income of most other exempt organizations is not.

This distinction reflects the fact that a social club's exemption from federal income tax has a justification fundamentally different from that which underlies the grant of tax exemptions to other nonprofit entities. For most such organizations, exemption from federal income tax is intended to encourage the provision of services that are deemed socially beneficial. Taxes are levied on "unrelated business income" only in order to prevent tax-exempt organizations from gaining an unfair advantage over competing commercial enterprises.[12] See *United States* v. *American College of Physi-*

[10] Section 513(a) defines "unrelated trade or business" as "any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption."

[11] Section 512(a)(3)(B) defines "exempt function income" as "the gross income from dues, fees, charges, or similar amounts paid by members of the organization as consideration for providing such members or their dependents or guests goods, facilities, or services in furtherance of the purposes constituting the basis for the exemption of the organization to which such income is paid."

[12] See S. Rep. No. 2375, 81st Cong., 2d Sess., 28 (1950) ("The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of [these] organizations enables them to use their profits tax-free to expand operations, while their competitors can expand only with the profits remaining after taxes"); H. R. Rep.

cians, 475 U. S. 834, 838 (1986) ("Congress perceived a need to restrain the unfair competition fostered by the tax laws"). Since Congress concluded that investors reaping tax-exempt income from passive sources would not be in competition with commercial businesses, it excluded from tax the investment income realized by exempt organizations.[13]

The exemption for social clubs rests on a totally different premise. Social clubs are exempted from tax not as a means of conferring tax *advantages*, but as a means of ensuring that the members are not subject to tax *disadvantages* as a consequence of their decision to pool their resources for the purchase of social or recreational services. The Senate Report accompanying the Tax Reform Act of 1969, 83 Stat. 536, explained that that purpose does not justify a tax exemption for income derived from investments:

> "Since the tax exemption for social clubs and other groups is designed to allow individuals to join together to provide recreational or social facilities or other benefits on a mutual basis, without tax consequences, the tax exemption operates properly only when the sources of income of the organization are limited to receipts from the membership. Under such circumstances, the individual is in substantially the same position as if he had spent his income on pleasure or recreation (or other benefits) without the intervening separate organization. However, where the organization receives income from sources outside the membership, such as income from investments . . . upon which no tax is paid, the membership receives a benefit not contemplated by the exemption in that untaxed dollars can be used by the organization to provide pleasure or recreation (or other benefits) to its membership. . . . In such a case, the exemption is

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No. 2319, 81st Cong., 2d Sess., 36 (1950). The tax on "unrelated business income" was added to the Code by the Revenue Act of 1950, ch. 994, 64 Stat. 906.

[13] See S. Rep. No. 2375, at 30–31; H. R. Rep. No. 2319, at 38.

> no longer simply allowing individuals to join together for recreation or pleasure without tax consequences. Rather, it is bestowing a substantial additional advantage to the members of the club by allowing tax-free dollars to be used for their personal recreational or pleasure purposes. The extension of the exemption to such investment income is, therefore, a distortion of its purpose." S. Rep. No. 91–552, p. 71 (1969).

In the Tax Reform Act of 1969, Congress extended the tax on "unrelated business income" to social clubs. As to these organizations, however, Congress defined "unrelated business taxable income" to include income derived from investments. Our review of the present case must therefore be informed by two central facts. First, Congress intended that the investment income of social clubs should be subject to federal tax, and indeed Congress devised a definition of "unrelated business taxable income" with that purpose in mind. Second, the statutory scheme for the taxation of social clubs was intended to achieve tax *neutrality*, not to provide these clubs a tax advantage: Even the exemption for income derived from members' payments was designed to ensure that members are not disadvantaged as compared with persons who pursue recreation through private purchases rather than through the medium of an organization.

III

Petitioner's principal argument is that it may deduct losses incurred through sales to nonmembers without demonstrating that these sales were motivated by an intent to profit. In the alternative, petitioner contends (and the Tax Court agreed) that if the Code does impose a profit-motive requirement, then that requirement has been satisfied in this case. We address these arguments in turn.

A

We agree with the Commissioner and the Court of Appeals that petitioner may use losses incurred in sales to nonmem-

bers to offset investment income only if those sales were motivated by an intent to profit. The statute provides that, as to social clubs, "the term 'unrelated business taxable income' means the gross income (excluding any exempt function income), less the deductions *allowed by this chapter* which are directly connected with the production of the gross income (excluding exempt function income)." § 512(a)(3)(A) (emphasis added). As petitioner concedes, the italicized language limits deductions from unrelated business income to expenses allowable as deductions under Chapter 1 of the Code. See Brief for Petitioner 21–22. In our view, the deductions claimed in this case—expenses for food, payroll, and overhead in excess of gross receipts from nonmember sales—are allowable, if at all, only under § 162 of the Code. See *North Ridge Country Club* v. *Commissioner*, 877 F. 2d, at 753; *Brook, Inc.* v. *Commissioner*, 799 F. 2d 833, 838 (CA2 1986).[14] Section 162(a) provides a deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Although the statute does not expressly require that a "trade or business" must be carried on with an intent to profit, this Court has ruled that a taxpayer's activities fall within the scope of § 162 only if an intent to profit has been shown. See *Commissioner* v. *Groetzinger*, 480 U. S. 23, 35 (1987) ("[T]o be engaged in a [§ 162] trade or business, . . . the taxpayer's primary purpose for engaging in the activity must be for income or profit"). Thus, the losses that Portland Golf incurred in selling food and drink to nonmembers will constitute "deductions allowed by this chapter" only if the club's nonmember sales were performed with an intent to profit.[15]

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[14] Portland Golf appears to concede this point, too. See Brief for Petitioner 10 ("The parties agree that all of the expenses in issue . . . are the types of corporate expenses allowed as deductions by Code Section 162"). Petitioner does not identify any other Code provision which would serve as a basis for the deduction claimed in this case.

[15] Section 183 of the Code permits a taxpayer to offset expenses incurred in a not-for-profit activity against income from that activity up to the amount of the income. Even before the enactment of § 183, moreover, the

We see no basis for dispensing with the profit-motive requirement in the present case. Indeed, such an exemption would be in considerable tension with the statutory scheme devised by Congress to govern the taxation of social clubs. Congress intended that the investment income of social clubs (unlike the investment income of most other exempt organizations) should be subject to the same tax consequences as the investment income of any other taxpayer. To allow such an offset for social clubs would run counter to the principle of tax neutrality which underlies the statutory scheme.

Petitioner concedes that "[g]enerally a profit motive is a necessary factor in determining whether an activity is a trade or business." Brief for Petitioner 23. Petitioner contends, however, that by including receipts from sales to nonmembers within § 512(a)(3)(A)'s definition of "unrelated business taxable income," the Code has defined nonmember sales as a "trade or business," and has thereby obviated the need for an inquiry into the taxpayer's intent to profit. We disagree. In our view, Congress' use of the term "unrelated *business* taxable income" to describe all receipts other than payments from the members hardly manifests an intent to define as a "trade or business" activities otherwise outside the scope of § 162. Petitioner's reading would render superfluous the words "allowed by this chapter" in § 512(a)(3)(A): If each taxable activity of a social club is "deemed" to be a trade or business, then *all* of the expenses "directly connected" with those activities would presumably be deductible. Moreover, Portland Golf's interpretation ignores Congress' general intent to

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courts and the Commissioner had not required that revenues earned in activities showing a net loss be declared as taxable income. See 1 Bittker & Lokken, n. 6, *supra*, ¶ 22.5.4, p. 22–63. Although § 183 is inapplicable to a nonprofit corporation such as Portland Golf, the Commissioner has followed longstanding tax principles in permitting the deduction of expenses incurred in nonmember sales up to the amount of petitioner's receipts. See Brief for Respondent 33. At issue in this case is petitioner's right to offset losses from nonmember sales against income from unrelated investments.

tax the income of social clubs according to the same principles applicable to other taxpayers. We therefore conclude that petitioner may offset losses incurred in sales to nonmembers against investment income only if its nonmember sales are motivated by an intent to profit.[16]

B

Losses from Portland Golf's sales to nonmembers may be used to offset investment income only if those activities were undertaken with a profit motive—that is, an intent to generate receipts in excess of costs. The parties and the other courts in this case, however, have taken divergent positions as to the range of expenses that qualify as costs of the nonexempt activity and are to be considered in determining whether petitioner acted with the requisite profit motive. In the view of the Tax Court, petitioner's profit motive was established by the fact that the club's receipts from nonmem-

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[16] The Code distinguishes a social club's "exempt function income" from its "unrelated business taxable income" by looking to the source of the payment: "[E]xempt function income" is limited to money received from the members. § 512(a)(3)(B). However, a social club could easily organize events whose primary purpose was to benefit the membership, yet arrange for nonmembers to make modest contributions toward the cost of the events. Those contributions would constitute "unrelated business taxable income"; but if losses incurred in such activities could be used to offset investment income, it would be relatively easy for clubs to avoid taxation on their investments.

The general rule that losses incurred in a not-for-profit activity may not be used to offset unrelated income rests on the recognition that one who incurs expenses without an intent to profit presumably derives some intrinsic pleasure or benefit from the activity. The Code's limitation on deductibility (expenses may be deducted up to, but not above, the gross income produced by the activity) reflects the view that taxpayers should not be allowed to deduct what are, in essence, personal expenses simply because the activity in question generates some receipts. Just as an individual taxpayer may not offset personal expenses against income from other sources, a social club should not be allowed to deduct expenses incurred for the benefit of the membership from unrelated business income.

ber sales exceeded its variable costs. Since Portland Golf's fixed costs, by definition, have been incurred even in the absence of sales to nonmembers, the Tax Court concluded that these costs should be disregarded in determining petitioner's intent to profit.

The Commissioner has taken no firm position as to the precise manner in which Portland Golf's fixed costs are to be allocated between member and nonmember sales. Indeed, the Commissioner does not even insist that any portion of petitioner's fixed costs must be attributed to nonmember activities in determining intent to profit.[17] He does insist, however, that the *same* allocation method is to be used in determining petitioner's intent to profit as in computing its actual profit or loss. See Brief for Respondent 44–46. In the present case the parties have stipulated that the gross-to-gross method provides a reasonable formula for allocating fixed costs, and Portland Golf has used that method in calculating the losses incurred in selling food and drink to nonmembers. The Commissioner contends that petitioner is therefore required to demonstrate an intent to earn gross receipts in excess of fixed and variable costs, with the allocable share of fixed costs being determined by the gross-to-gross method.

Although the Court of Appeals' opinion is not entirely clear on this point, see n. 8, *supra*, that court seems to have taken a middle ground. The Court of Appeals expressly rejected the Tax Court's assertion that profit motive could be estab-

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[17] The parties stipulated that the gross-to-gross formula was a reasonable method of allocating fixed expenses. App. 17. In his brief to this Court, however, the Commissioner states: "There may be room to debate whether the fixed costs allocated by petitioner to its nonmember sales constitute true economic costs of that activity that ought to be treated as 'directly connected' to the production of the nonmember sales income. It might be argued that only the variable costs are 'directly connected with' the nonmember activity, and therefore that only those variable costs should offset the gross receipts from the nonmember income." Brief for Respondent 45, n. 24.

lished by a showing that gross receipts exceeded variable costs; the court insisted that *some* portion of fixed costs must be considered in determining intent to profit. The court appeared, however, to leave open the possibility that Portland Golf could use the gross-to-gross method in calculating its actual losses, while using some *other* allocation method to demonstrate that its sales to nonmembers were undertaken with a profit motive.[18]

We conclude that the Commissioner's position is the correct one. Portland Golf's argument rests, as the Commissioner puts it, on an "inherent contradiction." Brief for Respondent 44. Petitioner's calculation of actual losses rests on the claim that a portion of its fixed expenses is properly regarded as attributable to the production of income from nonmember sales. Given this assertion, we do not believe that these expenses can be ignored (or, more accurately, attributed to petitioner's exempt activities) in determining whether petitioner acted with the requisite intent to profit. Essentially the same criticism applies to the Court of Appeals' approach. That court required petitioner to include *some* portion of fixed expenses in demonstrating its intent to profit, but it left open the possibility that petitioner could employ an allocation method different from that used in calculating its actual losses. Under that approach, some of petitioner's fixed expenses could be attributed to exempt functions in determining intent to profit and to nonmember sales in establishing the club's actual loss. This, like the rationale of the Tax Court, seems to us to rest on an "inherent contradiction."

Petitioner's principal response is that § 162 requires an intent to earn an *economic* profit, and that this is quite different from an intent to earn *taxable income*. Portland Golf emphasizes that numerous provisions of the Code establish

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[18] See n. 8, *supra*. The Tax Court noted that petitioner would have shown a profit on sales to nonmembers in both 1980 and 1981 if fixed costs had been allocated under the "actual use" method. See 55 TCM 212, 213 (1988), ¶ 88,076 P–H Memo TC 412, 413.

deductions and preferences which do not purport to mirror economic reality. Therefore, petitioner argues, taxpayers may frequently act with an intent to profit, even though the foreseeable (and, indeed, the intended) result of their efforts is that they suffer (or achieve) tax losses. Much of the Code, in petitioner's view, would be rendered a nullity if the mere fact of tax losses sufficed to show that a taxpayer lacked an intent to profit, thereby rendering the deductions unavailable. In Portland Golf's view, the parties have stipulated only that the gross-to-gross formula provides a reasonable method of determining what portion of fixed expenses is "directly connected" with the nonexempt activity for purposes of computing *taxable income*. That stipulation, Portland Golf contends, is irrelevant in determining the portion of fixed expenses that represents the *actual economic cost* of the activity in question.

We accept petitioner's contention that § 162 requires only an intent to earn an economic profit. We acknowledge, moreover, that many Code provisions are designed to serve purposes (such as encouragement of certain types of investment) other than the accurate measurement of economic income. A taxpayer who takes advantage of deductions or preferences of that kind may establish an intent to profit even though he has no expectation of realizing taxable income.[19] The fixed expenses that Portland Golf seeks to allo-

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[19] The Tax Court consistently has held that the possibility of realizing tax benefits should be disregarded in determining whether an intent to earn an economic profit has been shown. (That is, the reduction in tax liability cannot itself be the "profit.") See, *e. g.*, *Gefen* v. *Commissioner*, 87 T. C. 1471, 1490 (1986) ("A transaction has economic substance and will be recognized for tax purposes if the transaction offers a reasonable opportunity for economic profit, that is, profit exclusive of tax benefits"); *Seaman* v. *Commissioner*, 84 T. C. 564, 588 (1985) (" '[P]rofit' means economic profit, independent of tax savings"); *Surloff* v. *Commissioner*, 81 T. C. 210, 233 (1983) (same). Accord, *Simon* v. *Commissioner*, 830 F. 2d 499, 500 (CA3 1987). Portland Golf does not dispute this principle. See Brief for Petitioner 39 ("The cases have uniformly held that taxable businesses, in order to deduct expenses in excess of income, need only show an 'eco-

cate to its nonmember sales, however, are deductions of a different kind. The Code does not state that fixed costs are allocable on a gross-to-gross basis irrespective of economic reality. Rather, petitioner's right to use the gross-to-gross method rests on the club's assertion that this allocation formula reasonably identifies those expenses that are "directly connected" to the nonmember sales, § 512(a)(3)(A), and are "the ordinary and necessary expenses paid or incurred" in selling food and drink to nonmembers, see § 162(a).[20] Language such as this, it seems to us, reflects an attempt to measure economic income—not an effort to use the tax law to serve ancillary purposes. Having calculated its actual losses on the basis of the gross-to-gross formula, petitioner is therefore foreclosed from attempting to demonstrate its intent to profit by arguing that some other allocation method more accurately reflects economic reality.[21]

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nomic profit' independent of tax savings, or 'economic gain' independent of tax savings") (footnotes omitted). We therefore assume, without deciding, that potential reductions in tax liability are irrelevant to the determination whether a profit motive exists.

[20] As stated earlier, § 512(a)(3)(A) limits deductions from unrelated business taxable income to "deductions allowed by this chapter." In the present case, petitioner may offset losses from nonmember sales against investment income only if those losses are deductible under § 162. That Code provision states: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Thus, the expenses petitioner seeks to deduct will constitute "deductions allowed by this chapter" only if they are "the ordinary and necessary expenses paid or incurred" in selling food and drink to nonmembers.

[21] We do not hold that, for other cases, any particular method of allocating fixed expenses must be used by social clubs. We hold only that the allocation method used in determining actual profit or loss must also be used in determining whether the taxpayer acted with a profit motive. Petitioner here has stipulated, however, to the reasonableness of the gross-to-gross method and has used that method in calculating its actual losses. We note that no other allocation method, used consistently, would have produced a result more favorable to petitioner. Had petitioner employed the actual-use method, or ignored fixed costs entirely, it could have estab-

IV

We hold that any losses incurred as a result of petitioner's nonmember sales may be offset against its investment income only if the nonmember sales were undertaken with an intent to profit. We also conclude that in demonstrating the requisite profit motive, Portland Golf must employ the same method of allocating fixed expenses as it uses in calculating its actual loss. Petitioner has failed to show that it intended to earn gross income from nonmember sales in excess of its total (fixed plus variable) costs, where fixed expenses are allocated using the gross-to-gross method.[22] The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, concurring in part and concurring in the judgment.

The Tax Court found that Portland Golf Club's nonmember activity qualified as a trade or business under § 162(a) of the

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lished its intent to profit, but it would have realized a net gain from nonmember sales and its "unrelated business taxable income" would have been higher.

[22] The fact that petitioner suffered actual losses in 1980 and 1981 does not, by itself, prove that Portland Golf lacked a profit motive. A taxpayer's intent to profit is not disproved simply because no profit is realized during a particular year. See Treas. Reg. § 1.183–1(c)(1)(ii), 26 CFR § 1.183–1(c)(1)(ii) (1989) (most activities presumed to be engaged in for profit if gross income exceeds costs in any two of five consecutive years); Treas. Reg. § 1.183–2(b)(6), 26 CFR § 1.183–2(b)(6) (1989) ("A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit"). Petitioner could offset these losses against investment income if it could demonstrate that it *intended* to earn gross income in excess of total costs, with fixed expenses being allocated under the gross-to-gross formula. Portland Golf has not asserted, however, that it possessed such a motive. The club's reluctance to make that argument is understandable: In every year from 1975 through 1984, petitioner incurred losses from its sales to nonmembers when fixed costs are allocated on a gross-to-gross basis. 55 TCM, at 213, ¶ 88,076 P–H Memo TC, at 413.

Internal Revenue Code of 1954, 26 U. S. C. § 162(a), and it allowed the club to deduct expenses associated with the activity from its income. 55 TCM 212 (1988), ¶ 88,076 P–H Memo TC. The Court of Appeals remanded because it found the club's profit motive unclear. App. to Pet. for Cert. 1a, judgt. order reported at 876 F. 2d 897 (1989). Although the Tax Court had determined that the club intended the gross receipts from the nonmember activity to exceed the direct costs, the Court of Appeals held that § 162(a) requires an intent to produce gains in excess of both direct and indirect costs. The Court of Appeals remanded the case to allow the Tax Court to reconsider the club's profit motive, taking account of the overhead and other fixed costs attributable to the nonmember activity. I agree with that decision, and so would affirm the Court of Appeals.

I join all but Parts III–B and IV of the Court's opinion. I otherwise concur only in the judgment because the Court decides a significant issue that is unnecessary to our disposition of the case and, in my view, decides it the wrong way. When the Court of Appeals instructed the Tax Court to consider the club's indirect costs, it did not specify how the club should allocate these costs between its member and nonmember activities. In particular, it left open the possibility that the club could use one allocation method to calculate its expenses under § 162(a), while using some other allocation method to demonstrate its profit motivation. See *ante*, at 167–168. Although the Court purports to affirm the Court of Appeals, its opinion eliminates this possibility, and thus works a dramatic change in the remand order. The Court rules in Parts III–B and IV that, if the club uses the so-called gross-to-gross method to allocate its fixed costs when computing its expenses, it must use the same allocation method to prove its profit motivation. The Tax Court and Court of Appeals, in my view, should have had the opportunity to consider this issue in the first instance. Because the Court has

reached the question, however, I must state my disagreement with its conclusion.

A taxpayer's profit motive, in my view, cannot turn upon the particular accounting method by which it reports its ordinary and necessary expenses to the Internal Revenue Service (IRS). The Court cites no authority for its novel rule and we cannot adopt it simply because we confront a hard case. Section 162(a) provides: "There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." 26 U. S. C. § 162(a). Although the section does not require a profit motivation by its express terms, we have inferred such a requirement because the words "trade or business," in their ordinary usage, contemplate activities undertaken to earn a profit. See *Commissioner* v. *Groetzinger*, 480 U. S. 23, 27–28 (1987); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171 (1911). Yet, I see no justification for making the profit-motive requirement more demanding than necessary to distinguish trades and businesses from other activities pursued by taxpayers. See *Whipple* v. *Commissioner*, 373 U. S. 193, 197 (1963). Because an activity may be a trade or business even if the taxpayer intended to show losses on its income tax forms under a permissible accounting method, the Court endorses an improper conception of profit motivation.

A taxpayer often may choose from among different accounting methods when computing its ordinary and necessary expenses under § 162(a). In this case, as stipulated by the IRS, the club could have allocated its fixed costs either by the gross-to-gross method or by the so-called actual-use method. Although the gross-to-gross method showed a net loss for the relevant tax years, the actual-use method would have shown a net profit. See *ante*, at 158, n. 5. If profit motivation turns upon the allocation method employed by the club in filling out its tax forms, then the status of the nonmember activity as a trade or business may lie within the control of

the club's accountants. I find this interpretation of the words "trade or business" simply "to affront common understanding and to deny the facts of common experience." *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940). A taxpayer does not alter the nature of an enterprise by selecting one reasonable allocation method over another.

The Court's decision also departs from the traditional practice of the courts and the IRS. Rather than relying on strict consistency in accounting, the courts long have evaluated profit motivation according to a variety of factors that indicate whether the taxpayer acted in a manner characteristic of one engaged in a trade or business. See, *e. g.*, *Teitelbaum* v. *C. I. R.*, 294 F. 2d 541, 545 (CA7 1961); *Patterson* v. *United States*, 198 Ct. Cl. 543, 552–553, 459 F. 2d 487, 493–494 (1972); see Boyle, What is a Trade or Business?, 39 Tax Law. 737, 743–745 (1986); Lee, A Blend of Old Wines in a New Wineskin: Section 183 and Beyond, 29 Tax L. Rev. 347, 390–447 (1974). In a regulation based on a wide range of prior court decisions, the IRS itself has explained § 162 and profit motivation as follows:

> "Deductions are allowable under section 162 for expenses of carrying on activities which constitute a trade or business of the taxpayer and under section 212 for expenses incurred in connection with activities engaged in for the production or collection of income or for the management, conservation, or maintenance of property held for the production of income. Except as provided in section 183 and [26 CFR] § 1.183–1 [which authorize individuals and S-corporations to offset hobby losses], no deductions are allowable for expenses incurred in connection with activities which are not engaged in for profit. . . . The determination whether an activity is engaged in for profit is to be made by reference to objective standards, taking into account all of the facts and circumstances of each case. Although a reasonable expectation of profit is not required, the facts and circumstances

> must indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit." 26 CFR § 1.183–2(a) (1989).

To facilitate the application of this general standard, the IRS has supplied a list of nine factors, also based on a wide body of case law, for evaluating the taxpayer's profit motive. These factors include: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) the elements of personal pleasure or recreation. See §§ 1.183–2(b)(1) to (9).

The Court today limits this longstanding approach by pinning the profit-motive requirement to the accounting method that a taxpayer uses to report its ordinary and necessary expenses under § 162(a). Although the tax laws in general strive to reflect the true economic income of a taxpayer, the IRS at times allows taxpayers to use accounting methods that understate their income or overstate their expenses. In this case, as the Court itself acknowledges, the IRS stipulated that the club could use the gross-to-gross allocation method to calculate its expenses under § 162(a) even though this method tends to exaggerate the percentage of fixed costs attributable to the club's nonmember sales. See *ante*, at 157–158, n. 4. Yet, I see no basis for saying that, when the club took advantage of this unconditional stipulation, it committed itself to the legal position that the gross-to-gross method best reflects economic reality. Some inconsistency will exist if the club uses the gross-to-gross allocation method in computing the expenses, while using some other reasonable accounting method to prove that it undertook the nonmember activity

as a trade or business. But the solution to this inconsistency lies in altering the stipulation in other cases, not in changing the longstanding interpretation of profit motivation.

The precise effect of the Court's holding with respect to the club remains unclear. The Court states only that the club may not offset its losses from nonmember sales against its investment income. But I do not understand how the Court can confine its ruling to investment income alone. If the club's nonmember activity does not qualify as a trade or business, then the club cannot use § 162(a) to deduct *any* of the expenses associated with the nonmember activity, not even to the extent of gross receipts. Confronted with this difficulty at oral argument, respondent stated that, in the absence of statutory authority, the IRS has allowed an offset of expenses against gross receipts out of its own "generosity," a characteristic as rare as it is implausible. Tr. of Oral Arg. 42–43. The IRS, indeed, asserts the authority to disallow the offset in the future. See *id.*, at 44. Cf. 26 U. S. C. § 183 (authorizing individuals and S-corporations to offset hobby losses). This possibility further counsels against making the profit-motive requirement more stringent than necessary to determine whether the club undertook the nonmember activity as a trade or business. For these reasons, I join the Court's opinion, with the exception of Parts III–B and IV, and concur in the judgment.

ILLINOIS *v.* RODRIGUEZ

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 88–2018. Argued March 20, 1990—Decided June 21, 1990

Respondent was arrested in his apartment and charged with possession of illegal drugs, which the police had observed in plain view and seized. The officers did not have an arrest or search warrant, but gained entry to the apartment with the assistance of Gail Fischer, who represented that the apartment was "our[s]" and that she had clothes and furniture there, unlocked the door with her key, and gave the officers permission to enter. The trial court granted respondent's motion to suppress the seized evidence, holding that at the time she consented to the entry Fischer did not have common authority because she had moved out of the apartment. The court also rejected the State's contention that, even if Fischer did not have common authority, there was no Fourth Amendment violation if the police *reasonably believed* at the time of their entry that she possessed the authority to consent. The Appellate Court of Illinois affirmed.

Held:

1. The record demonstrates that the State has not satisfied its burden of proving that Fischer had "joint access or control for most purposes" over respondent's apartment, as is required under *United States* v. *Matlock*, 415 U. S. 164, 171, n. 7, to establish "common authority." Pp. 181–182.

2. A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not. Pp. 182–189.

(a) Because the Appellate Court's opinion does not contain a "plain statement" that its decision rests on an adequate and independent state ground, it is subject to review by this Court. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1042. P. 182.

(b) What respondent is assured by the Fourth Amendment is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." As with the many other factual determinations that must regularly be made by government agents in the Fourth Amendment context, the "reasonableness" of a police determination of consent to enter must be judged not by whether the police were correct in their assessment, but by the objective

standard of whether the facts available at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid. *Stoner* v. *California*, 376 U. S. 483, reconciled. Pp. 183–189.

(c) On remand, the appellate court must determine whether the police reasonably believed that Fischer had authority to consent to the entry into respondent's apartment. P. 189.

Reversed and remanded.

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

Joseph Claps, First Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, *Terence M. Madsen*, Assistant Attorney General, *Cecil A. Partee*, *Renée Goldfarb*, and *Theodore Fotios Burtzos*.

Michael R. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Bryson*.

James W. Reilley argued the cause for respondent. With him on the brief were *Christine P. Curran*, *Dianne Ruthman*, and *Rick Halprin*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Ronald S. Matthias* and *Clifford K. Thompson, Jr.*, Deputy Attorneys General; and for Americans for Effective Law Enforcement, Inc., et al. by *Gregory U. Evans*, *Daniel B. Hales*, *George D. Webster*, *Joseph A. Morris*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak*.

Benjamin S. Waxman and *Jeffrey S. Weiner* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

JUSTICE SCALIA delivered the opinion of the Court.

In *United States* v. *Matlock*, 415 U. S. 164 (1974), this Court reaffirmed that a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of "unreasonable searches and seizures" if the officers have obtained the consent of a third party who possesses common authority over the premises. The present case presents an issue we expressly reserved in *Matlock*, see *id.*, at 177, n. 14: Whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.

I

Respondent Edward Rodriguez was arrested in his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry to the apartment with the consent and assistance of Gail Fischer, who had lived there with respondent for several months. The relevant facts leading to the arrest are as follows.

On July 26, 1985, police were summoned to the residence of Dorothy Jackson on South Wolcott in Chicago. They were met by Ms. Jackson's daughter, Gail Fischer, who showed signs of a severe beating. She told the officers that she had been assaulted by respondent Edward Rodriguez earlier that day in an apartment on South California Avenue. Fischer stated that Rodriguez was then asleep in the apartment, and she consented to travel there with the police in order to unlock the door with her key so that the officers could enter and arrest him. During this conversation, Fischer several times referred to the apartment on South California as "our" apartment, and said that she had clothes and furniture there. It is unclear whether she indicated that she currently lived at the apartment, or only that she used to live there.

The police officers drove to the apartment on South California, accompanied by Fischer. They did not obtain an arrest warrant for Rodriguez, nor did they seek a search warrant for the apartment. At the apartment, Fischer unlocked the door with her key and gave the officers permission to enter. They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with white powder that they believed (correctly, as later analysis showed) to be cocaine. They proceeded to the bedroom, where they found Rodriguez asleep and discovered additional containers of white powder in two open attaché cases. The officers arrested Rodriguez and seized the drugs and related paraphernalia.

Rodriguez was charged with possession of a controlled substance with intent to deliver. He moved to suppress all evidence seized at the time of his arrest, claiming that Fischer had vacated the apartment several weeks earlier and had no authority to consent to the entry. The Cook County Circuit Court granted the motion, holding that at the time she consented to the entry Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment on South California, based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment. The Circuit Court also rejected the State's contention that, even if Fischer did not possess common authority over the premises, there was no Fourth Amendment violation if the police *reasonably believed* at the time of their entry that Fischer possessed the authority to consent.

The Appellate Court of Illinois affirmed the Circuit Court in all respects. The Illinois Supreme Court denied the State's petition for leave to appeal, 125 Ill. 2d 572, 537

N. E. 2d 816 (1989), and we granted certiorari. 493 U. S. 932 (1989).

II

The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. *Payton* v. *New York*, 445 U. S. 573 (1980); *Johnson* v. *United States*, 333 U. S. 10 (1948). The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, see *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), or from a third party who possesses common authority over the premises, see *United States* v. *Matlock*, *supra*, at 171. The State of Illinois contends that that exception applies in the present case.

As we stated in *Matlock*, *supra*, at 171, n. 7, "[c]ommon authority" rests "on mutual use of the property by persons generally having joint access or control for most purposes . . . ." The burden of establishing that common authority rests upon the State. On the basis of this record, it is clear that burden was not sustained. The evidence showed that although Fischer, with her two small children, had lived with Rodriguez beginning in December 1984, she had moved out on July 1, 1985, almost a month before the search at issue here, and had gone to live with her mother. She took her and her children's clothing with her, though leaving behind some furniture and household effects. During the period after July 1 she sometimes spent the night at Rodriguez's apartment, but never invited her friends there, and never went there herself when he was not home. Her name was not on the lease nor did she contribute to the rent. She had a key to the apartment, which she said at trial she had taken without Rodriguez's knowledge (though she testified at the preliminary hearing that Rodriguez had given her the key). On these facts the State has not established that, with respect to the South California apartment, Fischer had

"joint access or control for most purposes." To the contrary, the Appellate Court's determination of no common authority over the apartment was obviously correct.

III

A

The State contends that, even if Fischer did not in fact have authority to give consent, it suffices to validate the entry that the law enforcement officers reasonably believed she did. Before reaching the merits of that contention, we must consider a jurisdictional objection: that the decision below rests on an adequate and independent state ground. Respondent asserts that the Illinois Constitution provides greater protection than is afforded under the Fourth Amendment, and that the Appellate Court relied upon this when it determined that a reasonable belief by the police officers was insufficient.

When a state-court decision is clearly based on state law that is both adequate and independent, we will not review the decision. *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). But when "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," we require that it contain a "'plain statement' that [it] rests upon adequate and independent state grounds," *id.*, at 1040, 1042; otherwise, "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1041. Here, the Appellate Court's opinion contains no "plain statement" that its decision rests on state law. The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution. We conclude that the Appellate Court of Illinois rested its decision on federal law.

B

On the merits of the issue, respondent asserts that permitting a reasonable belief of common authority to validate an entry would cause a defendant's Fourth Amendment rights to be "vicariously waived." Brief for Respondent 32. We disagree.

We have been unyielding in our insistence that a defendant's waiver of his trial rights cannot be given effect unless it is "knowing" and "intelligent." *Colorado* v. *Spring*, 479 U. S. 564, 574–575 (1987); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). We would assuredly not permit, therefore, evidence seized in violation of the Fourth Amendment to be introduced on the basis of a trial court's mere "reasonable belief"—derived from statements by unauthorized persons—that the defendant has waived his objection. But one must make a distinction between, on the one hand, trial rights that *derive* from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. As we said in *Schneckloth:*

> "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." 412 U. S., at 241.

What Rodriguez is assured by the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents. What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." U. S. Const., Amdt. 4. There are various elements, of course,

that can make a search of a person's house "reasonable"—one of which is the consent of the person or his cotenant. The essence of respondent's argument is that we should impose upon this element a requirement that we have not imposed upon other elements that regularly compel government officers to exercise judgment regarding the facts: namely, the requirement that their judgment be not only responsible but correct.

The fundamental objective that alone validates all unconsented government searches is, of course, the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes. But "reasonableness," with respect to this necessary element, does not demand that the government be factually correct in its assessment that that is what a search will produce. Warrants need only be supported by "probable cause," which demands no more than a proper "assessment of probabilities in particular factual contexts . . . ." *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983). If a magistrate, based upon seemingly reliable but factually inaccurate information, issues a warrant for the search of a house in which the sought-after felon is not present, has never been present, and was never likely to have been present, the owner of that house suffers one of the inconveniences we all expose ourselves to as the cost of living in a safe society; he does not suffer a violation of the Fourth Amendment.

Another element often, though not invariably, required in order to render an unconsented search "reasonable" is, of course, that the officer be authorized by a valid warrant. Here also we have not held that "reasonableness" precludes error with respect to those factual judgments that law enforcement officials are expected to make. In *Maryland* v. *Garrison*, 480 U. S. 79 (1987), a warrant supported by probable cause with respect to one apartment was erroneously issued for an entire floor that was divided (though not clearly) into two apartments. We upheld the search of the apartment not properly covered by the warrant. We said:

> "[T]he validity of the search of respondent's apartment pursuant to a warrant authorizing the search of the entire third floor depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between [the suspect's] apartment and the third-floor premises." *Id.*, at 88.

The ordinary requirement of a warrant is sometimes supplanted by other elements that render the unconsented search "reasonable." Here also we have not held that the Fourth Amendment requires factual accuracy. A warrant is not needed, for example, where the search is incident to an arrest. In *Hill* v. *California*, 401 U. S. 797 (1971), we upheld a search incident to an arrest, even though the arrest was made of the wrong person. We said:

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

It would be superfluous to multiply these examples. It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be rea-

sonable. As we put it in *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949):

> "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."

We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape. See *Archibald* v. *Mosel*, 677 F. 2d 5 (CA1 1982).*

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*JUSTICE MARSHALL's dissent rests upon a rejection of the proposition that searches pursuant to valid third-party consent are "generally reasonable." *Post*, at 196. Only a warrant or exigent circumstances, he contends, can produce "reasonableness"; consent validates the search only because the object of the search thereby "limit[s] his expectation of privacy," *post*, at 198, so that the search becomes not really a search at all. We see no basis for making such an artificial distinction. To describe a consented search as a noninvasion of privacy and thus a nonsearch is strange in the extreme. And while it must be admitted that this ingenious device can explain why consented searches are lawful, it cannot explain why seemingly consented searches are "unreasonable," which is all that the Constitution forbids. See *Delaware* v. *Prouse*, 440 U. S. 648, 653–654 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials"). The only basis for contending that the constitu-

Stoner v. *California*, 376 U. S. 483 (1964), is in our view not to the contrary. There, in holding that police had improperly entered the defendant's hotel room based on the consent of a hotel clerk, we stated that "the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority.'" *Id.*, at 488. It is ambiguous, of course, whether the word "unrealistic" is descriptive or limiting—that is, whether we were condemning as unrealistic all reliance upon apparent authority, or whether we were condemning only such reliance upon apparent authority as is unrealistic. Similarly ambiguous is the opinion's earlier statement that "there [is no] substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search." *Ibid.* Was there no substance to it because it failed as a matter of law, or because the facts could not possibly support it? At one point the opinion does seem to speak clearly:

> "It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.*, at 489.

But as we have discussed, what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*. Even if one does not think the *Stoner* opinion had this subtlety in mind, the supposed clarity of its foregoing statement is immediately compromised, as follows:

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tional standard could not possibly have been met here is the argument that reasonableness must be judged by the facts as they were, rather than by the facts as they were known. As we have discussed in text, that argument has long since been rejected.

> "It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that *the police had any basis whatsoever to believe that* the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." *Ibid.* (emphasis added).

The italicized language should have been deleted, of course, if the statement two sentences earlier meant that an appearance of authority could never validate a search. In the last analysis, one must admit that the rationale of *Stoner* was ambiguous—and perhaps deliberately so. It is at least a reasonable reading of the case, and perhaps a preferable one, that the police could not rely upon the obtained consent because they knew it came from a hotel clerk, knew that the room was rented and exclusively occupied by the defendant, and could not reasonably have believed that the former had general access to or control over the latter. Similarly ambiguous in its implications (the Court's opinion does not even allude to, much less discuss the effects of, "reasonable belief") is *Chapman* v. *United States*, 365 U. S. 610 (1961). In sum, we were correct in *Matlock*, 415 U. S., at 177, n. 14, when we regarded the present issue as unresolved.

As *Stoner* demonstrates, what we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises. Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. As with other factual determinations bearing upon search and seizure, determination of consent to enter must "be judged against an objective standard: would the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief'" that the consenting party had authority over the premises? *Terry* v. *Ohio*, 392 U. S. 1, 21–22 (1968). If not, then war-

rantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

* * *

In the present case, the Appellate Court found it unnecessary to determine whether the officers reasonably believed that Fischer had the authority to consent, because it ruled as a matter of law that a reasonable belief could not validate the entry. Since we find that ruling to be in error, we remand for consideration of that question. The judgment of the Illinois Appellate Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

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

Dorothy Jackson summoned police officers to her house to report that her daughter Gail Fischer had been beaten. Fischer told police that Ed Rodriguez, her boyfriend, was her assaulter. During an interview with Fischer, one of the officers asked if Rodriguez dealt in narcotics. Fischer did not respond. Fischer did agree, however, to the officers' request to let them into Rodriguez's apartment so that they could arrest him for battery. The police, without a warrant and despite the absence of an exigency, entered Rodriguez's home to arrest him. As a result of their entry, the police discovered narcotics that the State subsequently sought to introduce in a drug prosecution against Rodriguez.

The majority agrees with the Illinois Appellate Court's determination that Fischer did not have authority to consent to the officers' entry of Rodriguez's apartment. *Ante*, at 181–182. The Court holds that the warrantless entry into Rodriguez's home was nonetheless valid if the officers reasonably believed that Fischer had authority to consent. *Ante* this page. The majority's defense of this position rests on a misconception of the basis for third-party consent searches. That

such searches do not give rise to claims of constitutional violations rests not on the premise that they are "reasonable" under the Fourth Amendment, see *ante*, at 183–184, but on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions. Cf. *Katz* v. *United States*, 389 U. S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). Thus, an individual's decision to permit another "joint access [to] or control [over the property] for most purposes," *United States* v. *Matlock*, 415 U. S. 164, 171, n. 7 (1974), limits that individual's reasonable expectation of privacy and to that extent limits his Fourth Amendment protections. Cf. *Rakas* v. *Illinois*, 439 U. S. 128, 148 (1978) (because passenger in car lacked "legitimate expectation of privacy in the glove compartment," Court did not decide whether search would violate Fourth Amendment rights of someone who had such expectation). If an individual has not so limited his expectation of privacy, the police may not dispense with the safeguards established by the Fourth Amendment.

The baseline for the reasonableness of a search or seizure in the home is the presence of a warrant. *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989). Indeed, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U. S. 573, 586 (1980). Exceptions to the warrant requirement must therefore serve "compelling" law enforcement goals. *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978). Because the sole law enforcement purpose underlying third-party consent searches is avoiding the inconvenience of securing a warrant, a departure from the warrant requirement is not justified simply because an officer reasonably believes a third party has consented to a search of the defendant's home. In holding otherwise, the majority ignores our long-standing view that "the informed and deliberate determina-

tions of magistrates . . . as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932).

I

The Fourth Amendment provides that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated." We have recognized that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court, Eastern District of Michigan*, 407 U. S. 297, 313 (1972). We have further held that "a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474 (1971). Those exceptions must be crafted in light of the warrant requirement's purposes. As this Court stated in *McDonald* v. *United States*, 335 U. S. 451 (1948):

> "The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *Id.*, at 455–456.

The Court has tolerated departures from the warrant requirement only when an exigency makes a warrantless search imperative to the safety of the police and of the community. See, *e. g.*, *id.*, at 456 ("We cannot be true to that

constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative"); *Warden* v. *Hayden*, 387 U. S. 294 (1967) (hot pursuit); *Chimel* v. *California*, 395 U. S. 752 (1969) (interest in officers' safety justifies search incident to an arrest); *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978) ("compelling need for official action and no time to secure a warrant" justifies warrantless entry of burning building). The Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home because of the burdens on police investigation and prosecution of crime. Our rejection of such claims is not due to a lack of appreciation of the difficulty and importance of effective law enforcement, but rather to our firm commitment to "the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey*, *supra*, at 393 (citing *United States* v. *Chadwick*, 433 U. S. 1, 6–11 (1977)).

In the absence of an exigency, then, warrantless home searches and seizures are unreasonable under the Fourth Amendment. The weighty constitutional interest in preventing unauthorized intrusions into the home overrides any law enforcement interest in relying on the reasonable but potentially mistaken belief that a third party has authority to consent to such a search or seizure. Indeed, as the present case illustrates, only the minimal interest in avoiding the inconvenience of obtaining a warrant weighs in on the law enforcement side.

Against this law enforcement interest in expediting arrests is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). To be sure, in some cases in which police officers reasonably rely on a

third party's consent, the consent will prove valid, no intrusion will result, and the police will have been spared the inconvenience of securing a warrant. But in other cases, such as this one, the authority claimed by the third party will be false. The reasonableness of police conduct must be measured in light of the possibility that the target has not consented. Where "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," the Constitution demands that the warrant procedure be observed. *Johnson* v. *United States*, 333 U. S. 10, 15 (1948). The concerns of expediting police work and avoiding paperwork "are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Ibid.* In this case, as in *Johnson*, "[n]o suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction . . . . If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Ibid.*

Unlike searches conducted pursuant to the recognized exceptions to the warrant requirement, see *supra*, at 191–192, third-party consent searches are not based on an exigency and therefore serve no compelling social goal. Police officers, when faced with the choice of relying on consent by a third party or securing a warrant, should secure a warrant and must therefore accept the risk of error should they instead choose to rely on consent.

II

Our prior cases discussing searches based on third-party consent have never suggested that such searches are "reasonable." In *United States* v. *Matlock*, this Court upheld a warrantless search conducted pursuant to the consent of a

third party who was living with the defendant. The Court rejected the defendant's challenge to the search, stating that a person who permits others to have "joint access or control for most purposes . . . assume[s] the risk that [such persons] might permit the common area to be searched." 415 U. S., at 171, n. 7; see also *Frazier* v. *Cupp*, 394 U. S. 731, 740 (1969) (holding that defendant who left a duffel bag at another's house and allowed joint use of the bag "assumed the risk that [the person] would allow someone else to look inside"). As the Court's assumption-of-risk analysis makes clear, third-party consent limits a person's ability to challenge the reasonableness of the search only because that person voluntarily has relinquished some of his expectation of privacy by sharing access or control over his property with another person.

A search conducted pursuant to an officer's reasonable but mistaken belief that a third party had authority to consent is thus on an entirely different constitutional footing from one based on the consent of a third party who in fact has such authority. Even if the officers reasonably believed that Fischer had authority to consent, she did not, and Rodriguez's expectation of privacy was therefore undiminished. Rodriguez accordingly can challenge the warrantless intrusion into his home as a violation of the Fourth Amendment. This conclusion flows directly from *Stoner* v. *California*, 376 U. S. 483 (1964). There, the Court required the suppression of evidence seized in reliance on a hotel clerk's consent to a warrantless search of a guest's room. The Court reasoned that the guest's right to be free of unwarranted intrusion "was a right . . . which only [he] could waive by word or deed, either directly or through an agent." *Id.*, at 489. Accordingly, the Court rejected resort to "unrealistic doctrines of 'apparent authority'" as a means of upholding the search to which the guest had not consented. *Id.*, at 488.[1]

[1] The majority insists that the rationale of *Stoner* is "ambiguous—and perhaps deliberately so" with respect to the permissibility of third-party

III

Acknowledging that the third party in this case lacked authority to consent, the majority seeks to rely on cases suggesting that reasonable but mistaken factual judgments by police will not invalidate otherwise reasonable searches. The majority reads these cases as establishing a "general rule" that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the

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searches where the suspect has not conferred actual authority on the third party. *Ante*, at 188. *Stoner* itself is clear, however; today's majority manufactures the ambiguity. When the *Stoner* Court stated that the Fourth Amendment is not to be eroded "by unrealistic doctrines of 'apparent authority,'" 376 U. S., at 488, and that "only the petitioner could waive by word or deed" his freedom from a warrantless search, *id.*, at 489, the Court rejected precisely the proposition that the majority today adopts.

The majority regards *Stoner*'s rejection of "unrealistic doctrines of 'apparent authority'" as ambiguous on the theory that the Court might have been referring only to unreasonable *applications* of such doctrines and not to the doctrines themselves. *Ante*, at 187. But *Stoner*'s express description of apparent authority *doctrines* as unrealistic cannot be viewed as mere happenstance. The Court in fact used the word "applications" in the same sentence to refer to misapplications of the *actual* authority doctrine: "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency *or* by unrealistic doctrines of 'apparent authority.'" 376 U. S., at 488 (emphasis added). The full sentence thus unambiguously confirms that *Stoner* rejected any reliance on *apparent* authority doctrines.

Nor did the *Stoner* Court leave open the door for a police officer to rely on a reasonable but mistaken belief in a third party's authority to consent when it remarked that "there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room." *Id.*, at 489. Stating that a defendant must "by word or deed" waive his rights, *ibid.*, is not inconsistent with noting that, in a particular case, the absence of actual waiver is confirmed by the police's inability to identify any basis for their contention that waiver had indeed occurred.

warrant requirement—is not that they always be correct, but that they always be reasonable." *Ante*, at 185–186.

The majority's assertion, however, is premised on the erroneous assumption that third-party consent searches are generally reasonable. The cases the majority cites thus provide no support for its holding. In *Brinegar* v. *United States*, 338 U. S. 160 (1949), for example, the Court confirmed the unremarkable proposition that police need only probable cause, not absolute certainty, to justify the arrest of a suspect on a highway. As *Brinegar* makes clear, the possibility of factual error is built into the probable cause standard, and such a standard, by its very definition, will in some cases result in the arrest of a suspect who has not actually committed a crime. Because probable cause defines the reasonableness of searches and seizures outside of the home, a search is reasonable under the Fourth Amendment whenever that standard is met, notwithstanding the possibility of "mistakes" on the part of police. *Id.*, at 176. In contrast, our cases have already struck the balance against warrantless home intrusions in the absence of an exigency. See *supra*, at 191–192. Because reasonable factual errors by law enforcement officers will not validate unreasonable searches, the reasonableness of the officer's mistaken belief that the third party had authority to consent is irrelevant.[2]

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[2] The same analysis applies to *Hill* v. *California*, 401 U. S. 797 (1971), where the Court upheld a search incident to an arrest in which officers reasonably but mistakenly believed that the person arrested in the defendant's home was the defendant. The Court refused to disturb the state court's holding that "'[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.'" *Id.*, at 802 (brackets in original) (quoting *People* v. *Hill*, 69 Cal. 2d 550, 553, 446 P. 2d 521, 523 (1968)). Given that the Court decided *Hill* before the extension of the warrant requirement to arrests in the home, *Payton* v. *New York*, 445 U. S. 573 (1980), *Hill* should be understood no less than *Brinegar* as simply a gloss on the meaning of "probable cause." The holding in *Hill* rested on the fact that the police had probable cause to believe that Hill had commit-

The majority's reliance on *Maryland* v. *Garrison*, 480 U. S. 79 (1987), is also misplaced. In *Garrison*, the police obtained a valid warrant for the search of the "third floor apartment" of a building whose third floor in fact housed two apartments. *Id.*, at 80. Although the police had probable cause to search only one of the apartments, they entered both apartments because "[t]he objective facts available to the officers at the time suggested no distinction between [the apartment for which they legitimately had the warrant and the entire third floor]." *Id.*, at 88. The Court held that the officers' reasonable mistake of fact did not render the search unconstitutional. *Id.*, at 88–89. As in *Brinegar*, the Court's decision was premised on the general reasonableness of the type of police action involved. Because searches based on warrants are generally reasonable, the officers' reasonable mistake of fact did not render their search "unreasonable." This reasoning is evident in the Court's conclusion that little would be gained by adopting additional burdens "over and above the bedrock requirement that, with the exceptions we have traced in our cases, the police may conduct searches only pursuant to a reasonably detailed warrant." *Garrison*, *supra*, at 89, n. 14.

Garrison, like *Brinegar*, thus tells us nothing about the reasonableness under the Fourth Amendment of a warrantless arrest in the home based on an officer's reasonable but mistaken belief that the third party consenting to the arrest was empowered to do so. The majority's glib assertion that "[i]t would be superfluous to multiply" its citations to cases like *Brinegar*, *Hill*, and *Garrison*, *ante*, at 185, is thus correct, but for a reason entirely different than the majority suggests. Those cases provide no illumination of the issue raised in this case, and further citation to like cases would be

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ted a crime. In such circumstances, the reasonableness of the arrest for which the police had probable cause was not undermined by the officers' factual mistake regarding the identity of the person arrested.

as superfluous as the discussion on which the majority's conclusion presently depends.

IV

Our cases demonstrate that third-party consent searches are free from constitutional challenge only to the extent that they rest on consent by a party empowered to do so. The majority's conclusion to the contrary ignores the legitimate expectations of privacy on which individuals are entitled to rely. That a person who allows another joint access to his property thereby limits his expectation of privacy does not justify trampling the rights of a person who has not similarly relinquished any of his privacy expectation.

Instead of judging the validity of consent searches, as we have in the past, based on whether a defendant has in fact limited his expectation of privacy, the Court today carves out an additional exception to the warrant requirement for third-party consent searches without pausing to consider whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment," *Mincey*, 437 U. S., at 394 (citations omitted). Where this free-floating creation of "reasonable" exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.

KANSAS ET AL. *v.* UTILICORP UNITED INC.

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

No. 88–2109. Argued April 16, 1990—Decided June 21, 1990

The respondent—an investor-owned public utility operating in the petitioner States—and other utilities and natural gas purchasers filed suit in the District Court against a pipeline company and five gas producers under § 4 of the Clayton Act, which authorizes any person injured by a violation of the antitrust laws to sue for treble damages. The utilities alleged that the defendants had unlawfully conspired to inflate the price of gas that they supplied to the utilities, and sought treble damages for both the amount overcharged and the decrease in sales to customers caused by the overcharge. The petitioner States filed separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation, asserting, *inter alia*, *parens patriae* claims on behalf of all natural persons residing in the States who had purchased gas from any utility at inflated prices. The court consolidated all of the actions and granted the utilities partial summary judgment with respect to the defendants' defense that, since the utilities had passed through all of the alleged overcharge to their customers, the utilities lacked standing because they had suffered no antitrust injury as required by § 4. In light of its conclusion that, under *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, and *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, the utilities had suffered antitrust injury as direct purchasers but their customers, as indirect purchasers, had not, the court dismissed the States' *parens patriae* claims. The Court of Appeals affirmed the dismissals.

Held: When suppliers violate antitrust laws by overcharging a public utility for natural gas, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4 because it alone has suffered antitrust injury. Pp. 206–219.

1. Three rationales underlie the indirect purchaser rule adopted in *Hanover Shoe* and *Illinois Brick:* (1) establishing the amount of an overcharge shifted to indirect purchasers would normally prove insurmountable in light of the wide range of considerations influencing a company's pricing decisions; (2) a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff; and (3) allowing suits by indirect purchasers would risk multiple li-

ability because the alleged antitrust violators could not use a pass-on defense in an action by the direct purchasers. Pp. 206–208.

2. The aforesaid rationales compel the conclusion that no exception to the indirect purchaser rule should be made for suits involving regulated public utilities that pass on all of their costs to their customers. Pp. 208–217.

(a) Allowing indirect suits in such cases might necessitate complex cost apportionment calculations, since a utility bears at least some portion of a passed-on overcharge to the extent that it could have sought and gained state permission to raise its rates in the absence of the overcharge, cf. *Hanover Shoe*, *supra*, at 493, and n. 9, and since various factors, such as the need to seek regulatory approval, may delay the passing-on process and thereby require the utility, in the interim, to bear some of the overcharge's costs in the form of lower earnings. Here, the certified question leaves unclear whether the respondent could have raised its prices prior to the overcharge, whether it had passed on "most or all" of its costs at the time of its suit, and even the means by which the pass through occurred. Proof of these preliminary issues, which are irrelevant to the defendants' liability, would turn upon the intricacies of state law, and, if it were determined that respondent had borne some of the costs, would require the adoption of an apportionment formula, the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid. Moreover, creating an exception in such cases would make little sense when, in light of all its difficulty, its practical significance is diminished by the fact that some States require utilities to pass on at least some of the recovery obtained in a § 4 suit to their customers. Pp. 208–212.

(b) Even if the risk of multiple recoveries would be eliminated by allowing the petitioners to recover only the amount of the overcharge and the respondent to recover only damages for its lost sales in a single lawsuit, the additional complexity thereby introduced into a case that already has become quite complicated argues strongly for retaining the indirect purchaser rule. See *Illinois Brick*, *supra*, at 731, n. 11. Pp. 212–213.

(c) Allowing indirect suits by utility customers would not better promote the goal of vigorous enforcement of the antitrust laws. The petitioners' argument that utilities lack incentives to sue overcharging suppliers is unpersuasive, since utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers; since there is no authority indicating that utilities, which may have to pass on § 4 damages recovered, would also have to pay the entire exemplary portion of these damages to customers; and since utilities, in fact, have an established record

of diligent and successful antitrust enforcement. On the other hand, indirect purchaser actions might be ineffective because consumers may lack the expertise and experience necessary to detect improper pricing by a utility's suppliers, while state attorneys general may hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers, and, in any event, may sue only on behalf of resident natural persons, leaving nonresidents and small businesses to fend for themselves. Pp. 214–216.

(d) Although the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, ample justifications exist for the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets. *Illinois Brick*, *supra*, at 744–745. Even assuming that any economic assumptions underlying the rule might be disproved in a specific case, it would be an unwarranted and counterproductive exercise to litigate a series of exceptions. Pp. 216–217.

3. The suggestion in *Hanover Shoe*, *supra*, at 494, and *Illinois Brick*, *supra*, at 736, that a departure from the indirect purchaser rule may be necessary when such a purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case, since the respondent did not sell gas to its customers under such a contract. Even if an exception could be created for situations that merely resemble those governed by such contracts, that exception could not be applied here, since there is no certainty that the respondent has borne no portion of the overcharge and otherwise suffered no injury. Pp. 217–218.

4. Section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976—which authorizes States to bring *parens patriae* actions on behalf of resident natural persons to secure monetary relief for property injury sustained by reason of certain antitrust violations—does not authorize the petitioners to sue on behalf of consumers notwithstanding the consumers' status as indirect purchasers. Section 4C did not establish any new substantive liability, but simply created a new procedural device to enforce existing rights of recovery under § 4 of the Clayton Act, *Illinois Brick*, *supra*, at 734, n. 14, which rights belong to the respondent in this case. Pp. 218–219.

866 F. 2d 1286, affirmed.

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

Thomas J. Greenan argued the cause for petitioners. With him on the briefs were *Robert T. Stephan*, Attorney General of Kansas, *James E. Hurt*, *William L. Webster*, Attorney General of Missouri, *Donald D. Barry*, *William E. Quirk*, *Russell S. Jones, Jr.*, and *Thomas A. Sheehan.*

Floyd R. Finch, Jr., argued the cause for respondent. With him on the brief was *Sally R. Burger.*

Lawrence S. Robbins argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Rill*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Boudin*, *Stephen J. Marzen*, *Catherine G. O'Sullivan*, and *Jay C. Shaffer.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Illinois by *Neil F. Hartigan*, Attorney General, *Michael J. Hayes*, Deputy Attorney General, *Robert Ruiz*, Solicitor General, and *John W. McCaffrey* and *Christine Rosso*, Senior Assistant Attorneys General, *Bernard Nash*, *George Kaufmann*, and *Peter J. Kadzik;* for the State of Maryland et al. by *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Michael F. Brockmeyer*, *Ellen S. Cooper*, and *Alan M. Barr*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Douglas B. Baily*, Attorney General of Alaska, and *Thomas E. Wagner*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Alison J. Butterfield*, *John Steven Clark*, Attorney General of Arkansas, *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *Sanford N. Gruskin*, Assistant Attorney General, *Duane Woodard*, Attorney General of Colorado, *Clarine Nardi Riddle*, Attorney General of Connecticut, and *Robert M. Langer* and *Steven M. Rutstein*, Assistant Attorneys General, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, and *George P. Shingler*, Senior Assistant Attorney General, *Warren Price III*, Attorney General of Hawaii, and *Robert A. Marks* and *Ted Gamble Clause*, Deputy Attorneys General, *James T. Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, and *Donna S. Nichols*, Deputy Attorney General, *Thomas J. Miller*, Attorney General of Iowa, and *John R. Perkins*, Deputy Attorney General, *Frederic J. Cowan*, Attorney General of Kentucky, and *James M. Ringo*, Assistant Attorney General, *William J. Guste, Jr.*, Attorney General of Louisiana, and *Jesse James Marks* and

JUSTICE KENNEDY delivered the opinion of the Court.

Section 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15, authorizes any person injured by a violation of

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Anne F. Benoit, Assistant Attorneys General, *James E. Tierney*, Attorney General of Maine, and *Stephen L. Wessler*, Deputy Attorney General, *James M. Shannon*, Attorney General of Massachusetts, and *George K. Weber* and *Thomas M. Alpert*, Assistant Attorneys General, *Frank Kelly*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Deputy Attorney General, and *Thomas F. Pursell*, Assistant Attorney General, *Mike Moore*, Attorney General of Mississippi, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, and *Dale A. Comer*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, and *Terry L. Robertson*, Senior Assistant Attorney General, *Robert J. Del Tufo*, Attorney General of New Jersey, and *Laurel A. Price*, Deputy Attorney General, *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, and *Lloyd A. Constantine*, Assistant Attorney General, *Lacy H. Thornburg*, Attorney General of North Carolina, *James C. Gulick*, Special Deputy Attorney General, and *K. D. Sturgis*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, and *David W. Huey*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Dave Frohnmayer*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Eugene F. Waye*, Chief Deputy Attorney General, and *Carl S. Hisiro*, Senior Deputy Attorney General, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, and *Jeffrey P. Hallem*, Assistant Attorney General, *Charles W. Burson*, Attorney General of Tennessee, and *Barry Turner*, Assistant Attorney General, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, First Assistant Attorney General, and *Allene D. Evans* and *Donna L. Nelson*, Assistant Attorneys General, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Julie Brill*, Assistant Attorney General, *Mary Sue Terry*, Attorney General of Virginia, and *Frank Seales*, Assistant Attorney General, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Carol A. Smith*, Assistant Attorney General, *Roger W. Thompkins*, Attorney General of West Virginia, and *Dan Huck*, Deputy Attorney General, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Kevin J. O'Connor*, Assistant Attorney General, *Joseph B. Meyer*, Attorney General of Wyoming, and *Robert H. Henry*, Attorney General of Oklahoma; for the

the antitrust laws to sue for treble damages, costs, and an attorney's fee. We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), we hold that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4.

I

The respondent, UtiliCorp United Inc., an investor-owned public utility operating in Kansas and western Missouri, purchased natural gas from a pipeline company for its own use and for resale to its commercial and residential customers. Together with a second utility and several other gas purchasers, the respondent sued the pipeline company and five gas production companies in the United States District Court for the District of Kansas. The utilities alleged that the defendants had conspired to inflate the price of their gas in violation of the antitrust laws. They sought treble damages, pursuant to § 4 of the Clayton Act, for both the amount overcharged by the pipeline company and the decrease in sales to their customers caused by the overcharge.

The petitioners, the States of Kansas and Missouri, initiated separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation. Acting as *parens patriae*, the petitioners asserted the claims of all natural persons residing within Kansas and Missouri who had purchased gas from any utility at inflated prices. They also

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National Conference of State Legislatures et al. by *Benna Ruth Solomon, Beate Bloch, Robert L. Wald,* and *Richard M. Rindler;* and for Nancy Allevato et al. by *Richard E. Zuckerman, David B. Jaffe, Robert S. Harrison,* and *David N. Zacks.*

Jeffrey I. Zuckerman, Daniel J. Popeo, Paul D. Kamenar, and *John C. Scully* filed a brief for the Washingon Legal Foundation as *amicus curiae* urging affirmance.

asserted claims as representatives of state agencies, municipalities, and other political subdivisions that had purchased gas from the defendants. The District Court consolidated all of the actions.

The defendants, in their answer, asserted that the utilities lacked standing under § 4. They alleged that, pursuant to state and municipal regulations and tariffs filed with state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers. As a result, the defendants contended, the utility customers had paid 100 percent of the alleged overcharge, and the utilities had suffered no antitrust injury as required by § 4.

The utilities moved for partial summary judgment with respect to this defense, and the District Court granted their motion. The court ruled that our decisions in *Hanover Shoe* and *Illinois Brick* controlled its interpretation of § 4. It read these cases to hold that a direct purchaser from an antitrust violator suffers injury to the full extent of an illegal overcharge even if it passes on some or all of the overcharge to its customers. The District Court concluded that utilities, as direct purchasers, had suffered antitrust injury, but that their customers, as indirect purchasers, had not.

In light of its ruling, the District Court chose to treat the partial summary judgment motion as a motion to dismiss the petitioners' *parens patriae* claims. It then granted this motion but allowed the petitioners to take an interlocutory appeal under 28 U. S. C. § 1292(b). It certified the following question to the Court of Appeals:

> "In a private antitrust action under 15 U. S. C. § 15 involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens

of the State?" *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 1109, 1120 (Kan. 1988).

The Court of Appeals answered the question in the negative. It agreed with the District Court that *Hanover Shoe* and *Illinois Brick* required dismissal of the *parens patriae* claims. See *In re Wyoming Tight Sands Antitrust Cases*, 866 F. 2d 1286, 1294 (CA10 1989). We granted certiorari to resolve a conflict between this decision and *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F. 2d 891 (CA7 1988) (en banc). 493 U. S. 1041 (1990). We now affirm.

II

Section 4 of the Clayton Act provides in full:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15(a).

As noted by the District Court and the Court of Appeals, we have applied this section in two cases involving allegations that a direct purchaser had passed on an overcharge to its customers.

In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, *supra*, Hanover alleged that United had monopolized the shoe manufacturing machinery industry in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2. It sought treble damages under § 4 of the Clayton Act for overcharges paid in leasing certain machinery from United. United defended, in part, on the ground that Hanover had passed on the overcharge to its customers and, as a result, had suffered no injury. We rejected the defense for two reasons. First, noting that a wide range of considerations may influence a company's pricing decisions, we concluded that

establishing the amount of an overcharge shifted to indirect purchasers "would normally prove insurmountable." 392 U. S., at 493. Second, we reasoned that a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff. See *id.*, at 494.

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), we applied these considerations to reach a similar result. The State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise the cost of concrete blocks in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. We ruled that the State had suffered no injury within the meaning of § 4 because Illinois Brick had not sold any concrete blocks to it. The company, instead, had sold the blocks to masonry subcontractors, who in turn had sold them to the State's general contractors. We decided that, because Illinois Brick could not use a pass-on defense in an action by direct purchasers, it would risk multiple liability to allow suits by indirect purchasers. See 431 U. S., at 730–731. We declined to overrule *Hanover Shoe* or to create exceptions for any particular industries. See 431 U. S., at 735–736, 744–745.

Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

The petitioners ask us to allow them to press the consumers' claims for three reasons. First, they assert that none of the rationales underlying *Hanover Shoe* or *Illinois Brick* exist in cases involving regulated public utilities. Second, they argue that we should apply an exception, suggested in

Illinois Brick, for actions based upon cost-plus contracts. Third, they maintain that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, 15 U. S. C. § 15c, authorizes them to assert claims on behalf of utility customers even if the customers could not assert any claims themselves. Affirming the Court of Appeals, we reject each of these contentions in turn.

III

The petitioners assert that we should allow indirect purchaser suits in cases involving regulated public utilities that pass on 100 percent of their costs to their customers. They maintain that our concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases. We disagree. Although the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities.

A

The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers. See *Hanover Shoe*, 392 U. S., at 493; *Illinois Brick*, *supra*, at 740–742; *Blue Shield of Va.* v. *McCready*, 457 U. S. 465, 475, n. 11 (1982). The petitioners find the rule unnecessary, in this respect, when a utility passes on its costs to its customers pursuant to state regulations or tariffs filed with a utility commission. In such cases, they assert, the customers pay the entire overcharge, obviating litigation over its apportionment. They maintain that they can prove the exact injury to the residential customers whom they represent because the respondent made periodic public filings showing the volume and price of gas that it sold to these consumers. They ask us to allow them to sue for

the entire amount of the overcharge and to limit the respondent's recovery to damages for its lost business.

The petitioners have oversimplified the apportionment problem in two respects. First, an overcharge may injure a utility, apart from the question of lost business, even if the utility raises its rates to offset its increased costs. As we explained in *Hanover Shoe:*

> "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it." 392 U. S., at 493, n. 9.

In other words, to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge.

In *Hanover Shoe*, however, we decided not to allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue. *Id.*, at 493. The petitioners assume that the presence of state regulation would make the proof less difficult here. We disagree. The state regulation does not simplify the problem but instead imports an additional level of complexity. To decide whether a utility has borne an overcharge, a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particu-

lar, to decide that an overcharge did not injure a utility, a court would have to determine that the State's regulatory schemes would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis and would turn upon the intricacies of state law.

From the certified question in this case, we do not know whether the respondent could have raised its prices prior to the overcharge. Its customers may have been willing to pay a greater price, and the Kansas and Missouri regulators may have allowed a rate increase based on factors other than strict costs. See *Midwest Gas Users Assn.* v. *State Corporation Comm'n*, 5 Kan. App. 2d 653, 661, 623 P. 2d 924, 931 (1981); *State ex rel. Associated Natural Gas Co.* v. *Public Service Comm'n*, 706 S. W. 2d 870, 879–880 (Mo. App. 1985). To the extent that the respondent could have sought and gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it; whether by overcharge or by increased rates, consumers would have been paying more for natural gas than they had been paying in the past. Because of this potential injury, the respondent must remain in the suit. If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.

Second, difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process. Some utilities must seek approval from the governing regulators prior to raising their rates. Other utilities, pursuant to purchase gas adjustment clauses (PGA's) filed with state regulators, may adjust their rates to reflect changes in their wholesale costs according to prearranged formulas without seeking regulatory approval in

each instance. Yet, even utilities that use PGA's often encounter some delay. See Brief for State of Illinois as *Amicus Curiae* 9, n. 11 (describing the various time lags under a typical PGA between the increase in a utility's wholesale costs and the rise in consumer rates). During any period in which a utility's costs rise before it may adjust its rates, the utility will bear the costs in the form of lower earnings. See S. Breyer, Regulation and its Reform 48–49 (1982). Even after the utility raises its rates, moreover, the pass-through process may take time to complete. During this time, the utility and its customers each would pay for some of the increased costs.

In this case, we could not deprive the respondent of its § 4 action without first determining that the passing-on process in fact had allowed it to shift the entire overcharge to its customers. The certified question, however, leaves unclear whether the respondent had passed on "most or all" of its costs at the time of the suit. In addition, even the means by which the passthrough occurred remain unsettled. The petitioners allege that, pursuant to formulas in PGA's filed with the Kansas Corporation Commission and the Missouri Public Service Commission, the respondent "automatically" adjusted some of its rates to reflect increases in the wholesale cost of gas. Brief for Petitioners 5, n. 5. The respondent, however, maintains that PGA's did not govern all of its sales. See Brief for Respondent 17. The difficulties posed by issues of this sort led us to adopt the direct purchaser rule, and we must decline to create an exception that would require their litigation. As we have stated before: "[T]he task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." *McCready*, 457 U. S., at 475, n. 11.

In addition to these complications, the regulation of utilities itself may make an exception to *Illinois Brick* unnecessary. Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices

because of their status as indirect purchasers. See 2 P. Areeda & D. Turner, Antitrust Law § 337e, pp. 193–194 (1978); Harris & Sullivan, Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 269, 342 (1979). Although one might criticize *Illinois Brick* for this consequence in other circumstances, the criticism may have less validity in the context of public utilities. Both the Court of Appeals in this case and the Seventh Circuit in *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F. 2d 891 (1988), have suggested that state regulators would require the utilities to pass on at least some of the recovery obtained in a § 4 suit. See *Wyoming Tight Sands*, 866 F. 2d, at 1291; *Panhandle Eastern*, *supra*, at 895. State regulators have followed this approach elsewhere. See, *e. g.*, *Louisiana Power & Light Co., Ex Parte*, Nos. U–17906, U–12636, U–17649, 1989 La. PUC LEXIS 3, *31–*32 (Mar. 1, 1989) (requiring Louisiana Power & Light Co., which won a $190 million judgment against United Gas Pipe Line Co., to flow the proceeds back to ratepayers through reduced rates over a 5-year period). If Kansas and Missouri impose similar requirements, then even if the customers cannot sue the alleged antitrust violaters, they may receive some of the compensation obtained by the respondent. Creating an exception to allow apportionment in violation of *Illinois Brick* would make little sense when, in light of all its difficulty, its practical significance is so diminished.

B

The *Illinois Brick* rule also serves to eliminate multiple recoveries. See *Illinois Brick*, 431 U. S., at 730–731; *McCready*, *supra*, at 474. The petitioners assert that no risk of multiple recovery would exist here, if we allowed them to sue, because the direct and indirect purchasers would be seeking different, not duplicative, damages; the petitioners would recover the amount of the overcharge and the utilities would recover damages for their lost sales. Leaving

aside the apportionment issue, we reject the argument in this case, just as we did in *Illinois Brick*. Bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery, but the reduction comes at too great a cost. See *Illinois Brick*, *supra*, at 731, n. 11.

This case already has become quite complicated. It involves numerous utilities and other companies operating in several States under federal, state, and municipal regulation and, in some instances, under no rate regulation at all. Even apart from gas sold to customers, the utilities seek damages for lost sales and for gas purchased for their own use. The petitioners, in addition to their *parens patriae* claims, are asserting direct claims on behalf of numerous state agencies. Other direct purchasers also seek several measures of damages. Allowing the petitioners to proceed on behalf of consumers would complicate the proceedings further. Even if they could represent consumers residing in Kansas and Missouri, they could not represent industrial and commercial purchasers or consumers from other States. See 15 U. S. C. § 15c(a)(1) (extending *parens patriae* representation only to resident natural persons). These unrepresented consumers might seek intervention and further delay the prompt determination of the suit. The expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation. At the same time, however, it might serve little purpose because, as noted above, state regulatory law may provide appropriate relief to consumers even if they cannot sue under § 4. As in *Illinois Brick*, we continue to believe that "even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule." 431 U. S., at 731, n. 11.

C

We have maintained, throughout our cases, that our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws. See *Hanover Shoe*, 392 U. S., at 493; *Illinois Brick*, *supra*, at 746; *McCready*, 457 U. S., at 475, n. 11; *California* v. *ARC America Corp.*, 490 U. S. 93, 102, n. 6 (1989). If we were convinced that indirect suits would secure this goal better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger. On balance, however, we do not believe that the petitioners can prevail in this critical part of the case. The petitioners assert that utilities, such as the respondent, lack the incentive to prosecute § 4 cases for two reasons. First, they state that utilities, by law, may pass on their costs to customers. Second, they surmise that utilities might have to pass on damages recovered in a § 4 action. In other words, according to the petitioners, utilities lose nothing if they do not sue and gain nothing if they do sue. In contrast, the petitioners maintain, the large aggregate claims of residential consumers will give state attorneys general ample motivation to sue in their capacity as *parens patriae*.

The petitioners' argument does not persuade us that utilities will lack incentives to sue overcharging suppliers. Utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers. See Kan. Stat. Ann. § 66–128a (1985) (allowing the state commission to "review and evaluate the efficiency or prudence of any actions . . . of any public utility or common carrier for the purpose of establishing fair and reasonable rates"); Mo. Rev. Stat. § 393.150 (1986) (interpreted in *State ex rel. Associated Natural Gas Co.* v. *Public Service Comm'n*, 706 S. W. 2d 870, 879–880 (Mo. App. 1985), to give regulators "considerable discretion" in setting gas rates). In addition, even if state law would require a utility to reimburse its customers for recovered overcharges, a utility may seek treble damages in a § 4 action.

The petitioners have cited no authority indicating that a victorious utility would have to pay the entire exemplary portion of these damages to its customers.

Utilities, moreover, have an established record of diligent antitrust enforcement, having brought highly successful § 4 actions in many instances. The well-known group of actions from the 1960's involving overcharges for electrical generating equipment provides an excellent example. In these cases, which involved "a series of horizontal price-fixing conspiracies characterized as the most shocking in the history of the Sherman Act, plaintiff utilities . . . recover[ed] in unprecedented sums" even though some of the utilities "passed on to their own customers whatever higher costs they incurred as a consequence of the alleged conspiracies." Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 10–11 (1966). The courts in these suits, even before the *Hanover Shoe* and *Illinois Brick* decisions, considered the pass-on issue and held that the causes of action were for the utilities to assert. See, *e. g.*, *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 335 F. 2d 203, 208 (CA7 1964); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914, 949–951 (SDNY 1965). Various factors may have prompted these and other utility actions. For example, in addition to the reasons stated above, the respondent asserts that, like any business, an investor-owned utility has an interest in protecting its market. But whatever the motivation for their § 4 suits, this history makes us quite hesitant to take from the utilities the responsibility for enforcing the antitrust laws.

Relying on indirect purchaser actions in utility cases might fail to promote antitrust enforcement for other reasons. Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers. See Landes & Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 U. Pa. L. Rev. 1274, 1278–1279 (1980). Although state attorneys general have greater ex-

pertise, they may hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers. See Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602, 613 (1979). See also *Illinois Brick*, 431 U. S., at 745 (stating that, in indirect actions, "the uncertainty of how much of an overcharge could be established . . . [and] the uncertainty of how that overcharge would be apportioned . . . would further reduce the incentive to sue"). And even when state attorneys general decide to bring *parens patriae* actions, they may sue only on behalf of resident natural persons. See 15 U. S. C. § 15c(a)(1). All others, including nonresidents and small businesses, might fail to enforce their claims because of the insignificance of their individual recoveries. For these reasons, we remain unconvinced that the exception sought by the petitioners would promote antitrust enforcement better than the current *Illinois Brick* rule.

D

The preceding conclusions bring us to a broader point. The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick*, 431 U. S., at 744. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:

> "[T]he process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theo-

> ries' into treble-damages proceedings, albeit at a somewhat higher level of generality." *Id.*, at 744–745.

In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

IV

The suggestion in *Hanover Shoe* and *Illinois Brick* that a departure from the direct purchaser rule may be necessary when an indirect purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case. In *Hanover Shoe*, we stated:

> "We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." 392 U. S., at 494.

We observed further in *Illinois Brick:*

> "In [a cost-plus contract] situation, the [direct] purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." 431 U. S., at 736.

The petitioners argue that the regulations and tariffs requiring the respondent to pass on its costs to the consumers place this case within the cost-plus contract exception. We disagree.

The respondent did not sell the gas to its customers under a pre-existing cost-plus contract. Even if we were to create an exception for situations that merely resemble those governed by such a contract, we would not apply the exception here. Our statements above show that we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury. That certainty does not exist here.

The utility customers made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit. Even though the respondent raised its prices to cover its costs, we cannot ascertain its precise injury because, as noted above, we do not know what might have happened in the absence of an overcharge. In addition, even if the utility customers had a highly inelastic demand for natural gas, see *Panhandle Eastern*, 852 F. 2d, at 895, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception. See *Illinois Brick*, *supra*, at 742; P. Areeda & H. Hovencamp, Antitrust Law § 337.3c, pp. 323–324 (Supp. 1988). Thus, although we do not alter our observations about the possibility of an exception for cost-plus contracts, we decline to create the general exception for utilities sought by the petitioners.

V

The petitioners, in their final argument, contend that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, 15 U. S. C. § 15c, authorizes them to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own. Section 4C(a)(1) provides in relevant part:

> "Any attorney general of a State may bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sus-

> tained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title." 15 U. S. C. § 15c(a)(1).

Because the Act, in their view, has the clear purpose of protecting consumers, see Kintner, Griffin, & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis, 46 Geo. Wash. L. Rev. 1, 23 (1977), the petitioners contend that it must allow the States to sue on behalf of consumers notwithstanding their status as indirect purchasers.

We have rejected this argument before. We stated in *Illinois Brick* that § 4C did not establish any new substantive liability. Instead, "[i]t simply created a new procedural device—*parens patriae* actions by States on behalf of their citizens—to enforce existing rights of recovery under § 4 [of the Clayton Act]." 431 U. S., at 734, n. 14. Section 4, as noted above, affords relief only to a person "injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15(a). State attorneys general may bring actions on behalf of consumers who have such an injury. See, *e. g.*, *Pennsylvania* v. *Mid-Atlantic Toyota Distributors, Inc.*, 704 F. 2d 125, 128 (CA4 1983) (suit on behalf of consumers injured by an alleged conspiracy to fix the price of cars). But here the respondent is the injured party under the antitrust laws, and the predicate for a *parens patriae* action has not been established. We conclude that the petitioners may not assert any claims on behalf of the customers.

Affirmed.

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

I dissent from the Court's opinion and judgment because it is inappropriate for the Court to deny standing to sue under § 4 of the Clayton Act, 15 U. S. C. § 15, to customers of a regulated utility in circumstances such as those presented in this case. By its plain language, § 4 reflects an "'expansive re-

medial purpose.'" *Blue Shield of Va.* v. *McCready*, 457 U. S. 465, 472 (1982) (citation omitted). It does not distinguish between classes of customers, but rather grants a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." 15 U. S. C. § 15(a). In enacting § 4, Congress sought to ensure that victims of anticompetitive conduct receive compensation. *Blue Shield*, *supra*, at 472; *Pfizer Inc.* v. *India*, 434 U. S. 308, 314 (1978).

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), we held that certain indirect purchasers of concrete block lacked standing to challenge the manufacturer's business practices under the antitrust laws because they could not be deemed to have suffered injury from the alleged illegal conduct. This suit, however, is very different from *Illinois Brick*. That case involved a competitive market where concrete block manufacturers sold to masonry contractors who in turn sold to general contractors who in turn sold to the *Illinois Brick* respondents; this case involves a highly regulated market where utilities possessing natural monopolies purchase gas from natural gas suppliers and then sell the gas to residential customers. *Illinois Brick* did not hold that, in all circumstances, indirect purchasers lack § 4 standing. Indeed, just last Term we observed that under *Illinois Brick* "indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them." *California* v. *ARC America Corp.*, 490 U. S. 93, 102, and n. 6 (1989). See also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 494 (1968).

The issue in this case is whether *Illinois Brick* bars a suit by retail customers to whom the utilities have passed on the entire cost of the gas sold to them, including any illegal overcharge. Before the District Court, the utilities moved to dismiss the States as *parens patriae*, arguing that the States lacked standing because they represented indirect purchas-

ers. In response, the States contended that the indirect purchasers were proper plaintiffs because the utilities had passed through the entire overcharge to their residential customers. The District Court found it unnecessary "to wait upon evidence establishing the degree to which the utilities passed on the overcharge," *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 1109, 1116 (Kan. 1988), for even accepting the States' position that there had been a total pass-on, decisions of this Court were thought to bar the suit. Likewise, in affirming the District Court, the Court of Appeals presumed a "perfect and provable pass-on of the allegedly illegal overcharge." *In re Wyoming Tight Sands Antitrust Cases*, 866 F. 2d 1286, 1293 (CA10 1989). Indeed, the vice president and general counsel of one of the respondent utilities is on record as stating that the utility's customers "pay *all* of any increases in the cost of natural gas [Kansas Power & Light] must purchase to serve them." Affidavit of David S. Black, Vice President and General Counsel of the Kansas Power & Light Company, Record, Doc. No. 485, Exhibit D (emphasis in original). Rather than embarking, as the Court does, on what amounts to a factfinding mission, which the courts below eschewed, about the fact and provability of this pass-on, we should decide this case on the basis that there has been a complete passthrough of the overcharge. On that basis, it is evident that the concerns underlying the decision in *Illinois Brick* do not support the judgment below. Rather, we should follow the plain intent of § 4 that the victims of anticompetitive conduct be allowed the remedy provided by the section.

Illinois Brick barred indirect purchaser suits chiefly because we feared that permitting the use of pass-on theories under § 4 would transform these treble-damages actions into massive and inconclusive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers. 431 U. S., at 737. As Judge Posner has

written: "The optimal adjustment by an unregulated firm to the increased cost of the input will always be a price increase smaller than the increase in input cost, and this means that the increased cost will be divided between the two tiers, the direct and indirect purchasers—but in what proportion will often be hard to determine, even by sophisticated techniques of economic analysis. This is a central insight of the *Illinois Brick* decision." *Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Co.*, 852 F. 2d 891, 894 (CA7 1988).

In this case, however, it is regulation rather than market forces that determines the amount of overcharge that the utility passes through to its residential customers. The rates of utilities are determined by law and are set at a level designed to allow a fair return on a rate base that includes the cost of furnishing the service, plainly including in this case the cost of gas purchased from the pipelines and resold to customers. It is fanciful, at least unrealistic, to think that a utility entitled to pass on to its customers the cost of gas that it has purchased will not do so to the maximum extent permitted by law. Furthermore, petitioners assert that in this case the applicable law requires that such cost be passed on to consumers. And, as we have said, the Tenth Circuit opinion reflects the likelihood of a perfect and provable pass-on.

Of course, to recover in a case like this, the plaintiff must prove that the utility paid the pipelines an illegally high price and must demonstrate the amount of the overcharge. That amount is included in the rates charged by the utility and hence is passed through to the consumer. The result is that determining the injury inflicted on consumers involves nothing more than reading their utility bills, which reveal the amount of gas purchased by them at a price which includes the amount of the illegal overcharge passed through to them. Where it is clear that the entire overcharge is passed through, there can be no claim that indirect purchasers can-

not prove the extent of their damage caused by a rate calculated on a rate base inflated by an illegal price paid for gas.

The Court contends that the apportionment problem is not so simple. It maintains that, even where a utility raises its rates to compensate for the overcharge and passes the overcharge through to the indirect purchasers, an apportionment problem still exists because "to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge." *Ante*, at 209. The problem identified by the majority is not peculiar to indirect purchaser suits. In antitrust cases where suppliers increase their prices, courts frequently must separate the price increase attributable to anticompetitive conduct (*i. e.*, the "overcharge") from the price increase attributable to legitimate factors. This type of calculation "has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was due partly or entirely to other factors." *Panhandle Eastern*, *supra*, at 897; see *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251 (1946). The problem identified in *Illinois Brick* was entirely different: There, we were concerned that it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser. As argued above, this difficulty is not a concern in the present case.* It is at least very doubtful that a utility that is

*The majority also suggests that "difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process." *Ante*, at 210. This suggestion, as indicated by the words "might" and "may," is quite speculative. It is much more realistic to believe that sooner or later, the customer will foot the cost of overpriced gas. If timing was such a problem, the Tenth Circuit would not have assumed a "perfect and provable" passthrough.

in position to secure a rate increase on grounds having nothing to do with the price paid for its gas would fail to request a rate increase that included as well the entire amount paid for gas purchased from pipelines and sold to consumers.

Illinois Brick also observed that granting standing to the indirect purchasers in that case would lead to the underenforcement of the antitrust laws. 431 U. S., at 745–747. In the cases where there is "a perfect and provable passthrough," however, the opposite is true for two reasons. First, because the passthrough of the overcharge is complete and easily demonstrated, the indirect purchasers—and the States in their *parens patriae* capacity—may readily discover their injury. Second, although the utility could sue to recover lost profits resulting from lost sales due to the illegally high price, its injury is not measured by the amount of the illegal overcharge that it has passed on, and hence the utility would have no incentive to seek such a recovery.

The majority suggests that, even where a utility passes the entire overcharge through to the indirect customers, the utility nonetheless might actively prosecute antitrust claims because the state regulatory commission may allow the utility to keep any damages that the utility recovers. But the utility commissions cannot allow an antitrust recovery forbidden by federal law. Given a passthrough, the customer, not the utility, suffers the antitrust injury, and it is the customer or the State on his behalf that is entitled to recover treble damages. In any event, it seems to me that the majority conjures up a very strange utility commission, the possible existence of which the court fails to document.

A third consideration prompting our decision in *Illinois Brick* was our belief that permitting indirect purchaser suits might subject antitrust defendants to multiple liability. *Id.*, at 730–731. Again however, where there is a "perfect and provable" passthrough, there is no danger that both the utilities and the indirect purchasers will recover damages for the same anticompetitive conduct because the utili-

ties have not suffered any overcharge damage: The petitioners will sue for the amount of the overcharge, while the utilities will sue for damages resulting from their lost sales.

The majority argues that, even "[l]eaving aside the apportionment issue" (*i. e.*, assuming that there is no apportionment difficulty as the Tenth Circuit did in affirming summary judgment), the multiple recovery problem identified in *Illinois Brick* still exists. *Ante*, at 212–213. I disagree. *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Blue Shield*, 457 U. S., at 474–475. The danger of multiple recoveries does not exist aside from the apportionment difficulty; rather, it stems from it. If only defensive use of a pass-through defense were barred, or if it were extremely difficult to ascertain the percentage of an overcharge that the utility passed through, then the supplier of natural gas might potentially have to pay overlapping damages to successive purchasers at different levels in the distribution chain. But where there is no apportionment difficulty, there is no comparable risk.

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a passthrough to consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this case on the basis that the passthrough is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case. For that

reason, rather than extending the *Illinois Brick* exception to § 4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.

SAWYER *v.* SMITH, INTERIM WARDEN

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

No. 89–5809. Argued April 25, 1990—Decided June 21, 1990

Petitioner Sawyer's conviction and death sentence for a brutal murder became final in 1984. The Federal District Court denied his habeas corpus petition, which was based in relevant part on the argument that the prosecutor's closing argument during the penalty phase of his trial diminished the jury's sense of responsibility for the capital sentencing decision, in violation of this Court's 1985 decision in *Caldwell* v. *Mississippi*, 472 U. S. 320. While his appeal of the denial of habeas relief was pending, this Court decided *Teague* v. *Lane*, 489 U. S. 288, under which a new rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule (1) places an entire category of primary conduct beyond the reach of criminal law, *id.*, at 311, or prohibits imposition of a certain type of punishment for a class of defendants because of their status or offense, see *Penry* v. *Lynaugh*, 492 U. S. 302, 330, or (2) applies a new watershed rule of criminal procedure that enhances accuracy and is necessary to the fundamental fairness of the criminal proceeding, 489 U. S., at 312–313. The Court of Appeals affirmed the denial of relief, holding that *Caldwell* announced a new rule within the meaning of *Teague* and did not fall within *Teague*'s second exception.

Held: Petitioner is not entitled to federal habeas relief, because *Caldwell* announced a new rule, as defined by *Teague*, that does not come within either of the *Teague* exceptions. Pp. 233–245.

(a) *Caldwell*'s result was not dictated by Eighth Amendment precedent existing at the time petitioner's conviction became final. No case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment. The discussion of improper prosecutorial comment in *Donnelly* v. *DeChristoforo*, 416 U. S. 637, a noncapital murder case, was based on the Due Process Clause's guarantees of fundamental fairness, not the Eighth Amendment's more particular guarantees of sentencing reliability. *Eddings* v. *Oklahoma*, 455 U. S. 104; *Lockett* v. *Ohio*, 438 U. S. 586; *Gardner* v. *Florida*, 430 U. S. 349; and *Woodson* v. *North Carolina*, 428 U. S. 280, earlier Eighth Amendment cases, spoke to the general issue of sentencing reliability but not to the issue decided in *Caldwell*, and *Teague* would be meaningless if applied at such a level of generality. In 1984, from a state court's point of view,

there were indications that *Caldwell* was not an Eighth Amendment requirement, see *California* v. *Ramos*, 463 U. S. 992; *Maggio* v. *Williams*, 464 U. S. 46, and there was some doubt as to this Court's view concerning a major premise of *Caldwell*, that misleading prosecutorial comment might cause a bias in favor of death sentences, see *Dobbert* v. *Florida*, 432 U. S. 282, 294, and n. 7. It cannot be said that state cases were anticipating the *Caldwell* rule when they prohibited similar prosecutorial statements, because their decisions were based on state law and did not purport to construe the Eighth Amendment. Reliance on these cases misapprehends the function of federal habeas relief, which serves to ensure that state convictions comport with established *federal* law at the time a petitioner's conviction becomes final. To the extent that post-*Caldwell* Louisiana cases reflect state-court recognition that general Eighth Amendment principles pointed toward adoption of a *Caldwell* rule, or that *Caldwell* is congruent with pre-existing state law, they cannot serve to show that *Caldwell* was dictated by this Court's Eighth Amendment precedents, since courts can be expected to apply principles announced in prior Eighth Amendment decisions that are susceptible to debate among reasonable minds. Petitioner's argument that state courts would not have provided protection against misleading prosecutorial comment unless they had been compelled to do so by federal precedent and the threat of federal habeas review is premised on a skepticism of state courts that this Court declines to endorse. Pp. 233–241.

(b) *Caldwell* does not come within either of the *Teague* exceptions. The first exception has no applicability here. Petitioner's argument that the second exception should be read to include new rules of capital sentencing that preserve the accuracy and fairness of judgments looks only to the first half of the exception's definition. To qualify under *Teague*, a rule must not only improve the accuracy of trial; it must also be essential to the fairness of the proceeding. There would be no limit to the second exception if it were to be recast as suggested by petitioner, since almost all Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability or accuracy in some sense. *Caldwell* is a systemic rule designed as an enhancement of the accuracy of capital sentencing. However, this measure of protection against error in the context of capital sentencing was added to the already existing due process guarantee of fundamental fairness afforded by *Donnelly*, *supra*. "[T]he only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to render their sentencing trial 'fundamentally unfair.'" 881 F. 2d 1273, 1293. Thus, it cannot be said that *Caldwell* is the type of absolute prerequisite to

fundamental fairness that may come within *Teague*'s second exception. Cf., *e. g.*, *Dugger* v. *Adams*, 489 U. S. 401. Pp. 241–245.

881 F. 2d 1273, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, in which BLACKMUN, J., joined as to Parts I, II, III, and IV, and in which STEVENS, J., joined as to Parts I, II, and III, *post*, p. 245.

Catherine Hancock argued the cause for petitioner. With her on the briefs was *Elizabeth W. Cole.*

Dorothy A. Pendergast argued the cause for respondent. With her on the brief were *John M. Mamoulides* and *Terry M. Boudreaux.**

JUSTICE KENNEDY delivered the opinion of the Court.

We must decide in this case whether a prisoner whose murder conviction became final before our decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), is entitled to use that decision to challenge his capital sentence in a federal habeas corpus action. We hold that he cannot, for *Caldwell* announced a new rule as defined by *Teague* v. *Lane*, 489 U. S. 288 (1989), and the new rule does not come within *Teague*'s exception for watershed rules fundamental to the integrity of the criminal proceeding.

I

Over 10 years ago, petitioner Robert Sawyer murdered Frances Arwood, a visitor in the New Orleans, Louisiana, residence petitioner shared with his girlfriend, Cynthia

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**Julius L. Chambers* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae* urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Bar Association by *Stanley Chauvin, Jr.*, *Jay Topkis*, *Ronald J. Tabak*, and *Eric M. Freedman;* and for Stephen H. Sachs et al. by *Randy Hertz* and *Michael Millemann.*

Shano. On September 29, 1979, petitioner and his accomplice Charles Lane arrived at the residence after a night of drinking. They argued with Arwood and accused her of giving drugs to Shano's children. For reasons that are not clear, petitioner and Lane struck Arwood repeatedly with their fists and dragged her by the hair into the bathroom. There they stripped the victim naked, literally kicked her into the bathtub, and subjected her to scalding, dunkings, and additional beatings. Petitioner left Lane to guard the victim, and apparently to rape her, while petitioner went to the kitchen to boil water to scald her. Petitioner kicked Arwood in the chest, causing her head to strike the tub or a windowsill and rendering her unconscious. The pair then dragged Arwood into the living room, where they continued to beat and kick her. Petitioner poured lighter fluid on the unconscious victim, particularly her torso and genital area, and set the lighter fluid afire. He told Lane that he had done this to show "just how cruel he could be." There were further brutalities we do not recount. Arwood later died of her injuries.

Petitioner was convicted and sentenced to death for the crime by a Louisiana jury in September 1980. At issue in this case are remarks made by the prosecutor in his closing argument during the sentencing phase of the trial. The prosecutor first stated, after discussing the proof of aggravating circumstances under Louisiana law:

> "The law provides that if you find one of those circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by

> the State Legislature that this is a type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision." Tr. 982.

After emphasizing the brutal nature of the crime for which they had convicted petitioner, the prosecutor told the jury:

> "There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less." *Id.*, at 984.

Finally, the prosecutor emphasized again that the jury's decision would be reviewed by later decisionmakers:

> "It's all [you're] doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind

you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions." *Id.*, at 985.

The Louisiana Supreme Court affirmed petitioner's conviction and sentence. *State* v. *Sawyer*, 422 So. 2d 95 (1982). This Court granted certiorari and remanded the case with instructions to the Louisiana Supreme Court to reconsider its decision in light of *Zant* v. *Stephens*, 462 U. S. 862 (1983). *Sawyer* v. *Louisiana*, 463 U. S. 1223 (1983). The Louisiana Supreme Court reaffirmed the capital sentence on remand, *Sawyer* v. *Louisiana*, 442 So. 2d 1136 (1983). His conviction and sentence became final on April 2, 1984, when we denied certiorari, *Sawyer* v. *Louisiana*, 466 U. S. 931. Petitioner sought state collateral relief, which was denied. *Sawyer* v. *Maggio*, 479 So. 2d 360 (La. 1985); *Sawyer* v. *Maggio*, 480 So. 2d 313 (La. 1985).

Petitioner then filed the federal habeas corpus petition now before us, raising a host of constitutional claims. Relevant here is petitioner's claim that the prosecutor's closing argument violated the Eighth Amendment of the United States Constitution by diminishing the jury's sense of responsibility for the capital sentencing decision, in violation of our decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). *Caldwell* was decided over one year after petitioner's conviction became final.

The District Court denied relief, concluding that the prosecutor's remarks were of a different character from those in *Caldwell*, and that there was no reasonable probability that the sentence would have been different in the absence of the comments. A divided panel of the Court of Appeals for the Fifth Circuit affirmed. 848 F. 2d 582 (1988). The panel held that the facts in this case were "a far cry from those in *Caldwell*," in large part due to the absence of any judicial approval of the prosecutor's comments. *Id.*, at 596. Following the panel decision, the Fifth Circuit granted rehearing en banc. *Id.*, at 606.

After the en banc court heard oral argument, but while the case was pending, a plurality held in *Teague* v. *Lane*, 489 U. S. 288 (1989), that a rule of constitutional law established after a petitioner's conviction has become final may not be used to attack the conviction on federal habeas corpus unless the rule falls within one of two narrow exceptions. The Fifth Circuit requested supplemental briefing from the parties on the question whether *Teague* barred petitioner's claim for relief under *Caldwell*. The en banc court held that *Caldwell* announced a new rule within the meaning of *Teague*, a rule not within *Teague*'s second exception for watershed rules of criminal procedure that guarantee the accuracy of a criminal proceeding. Accordingly, the Court of Appeals affirmed the denial of habeas corpus relief. 881 F. 2d 1273 (1989).

We granted certiorari, 493 U. S. 1042 (1990), to resolve a conflict among the Courts of Appeals, see *Hopkinson* v. *Shillinger*, 888 F. 2d 1286 (CA10 1989), and now affirm.

II

We must address first whether, in relying on *Caldwell*, petitioner claims the benefit of a new rule, as defined by our decision in *Teague*. In *Caldwell*, we held that the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere. See 472 U. S., at 328–329; *id.*, at 342 (opinion of O'CONNOR, J.). We determined that false information of this type might produce "substantial unreliability as well as bias in favor of death sentences." *Id.*, at 330.

At the outset we note that the parties dispute whether *Caldwell*, even if its rule applies, could support any claim for relief in petitioner's case. The State emphasizes that the judge in this case, unlike *Caldwell*, see *id.*, at 339, did not approve the prosecutor's argument, and that the remarks

in this case were less likely to mislead. Petitioner, on the other hand, contends that the prosecutor's remarks were similar to those in *Caldwell*, and were not cured by the judge's instructions to the jury. We need not address the significant questions concerning the merits of petitioner's *Caldwell* claim on these facts, or the question whether application of *Caldwell* to the facts presented here would itself involve a new rule of law. Rather, we address only whether *Caldwell* is available to petitioner as a ground upon which he may seek relief. Cf. *Dugger* v. *Adams*, 489 U. S. 401, 408, n. 4 (1989) (merit of *Caldwell* claim immaterial to disposition of case on procedural bar grounds).

Our review of the relevant precedents that preceded *Caldwell* convinces us that it is a new rule for purposes of *Teague*. On this point we are in accord with the Court of Appeals, as well as the other two Courts of Appeals that have addressed the question. See *Clark* v. *Dugger*, 901 F. 2d 908 (CA11 1990); *Hopkinson* v. *Shillinger*, *supra*. The rule of *Teague* serves to "validat[e] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990). Thus, we have defined new rules as those that were not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, at 301 (plurality opinion). The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.

Caldwell, of course, was not decided upon a clean slate. As the Court in *Caldwell* recognized, we had earlier ad-

dressed the question of improper prosecutorial comment in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). We stated in *Donnelly* that improper remarks by a prosecutor could at some point "so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643. No such pervasive error was established in that case, and we took the occasion to warn against "holding every improper and unfair argument of a state prosecutor to be a federal due process violation." *Caldwell*, *supra*, at 338. *Caldwell*, unlike *Donnelly*, was a capital case; and while noting the principle set forth in *Donnelly*, the Court in *Caldwell* determined to rely not on the Due Process Clause but on more particular guarantees of sentencing reliability based on the Eighth Amendment. In *Donnelly* we had reversed a Court of Appeals opinion vacating a conviction because prosecutorial comments were "potentially" misleading, 416 U. S., at 641, but in *Caldwell* we found that the need for reliable sentencing in capital cases required a new sentencing proceeding because false prosecutorial comment created an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously,'" 472 U. S., at 343 (opinion of O'CONNOR, J.).

Examination of our Eighth Amendment authorities that preceded *Caldwell* shows that it was not dictated by prior precedent existing at the time the defendant's conviction became final. In *Caldwell* itself we relied on *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality opinion); and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), in support of the result. We cited these decisions for the general proposition that capital sentencing must have guarantees of reliability, and must be carried out by jurors who would view all of the relevant characteristics of the crime and the criminal, and take their task as a serious one. Petitioner, too, cites these and other cases in support of the argument that *Caldwell* was

"rooted" in the Eighth Amendment command of reliable sentencing, and that application of these cases to misleading prosecutorial comment "[b]y analogy" would lead to the predictable *Caldwell* result. Brief for Petitioner 16.

We do not doubt that our earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell*. But neither this fact, nor petitioner's contention that state courts "would have found *Caldwell* to be a predictable development in Eighth Amendment law," Brief for Petitioner 8, suffices to show that *Caldwell* was not a new rule. In petitioner's view, *Caldwell* was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality. Cf. *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) ("[I]f the test of 'clearly established law' were to be applied at this level of generality, . . . [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights").

It is beyond question that no case prior to *Caldwell* invalidated a prosecutorial argument as impermissible under the Eighth Amendment. *Eddings* and *Lockett* invalidated statutory schemes that imposed an absolute prohibition against consideration of certain mitigating evidence by the sentencer. *Woodson* invalidated a capital sentencing statute providing for mandatory capital sentencing. *Gardner* invalidated a capital sentence based on information of which the defendant had no notice or opportunity to respond. These cases do not speak to the issue we decided in *Caldwell*. What we said in *Saffle* v. *Parks*, 494 U. S. 484, 491 (1990), applies here: "Even were we to agree with [petitioner's] assertion that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that [petitioner] seeks." Certainly *Caldwell* was not seen as compelled by the three Justices of this Court who found a "lack of authority" in our

Eighth Amendment precedents for the approach taken there. See 472 U. S., at 350 (REHNQUIST, J., dissenting).

From the point of view of a state court considering petitioner's claim at the time his conviction became final, *Saffle*, *supra*, at 488, there were in fact indications in our decisions that the *Caldwell* rule was *not* a requirement of the Eighth Amendment. In a previous case raising an Eighth Amendment challenge to prosecutorial comment, we had rejected the petitioner's claim. *California* v. *Ramos*, 463 U. S. 992 (1983). Indeed, the Mississippi Supreme Court had held without dissent in *Caldwell* that *Ramos* stood for the proposition that "states may decide whether it is error to mention to jurors the matter of appellate review." See *Caldwell* v. *State*, 443 So. 2d 806, 813 (1983). The Mississippi court's characterization of *Ramos*, of course, later proved to be incorrect. But this nonetheless suggests that prior to *Caldwell* our cases did not put other courts on notice that the Eighth Amendment compelled the *Caldwell* result.

Our opinion in *Maggio* v. *Williams*, 464 U. S. 46 (1983), provides more direct evidence that the rule of *Caldwell* cannot be described as dictated by existing law at the time petitioner's claim became final. In *Williams* we vacated a stay of execution in a case presenting a claim very similar to that in *Caldwell*. JUSTICE STEVENS' opinion concurring in the judgment described at length the prosecutor's argument in that case, 464 U. S., at 53–54, one similar to the argument made in *Caldwell*. The Court, however, found that the prisoner's challenge to the prosecutor's statements "warrant[ed] little discussion." 464 U. S., at 49. Although we stated that the failure to raise the claim of improper prosecutorial argument in an earlier habeas petition was "inexcusable," we noted that the District Court in the second petition had given the claim "full consideration" under the "standard established in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974)," and had found that the prosecutor's closing argument "did not render Williams' trial fundamentally unfair." *Id.*, at 49–50. Our

opinion concluded by describing this and other claims raised by Williams as "insubstantial." *Id.*, at 52. *Williams*, of course, did not represent a rejection on the merits of the rule announced in *Caldwell*. But given our statements concerning so similar a claim in *Williams*, we do not think a state court viewing petitioner's case at the time his conviction became final could have concluded that our Eighth Amendment precedents compelled such a rule.

We note also that, when petitioner's conviction became final, there was some reason for doubt as to this Court's view concerning what became a major premise of *Caldwell*, that misleading prosecutorial comment might cause a "bias in favor of death sentences." 472 U. S., at 330. At the time of petitioner's trial and appeal there was at least "some suggestion," see *Dugger* v. *Adams*, 489 U. S., at 409, that comments tending to diminish the jury's sense of sentencing responsibility would skew the result toward leniency rather than a death sentence. See *Dobbert* v. *Florida*, 432 U. S. 282, 294, and n. 7 (1977) (Florida's change to a system in which jury's verdict was advisory might benefit defendants, as the jury "may have chosen leniency when they knew [the sentencing] decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final").

Petitioner places primary reliance on numerous state cases, decided prior to the finality of his conviction, that prohibited prosecutorial statements of the type later held to violate the Eighth Amendment in *Caldwell*. See, *e. g.*, *Ward* v. *Commonwealth*, 695 S. W. 2d 404, 408 (Ky. 1985); *Ice* v. *Commonwealth*, 667 S. W. 2d 671, 676 (Ky.), cert. denied, 469 U. S. 860 (1984); *Wiley* v. *State*, 449 So. 2d 756, 762 (Miss. 1984), cert. denied, 479 U. S. 906 (1986); *Williams* v. *State*, 445 So. 2d 798, 811–812 (Miss. 1984), cert. denied, 469 U. S. 1117 (1985); *State* v. *Robinson*, 421 So. 2d 299, 233–234 (La. 1982); *State* v. *Willie*, 410 So. 2d 1019, 1033–1035 (La. 1982), cert. denied, 465 U. S. 1051 (1984); *State* v. *Jones*, 296

N. C. 495, 501–502, 251 S. E. 2d 425, 427–429 (1979); *State* v. *Gilbert*, 273 S. C. 690, 696–698, 258 S. E. 2d 890, 894 (1979); *State* v. *Tyner*, 273 S. C. 646, 659–660, 258 S. E. 2d 559, 566 (1979); *Hawes* v. *State*, 240 Ga. 327, 334–335, 240 S. E. 2d 833, 839 (1977); *Fleming* v. *State*, 240 Ga. 142, 145–146, 240 S. E. 2d 37, 40 (1977), cert. denied, 444 U. S. 885 (1979); *State* v. *White*, 286 N. C. 395, 403–404, 211 S. E. 2d 445, 450 (1975); *Prevatte* v. *State*, 233 Ga. 929, 932–933, 214 S. E. 2d 365, 367–368 (1975); *State* v. *Hines*, 286 N. C. 377, 381–386, 211 S. E. 2d 201, 204–207 (1975). Petitioner argues that these authorities show that state courts anticipated the rule of *Caldwell*, and that no state reliance interest could be upset by retroactive application of the federal rule to overturn a state conviction that became final before *Caldwell* was decided.

The flaw in this argument is that "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution." *Dugger* v. *Adams*, *supra*, at 409. All of the cases cited by petitioner, with one arguable exception, are decisions of *state* law, and do not purport to construe the Eighth Amendment. These cases, moreover, apply state common-law rules prohibiting *any* mention of appellate review; they do not condemn false prosecutorial statements under the Eighth Amendment analysis employed in *Caldwell*. Reliance on state-law cases for the proposition that the rule adopted in *Caldwell* was an old one misapprehends the function of federal habeas corpus. As we have said, the "'relevant frame of reference'" for the new rule inquiry "'is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.'" *Teague*, 489 U. S., at 306 (plurality opinion) (quoting *Mackey* v. *United States*, 401 U. S. 667, 682 (1971)). Federal habeas corpus serves to ensure that state convictions comport with the *federal* law that was established at the time petitioner's conviction became final.

Petitioner points out, to support his argument that *Caldwell* applied an old rule, that our opinion there was based in part on the adoption by many state courts of rules that prohibited prosecutorial comments that could diminish the jury's sense of sentencing responsibility. Brief for Petitioner 11; see 472 U. S., at 333–334, and n. 4. It is true that our cases have looked to the decisions of state courts and legislatures to inform Eighth Amendment analysis. But petitioner's attempt to use this fact to show that *Caldwell* is an old rule is untenable. Under this view, state-court decisions would both inform this Court's decisions on the substantive content of the Eighth Amendment and, by simultaneous effect, impose those standards back upon the States themselves with retroactive effect. This view is also inconsistent with our citation in *Penry* v. *Lynaugh*, 492 U. S. 302, 329–330 (1989), of *Ford* v. *Wainwright*, 477 U. S. 399 (1986), which relied for its Eighth Amendment analysis on the statutory or common law of a majority of the States, see *id.*, at 408–409, as an example of a new rule.

One Louisiana case cited by petitioner disapproving prosecutorial comment on appellate review does discuss Eighth Amendment principles rather than relying solely on state law. Even in this case, however, the court cited Eighth Amendment cases only in its discussion of prosecutorial reference to the possibility of *pardon*. Its discussion of prosecutorial comment on appellate review, the issue before us here, referred to state-law rules. See *State* v. *Willie*, *supra*, at 1033 (La. 1982), cert. denied, 465 U. S. 1051. Petitioner also cites post-*Caldwell* Louisiana cases, which cite *Caldwell* and state cases interchangeably, and state that *Caldwell* did not change prior law in the State. See *State* v. *Smith*, 554 So. 2d 676, 685 (La. 1989); *State* v. *Clark*, 492 So. 2d 862, 870–871 (La. 1986); *State ex rel. Busby* v. *Butler*, 538 So. 2d 164, 173 (La. 1988). To the extent these cases reflect state-court recognition that general Eighth Amendment principles pointed toward adoption of a *Caldwell* rule, or that *Caldwell*

is congruent with pre-existing state law, they cannot serve to show that *Caldwell* was dictated by our Eighth Amendment precedent. State courts as well as federal can be expected to engage in application of the principles announced in prior Eighth Amendment decisions that are "susceptible to debate among reasonable minds." *Butler*, 494 U. S., at 415.

Petitioner appears to contend that state courts will recognize federal constitutional protections only if they are compelled to do so by federal precedent and the threat of federal habeas review. Since some state courts had recognized a principle similar to *Caldwell*'s, this argument goes, the result in *Caldwell* must have been compelled by Eighth Amendment precedent. This argument is premised on a skepticism of state courts that we decline to endorse. State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution. It is not surprising that state courts, whether applying federal constitutional protections or seeking fair administration of their own state capital punishment law, would have taken care to exclude misleading prosecutorial comment. But this conscientious exercise of their powers of supervision and review could not dictate *Caldwell* as a principle of federal law under the Eighth Amendment.

III

Under *Teague*, new rules may be applied in habeas corpus proceedings only if they come within "one of two narrow exceptions." *Saffle*, 494 U. S., at 486. The first of these applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, *Teague*, *supra*, at 311 (plurality opinion), or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense, *Penry*, *supra*, at 330. This exception has no application here. The second *Teague* exception applies to new "watershed rules of criminal procedure" that are necessary to the fundamental fairness of the

criminal proceeding. *Saffle*, *supra*, at 495; *Teague*, 489 U. S., at 311–313 (plurality opinion). Petitioner here challenges the Court of Appeals' conclusion that *Caldwell* does not come within this exception.

Petitioner contends that the second *Teague* exception should be read to include new rules of capital sentencing that "preserve the accuracy and fairness of capital sentencing judgments." Brief for Petitioner 30. But this test looks only to half of our definition of the second exception. Acceptance of petitioner's argument would return the second exception to the broad definition that Justice Harlan first proposed in *Desist*, but later abandoned in *Mackey*, under which new rules that "significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." *Desist* v. *United States*, 394 U. S. 244, 262 (1969). In *Teague*, we modified Justice Harlan's test to combine the accuracy element of the *Desist* test with the *Mackey* limitation of the exception to watershed rules of fundamental fairness. It is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also "'alter our understanding of the *bedrock procedural elements*'" essential to the fairness of a proceeding. *Teague*, *supra*, at 311 (plurality opinion) (quoting *Mackey*, 401 U. S., at 693).

The scope of the *Teague* exceptions must be consistent with the recognition that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, *supra*, at 309 (plurality opinion) (citing Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970)). The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application." *Solem* v.

Stumes, 465 U. S. 638, 654 (1984) (opinion of Powell, J.). As we stated in *Teague*, because the second exception is directed only at new rules essential to the accuracy and fairness of the criminal process, it is "unlikely that many such components of basic due process have yet to emerge." 489 U. S., at 313 (plurality opinion).

It is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense. Indeed, petitioner has not suggested any Eighth Amendment rule that would not be sufficiently "fundamental" to qualify for the proposed definition of the exception, and at oral argument in this case counsel was unable to provide a single example. Tr. of Oral Arg. 17. In practical effect, petitioner asks us to overrule our decision in *Penry* that *Teague* applies to new rules of capital sentencing. This we decline to do.

At the time of petitioner's trial and appeal, the rule of *Donnelly* was in place to protect any defendant who could show that a prosecutor's remarks had in fact made a proceeding fundamentally unfair. It was always open to this petitioner to challenge the prosecutor's remarks at his sentencing proceeding, by making the showing required by *Donnelly*. See *Dugger* v. *Adams*, 489 U. S., at 410 (defendant whose trial and appeal occurred prior to *Caldwell* "could have challenged the improper remarks by the trial judge at the time of his trial as a violation of due process. See *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974)"); *Maggio* v. *Williams*, 464 U. S., at 49–50 (discussing application of *Donnelly* to improper remarks at sentencing). Petitioner has not contested the Court of Appeals' finding that he has no claim for relief under the *Donnelly* standard. And as the Court of Appeals stated: "[T]he only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as

to render their sentencing trial 'fundamentally unfair.'" 881 F. 2d, at 1293.

Rather than focusing on the prejudice to the defendant that must be shown to establish a *Donnelly* violation, our concern in *Caldwell* was with the "unacceptable risk" that misleading remarks could affect the reliability of the sentence. See 472 U. S., at 343 (opinion of O'CONNOR, J.). *Caldwell* must therefore be read as providing an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing. See *Darden* v. *Wainwright*, 477 U. S. 168, 183–184, n. 14 (1986). The *Caldwell* rule was designed as an enhancement of the accuracy of capital sentencing, a protection of systemic value for state and federal courts charged with reviewing capital proceedings. But given that it was added to an existing guarantee of due process protection against fundamental unfairness, we cannot say this systemic rule enhancing reliability is an "absolute prerequisite to fundamental fairness," 489 U. S., at 314, of the type that may come within *Teague*'s second exception.

Discussions of the nature of *Caldwell* error from other contexts also support our conclusion. In *Dugger* v. *Adams*, *supra*, we held that failure to consider a *Caldwell* claim would not come within a "fundamental miscarriage of justice" exception to the doctrine of procedural default. *Id.*, at 412, n. 6; see *Murray* v. *Carrier*, 477 U. S. 478 (1986). We rejected the dissent's contention that a fundamental miscarriage of justice had been shown in that "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined." *Dugger*, *supra*, at 412, n. 6. Similarly, in *Williams*, *supra*, JUSTICE STEVENS concluded his discussion of a *Caldwell*-type claim by stating: "I question whether it can be said that this trial was fundamentally unfair. See *Rose* v. *Lundy*, [455 U. S. 509,] 543, and n. 8 [(1982)] (STEVENS, J., dissenting)." 464 U. S., at 56. These cases, of course, involved different

rules and contexts. Yet we think their rationale reflects a rejection of the argument that *Caldwell* represents a rule fundamental to the criminal proceeding.

Because petitioner seeks the benefit of a new rule that does not come within either of the *Teague* exceptions, his claim for habeas corpus relief is without merit. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, JUSTICE BLACKMUN joins as to Parts I–IV, and JUSTICE STEVENS joins as to Parts I–III, dissenting.

In his closing argument in the sentencing phase of Robert Sawyer's trial, the prosecutor emphatically argued to the jury that a sentence of death would be "merely a recommendation" and that "others" would be able to correct the decision if it turned out to be "wrong." This argument misrepresented the scope of appellate review of capital sentences under Louisiana law. La. Code Crim. Proc. Ann., Art. 905.9 (West 1984) (review by State Supreme Court is limited to question whether sentence of death is "excessive"). The prosecutor's effort to minimize the jury's sense of responsibility is precisely the type of misleading argument that we condemned in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), and is therefore "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment.'" *Id.*, at 340 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion)).

The Court refuses to address Sawyer's *Caldwell* claim on the merits. Instead, it holds that *Caldwell* created a "new" rule within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989), *ante*, at 234, and that *Caldwell*'s protection against misleading prosecutorial argument is not a "'watershed rul[e] of criminal procedure'" essential to the fundamental fairness of a capital proceeding, *ante*, at 241 (quoting *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990)). To reach this result, the majority

misrepresents the source and function of *Caldwell*'s prohibitions, thereby applying its newly crafted retroactivity bar to a case in which the State has no legitimate interest in the finality of the death sentence it obtained through intentional misconduct. I dissent.

I

In *Teague*, the plurality declared that a case announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U. S., at 301. This Term, the Court held that the "'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990). Accord, *Parks*, *supra*, at 488 (quoting *Butler*, *supra*, at 414). I continue to regard the Court's effort to curtail the scope of federal habeas as inconsistent with Congress' intent to provide state prisoners with an opportunity to redress "unlawful state deprivations of their liberty interests through a fresh and full review of their claims by an Article III court." *Butler*, *supra*, at 427 (BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissenting). Even under the majority's standard, though, if the answer to a legal question is not "susceptible to debate among reasonable minds," *Butler*, *supra*, at 415, or if existing precedent would have "compelled" state courts to provide relief at the time the defendant's conviction became final, *Parks*, *supra*, at 488, then the decision does not announce a "new" legal rule within the meaning of *Teague*. In such circumstances, a defendant is entitled to the retroactive benefit of the decision he seeks to invoke.

A

The "new rule" inquiry spelled out in *Teague*, *Butler*, and *Parks* confirms that *Caldwell* did not create a new rule. The roots of the *Caldwell* rule can be traced directly to this Court's Eighth Amendment decisions demanding heightened

reliability in capital sentencing. *Woodson* v. *North Carolina*, *supra* (plurality opinion); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Eddings* v. *Oklahoma*, 455 U. S. 104, 118–119 (1982) (O'CONNOR, J., concurring). In *Woodson*, *Lockett*, and *Eddings*, the Court considered and rejected States' efforts after *Furman* v. *Georgia*, 408 U. S. 238 (1972), to eliminate arbitrariness in the administration of the death penalty by limiting or withdrawing the sentencer's discretion. These decisions, as well as the post-*Furman* decisions in which the Court upheld capital sentencing schemes, see, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976), emphasized that sentencers must confront their "truly awesome responsibility of decreeing death for a fellow human . . . with due regard for the consequences of their decision." *Lockett*, *supra*, at 598 (plurality opinion) (internal quotation marks and citation omitted). By the time of *Caldwell*, "this Court's Eighth Amendment jurisprudence ha[d] taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." 472 U. S., at 329.

The majority nonetheless insists that the "principle of reliability in capital sentencing" is framed at such a high "level of generality" that treating it as the relevant principle for determining whether *Caldwell* is new law would render *Teague* "meaningless." *Ante*, at 236. This argument ignores the centrality of the *Caldwell* rule to reliability in capital sentencing. *Caldwell* error affects not just the consideration of some relevant sentencing factors, but the entire decision-making process itself. When a prosecutor misleadingly tells the jury that its verdict may be corrected on appeal, the prosecutor invites the jury to shirk its sentencing responsibility. The prosecutor essentially informs the jury that its verdict is less important because no execution will occur without the independent approval of higher authorities. To the extent

the prosecutor's comments are "focused, unambiguous, and strong," *Caldwell*, *supra*, at 340, such misconduct casts irredeemable doubt on the resulting verdict.

Some rules in capital proceedings do not contribute fundamentally to reliability; as to such rules, the majority's rejection of the reliability principle as too general may be apt. For example, the rule of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), prohibiting the state from exercising peremptory challenges in a racially discriminatory manner does not have a fundamental impact on the accuracy—as opposed to the integrity—of the criminal process. See *Allen* v. *Hardy*, 478 U. S. 255, 259 (1986). The *Caldwell* rule, though, is a *prerequisite* to reliability in capital sentencing. Not unlike the right to counsel, the right to a jury that understands the gravity of its task is essential to the vindication of the other sentencing guarantees. Meticulous presentation of evidence and careful instruction on the law are of minimal value to a defendant whose jury has been led to believe that its verdict is of little or no consequence. The majority's observation that *Caldwell*'s prohibition against misleading prosecutorial argument is specific thus does not undermine Sawyer's assertion that it was dictated by the Eighth Amendment's general insistence on reliability in capital sentencing.

B

The majority's assertion that "there were in fact indications in our decisions that the *Caldwell* rule was *not* a requirement of the Eighth Amendment," *ante*, at 237, is unsupported by the cases on which the majority relies. In *California* v. *Ramos*, 463 U. S. 992 (1983), the defendant had challenged California's requirement that trial courts instruct capital juries about the Governor's power to commute life sentences. In rejecting the Eighth Amendment challenge, the Court emphasized that the challenged instruction was *accurate*. The Court distinguished *Gardner* v. *Florida*, 430 U. S. 349 (1977), in which the Court had struck down a death

sentence based in part on information contained in a presentence report that had not been disclosed to defense counsel. Unlike *Gardner*, where there was a "risk that some of the information [relied on in sentencing] . . . may [have] be[en] erroneous," *id.*, at 359 (plurality opinion), the sentencing decision in *Ramos* did not rest "in part on erroneous or inaccurate information." 463 U. S., at 1004. See also *ibid.* (the "need for reliability in capital sentencing" did not require reversal because the challenged instruction gave the jury "accurate information"). Cf. *Caldwell*, 472 U. S., at 342 (O'CONNOR, J., concurring in part and concurring in judgment) ("In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility. I agree that there can be no 'valid state penological interest' in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case") (quoting *id.*, at 336 (majority opinion)). The *Ramos* Court's approval of California's decision to provide capital juries with accurate information respecting commutation cannot reasonably be read as an approval of misleading or inaccurate prosecutorial argument concerning the scope of appellate review.

That the Mississippi Supreme Court in *Caldwell* erroneously read *Ramos* so broadly does not, as the majority argues, "sugges[t] that prior to *Caldwell* our cases did not put other courts on notice that the Eighth Amendment compelled the *Caldwell* result." *Ante*, at 237. Some courts will misconstrue our precedents notwithstanding their clarity, see, *e. g.*, *McKoy* v. *North Carolina*, 494 U. S. 433, 439–441 (1990) (state court failed to adhere to clear direction of *Mills* v. *Maryland*, 486 U. S. 367 (1988)), and the mere fact that a single court adopts a position contrary to the one dictated by our precedents does not confirm that the case law was unclear. Indeed, if that were the standard, almost every Supreme Court decision would announce a new rule, as we

seldom take cases to resolve issues as to which the lower courts are in universal agreement. Moreover, under the majority's view, state-court decisions, by misconstruing the scope of this Court's Eighth Amendment decisions, would simultaneously limit the reach of those decisions as a matter of federal law. Cf. *ante*, at 240.

Ironically, the majority regards one errant decision by the Mississippi Supreme Court as evidence of uncertainty and yet dismisses as irrelevant to its "new rule" inquiry the States' near-unanimous rejection of *Caldwell*-type prosecutorial arguments prior to *Caldwell*, *supra*, at 333–334, and n. 4 (collecting cases). Even the Mississippi Supreme Court declared that "[a]ny argument by the state which distorts or minimizes the solemn obligation and responsibility of the jury is serious error." *Hill* v. *State*, 432 So. 2d 427, 439 (1983) (refusing to rule on defendant's *Caldwell*-type claim, however, because of the absence of a contemporaneous objection). State decisions, even if they are not premised on federal law, play a part in determining the status of constitutional protections under the Eighth Amendment. That Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and this Court has often looked to the laws of the States as a barometer of contemporary values, see, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 330–331 (1989); *Ford* v. *Wainwright*, 477 U. S. 399, 408–409 (1986). Of course, the recognition of a right under state law does not translate automatically into the existence of federal constitutional protection. But a consensus among States regarding an essential ingredient to "a *fair trial* in the sentencing phase," *State* v. *Berry*, 391 So. 2d 406, 418 (La. 1980) (opinion on rehearing), is evidence that the right is cognizable under the Federal Constitution. The States' strong pre-*Caldwell* condemnation of misleading prosecutorial arguments regarding the scope of appellate review

is thus additional evidence that our Eighth Amendment decisions compelled the result in *Caldwell*.

Moreover, the majority's contention that the state courts based their decisions solely on "state common law," *ante*, at 239, assumes that States' capital punishment jurisprudence has evolved independently of our Eighth Amendment decisions. But state decisions regarding capital sentencing procedures—even those that do not explicitly mention federal law—are surely informed by federal principles and should thus be accorded some weight in discerning the scope of federal protections. Only an especially condescending federalism would protect States from retroactive application of federal law by dismissing state decisions concerning capital sentencing as irrelevant to the lineage of the federal law.[1]

C

This Court's approach to improper prosecutorial comments in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), also supports a finding that *Caldwell* did not establish a new rule. In *Donnelly*, the prosecutor hinted that the defendant might have been willing to accept a lesser penalty for his crime, implicitly suggesting that the defendant had acknowledged his guilt. The Court held that this comment did not violate the Due Process Clause because it was ambiguous, corrected by the trial court, and too fleeting to have influenced the jury. *Id.*, at 643–645. The *Donnelly* Court specifically

[1] That *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989), and *Teague* v. *Lane*, 489 U. S. 288, 301 (1989), cite *Ford* v. *Wainwright*, 477 U. S. 399 (1986), as crafting a "new" rule does not establish that state decisions are irrelevant in assessing the status of a right under the Federal Constitution. Cf. *ante*, at 240. Neither of these opinions discussed the citation to *Ford*, and the force of their conclusions is undermined by this Court's subsequent reliance on state decisions in *Saffle* v. *Parks*, 494 U. S. 484 (1990), to determine whether the rule invoked in that case was compelled by our Eighth Amendment decisions, see *id.*, at 490–491 (citing state decisions). State decisions cannot be deemed relevant to the *Teague* inquiry only to the extent that they *disprove* the rootedness of a constitutional right.

confined its decision to prosecutorial comments that did not implicate "specific guarantees of the Bill of Rights." *Id.*, at 643. Had the claim implicated such rights, the Court acknowledged that "special care" would be required "to assure that prosecutorial conduct in no way impermissibly infringe[d] them." *Ibid.*

Donnelly was decided prior to the Court's explicit recognition in the cases following *Gregg* that the Eighth Amendment affords special protections to defendants facing the death penalty. The Court's decisions in the decade after *Donnelly* but before *Caldwell* made unmistakably clear that the death penalty's qualitatively different character from all other punishments necessitates "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U. S., at 305 (plurality opinion). See also *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980) (quoting *Gardner*, 430 U. S., at 357–358 (plurality opinion)). Moreover, our jurisprudence by the time of *Caldwell* indicated unambiguously that the Eighth Amendment protects against the *risk* that the death penalty would be imposed in an arbitrary or capricious manner. *Gregg*, 428 U. S., at 188 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Lockett*, 438 U. S., at 605 (plurality opinion). In light of the Court's repeated emphasis on indispensable safeguards guaranteed in capital sentencing by a provision of the Bill of Rights, a court faced with misleading prosecutorial comments about the jury's sentencing role just prior to *Caldwell* could not reasonably have concluded on the basis of *Donnelly* that such comments would survive this Court's scrutiny.

The majority's contrary conclusion rests on a misunderstanding of the relationship between *Caldwell* and *Donnelly*. The majority endorses the Fifth Circuit's view that "'[t]he only defendants who need to rely on *Caldwell* rather than *Donnelly* are those who must concede that the prosecutorial argument in their case was not so harmful as to render their

sentencing trial "fundamentally unfair."'" *Ante*, at 243–244 (quoting 881 F. 2d 1273, 1293 (1989)). But *Caldwell* is not, as the majority argues, "an additional measure of protection against error, beyond that afforded by *Donnelly*, in the special context of capital sentencing." *Ante*, at 244. This analysis erroneously presumes precisely what *Caldwell* denies, that "focused, unambiguous, and strong," prosecutorial arguments that mislead a jury about its sentencing role in the capital context can ever be deemed harmless. *Caldwell* rests on the view that *any* strong, uncorrected, and unequivocal prosecutorial argument minimizing the jury's sense of responsibility for its capital sentencing decision "presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." 472 U. S., at 333. *Caldwell* thus tells us that a capital trial in which the jury has been misled about its sentencing role *is* fundamentally unfair and therefore violates *Donnelly* as well.

The majority's claim that *Maggio* v. *Williams*, 464 U. S. 46 (1983), provides more "direct evidence" that the rule of *Caldwell* was not clear at the time petitioner's conviction became final, *ante*, at 237, is likewise unconvincing. In *Williams*, the Court vacated the Fifth Circuit's entry of a stay in a capital case because Williams' contentions were "insubstantial." 464 U. S., at 52. Williams alleged, *inter alia*, that the prosecutor's closing argument had "elicited a decision based on passion rather than reason." *Id.*, at 49. Some, but not all, of the prosecutor's argument referred to the scope of appellate review. See *id.*, at 53–54 (STEVENS, J., concurring in judgment). When the motion to vacate the stay came to this Court, the sole issue was whether there was "a reasonable probability" that four Members of the Court would vote to grant certiorari. *Id.*, at 48 (internal quotation marks omitted). In view of Williams' prior unsuccessful efforts to secure relief on similar claims, the Court applied "a strict standard of review" to Williams' application. *Id.*, at 55 (STEVENS, J., concurring in judgment). The Court did not discuss the

merits of Williams' claim regarding the prosecutorial argument other than to note that the District Court had given it "full consideration," *id.*, at 49, and had found "that it did not render Williams' trial fundamentally unfair," *id.*, at 50. The Court's vacation of the stay in these circumstances thus reflects only the Court's view that Williams' claims, in such a posture, did not "warrant certiorari and plenary consideration." *Id.*, at 48.[2] In sum, because the cases that dictated the result in *Caldwell* were decided before Sawyer's conviction became final in 1984, he is entitled to careful review of the merits of his *Caldwell* claim.

II

Even if *Caldwell* established a "new rule," that rule nonetheless is available on federal habeas because it is a rule "without which the likelihood of an accurate [verdict] is seriously diminished," *Teague*, 489 U. S., at 313 (plurality opinion). The devastating impact of prosecutorial argument that diminishes jurors' sense of responsibility is revealed in the state-court decisions condemning such argument. See, *e. g.*, *Fleming* v. *State*, 240 Ga. 142, 146, 240 S. E. 2d 37, 40 (1977) (holding that "this type of remark has an unusual potential for corrupting the death sentencing process"); *State* v. *Berry*, 391 So. 2d, at 418 ("If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated"); *Ward* v. *Commonwealth*, 695 S. W. 2d

[2] The majority nonetheless views *Williams* as casting some doubt on the ultimate disposition of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) because the prosecutor's argument in *Williams* was "very similar to [the argument] in *Caldwell*." *Ante*, at 237. That position, though, is overbroad. The District Court's finding that Williams' trial was not fundamentally unfair under *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), was tantamount to a finding that Williams' jury was not misled about its sentencing role. See *Williams* v. *King*, 573 F. Supp. 525, 530–531 (MD La. 1983).

404, 408 (Ky. 1985) (holding that "the prosecutor clearly sought to divert from the minds of the jurors their true responsibility in this case by implying that the ultimate responsibility would fall to the trial judge, this court, [or] other appellate courts . . . . This is clearly an error of reversible magnitude"); *Hill* v. *State*, 432 So. 2d, at 439 ("Any argument by the state which distorts or minimizes this solemn obligation and responsibility of the jury is serious error. . . . [I]n a death penalty case a jury should never be given false comfort that any decision they make will, or can be, corrected"); *Wiley* v. *State*, 449 So. 2d 756, 762 (Miss. 1984) ("While a jury is not literally 'the hangman,' only they *[sic]* may supply the hangman's victims. All notions of justice require that the jurors as individuals, and as a body, recognize and appreciate the gravity of their role").

The majority's underestimation of *Caldwell*'s importance rests on the defect discussed above, *supra*, at 252–253, namely, the view that a *Caldwell* error will not render a trial fundamentally unfair.[3] The majority's vague suggestion that *Caldwell* serves as "a protection of systemic value for state and federal courts charged with reviewing capital proceedings," *ante*, at 244, does not disguise its inability to identify, in concrete terms, a situation in which *Caldwell* error occurs and yet the capital proceeding can be described as fun-

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[3] The majority's rejection of the States' view that *Caldwell*'s prohibitions are vital to the fairness of a capital proceeding reveals a tension in the Court's retroactivity doctrine. At the same time that the majority insists that *Caldwell* was not dictated by our Eighth Amendment decisions, the majority also argues that *Caldwell* is not a fundamental rule because it affected only an incremental change in capital sentencing. See *ante*, at 244 (stating that *Caldwell* provides merely an "additional measure of protection against error, beyond that afforded by *Donnelly*"). A rule may be "new" even if it is designed to serve interests substantially similar to an "old" rule. The majority's extensive effort in its "new rule" analysis to demonstrate that *Caldwell*'s "additional" protections marked a departure in our Eighth Amendment jurisprudence, however, seems disingenuous in light of its conclusion that the departure did not amount to much.

damentally fair. See *Caldwell*, 472 U. S., at 341 (holding that if improper prosecutorial comment occurs the sentencing decision "does not meet the standard of reliability that the Eighth Amendment requires").

Nor does *Dugger* v. *Adams*, 489 U. S. 401 (1989), undermine *Caldwell*'s status as a fundamental rule. The issue there was whether a particular defendant who had failed to object to misleading prosecutorial argument at sentencing had suffered sufficient prejudice to justify overlooking a state procedural bar. 489 U. S., at 406. The Court's denial of relief rested largely on the importance of the State's "interest in having the defendant challenge a faulty instruction in a timely manner so that it can correct the misstatement." *Id.*, at 409; see also *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977). The stringent standard for excusing procedural defaults against a particular defendant is premised on "the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct." *Reed* v. *Ross*, 468 U. S. 1, 13 (1984) (citations omitted).

No such concern with enforcing state procedural rules against a particular defendant is at stake when we decide whether to apply new constitutional principles retroactively to all federal habeas cases. Our inquiry instead focuses on the importance of the new principle generally to the fairness and accuracy of the proceedings in which that principle went unobserved. Whereas the *Dugger* inquiry focuses on the general necessity of a rule to ensure an accurate verdict in all cases, the Court will overlook a clear procedural default only if the error has "probably resulted in the conviction of one who is actually innocent," 489 U. S., at 412, n. 6 (internal quotation marks omitted). The strict procedural default rule is designed in part to protect the State's interest—unique in

the context of procedural default—in correcting error in the first instance. *Sykes*, *supra*, at 88–90.

Finally, the fundamental importance of *Caldwell* cannot be denied on the ground that "it is 'unlikely that many [new rules] of basic due process [essential to accuracy and fairness] have yet to emerge.'" *Ante*, at 243 (quoting *Teague*, 489 U. S., at 313 (plurality opinion)). The majority cannot bind the future to present constitutional understandings of what is essential for due process. See, *e. g.*, *Hurtado* v. *California*, 110 U. S. 516, 530–531 (1884). We would rightly regard such a statement as an expression of hubris were we to discover it in a volume of the United States Reports from 100, 50, or even 20 years ago, at which time, incidentally, this Court, "[i]n light of history, experience, and the present limitations of human knowledge," rejected the argument "that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." *McGautha* v. *California*, 402 U. S. 183, 207 (1971) (footnote omitted); cf. *Gregg*, 428 U. S., at 189 (joint opinion of Stewart, Powell, and STEVENS, JJ.) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"). Moreover, the notion that we have already discovered all those procedures central to fundamental fairness is squarely inconsistent with our Eighth Amendment methodology, under which "bedrock" Eighth Amendment principles emerge in light of new societal understandings and experience. See, *e. g.*, *Coker* v. *Georgia*, 433 U. S. 584, 593–597 (1977) (plurality opinion).

III

The Court's refusal to allow Sawyer the benefit of *Caldwell* reveals the extent to which *Teague* and its progeny unjustifi-

ably limit the retroactive application of accuracy-enhancing criminal rules. Prior to *Teague*, our retroactivity jurisprudence always recognized a difference between rules aimed primarily at deterring police conduct and those designed to promote the accuracy of criminal proceedings. Although the former generally were not applied retroactively, see, *e. g.*, *Linkletter* v. *Walker*, 381 U. S. 618, 636–637 (1965), the Court routinely afforded defendants the benefit of "new constitutional doctrine [whose purpose] is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion). We departed from the general rule favoring retroactive application of accuracy-enhancing rules only in special cases in which retroactivity would have undermined substantial reliance interests of law enforcement officials and prosecutors who acted in good faith prior to the change in the law. See, *e. g.*, *Stovall* v. *Denno*, 388 U. S. 293 (1967).

The state prosecutor in this case surely could not claim a good-faith belief in the legitimacy of the conduct proscribed in *Caldwell*—misleading and inaccurate argument designed to minimize the jury's sentencing responsibility. Indeed, respondent seems to concede as much, framing the State's reliance interest, beyond its general interest in the finality of its convictions, as the right to have "misleading prosecutorial remarks . . . reviewed under the fundamental fairness standard of due process" rather than the Eighth Amendment. Brief for Respondent 16. This purported reliance interest depends on the erroneous view that *Caldwell* error could survive review under the Due Process Clause. See, *supra*, at 257. But even granting a distinction in the degree of scrutiny applied by *Donnelly* and *Caldwell*, the State's claimed interest in having its intentional misconduct reviewed under a less demanding standard is hardly worth crediting.

The State is thus left to rely solely on its general interest in the finality in its criminal proceedings. Before today, such an interest was never alone sufficient to preclude vindication of constitutional rights on federal habeas. See *Reed* v. *Ross*, 468 U. S., at 15. *Teague* itself, of course, stated that it was departing from our traditional approach. But that case, as well as *Butler* and *Parks*, involved rules that the Court did not recognize as contributing meaningfully to the accuracy of criminal proceedings. See *Teague*, 489 U. S., at 315 (plurality opinion) (failure to apply rule does not "seriously diminish the likelihood of obtaining an accurate conviction"); *Butler*, 494 U. S., at 416 (failure to apply rule "would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood"); *Parks*, 494 U. S., at 495 ("The objectives of fairness and accuracy are more likely to be threatened than promoted" by the rule); cf. *ante*, at 244 (acknowledging that *Caldwell*'s central purpose is to enhance "the accuracy of capital sentencing"). Those cases thus could have been decided in the same way under our prior retroactivity doctrine, which weighed the State's finality and reliance interests against the defendant's interests protected by the new rule.

No such balancing of the competing concerns occurs today. The Court instead simply elevates its preference for finality in state proceedings over Congress' commitment "to provide a federal forum for state prisoners . . . by extending the habeas corpus powers of the federal courts to their constitutional maximum," *Fay* v. *Noia*, 372 U. S. 391, 426 (1963). This raw preference for finality is unjustified. Although a State undoubtedly possesses a legitimate interest in the finality of its convictions, when the State itself undermines the accuracy of a capital proceeding, that general interest must give way to the demands of justice.

IV

The jury that sentenced Sawyer to death was deliberately misled about the significance of its verdict. That Sawyer

was thus denied a fundamentally fair trial was as apparent when Sawyer's conviction became final as it is today. The Court's refusal to allow a federal habeas court to correct this error is yet another indication that the Court is less concerned with safeguarding constitutional rights than with speeding defendants, deserving or not, to the executioner. I dissent.

V

Even if I did not believe that Sawyer was entitled to federal habeas review of his *Caldwell* claim, I would nonetheless vacate his death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U. S., at 231 (MARSHALL, J., dissenting).

Syllabus

CRUZAN, BY HER PARENTS AND CO-GUARDIANS, CRUZAN ET UX. *v.* DIRECTOR, MISSOURI DEPARTMENT OF HEALTH, ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 88–1503. Argued December 6, 1989—Decided June 25, 1990

Petitioner Nancy Cruzan is incompetent, having sustained severe injuries in an automobile accident, and now lies in a Missouri state hospital in what is referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. The State is bearing the cost of her care. Hospital employees refused, without court approval, to honor the request of Cruzan's parents, copetitioners here, to terminate her artificial nutrition and hydration, since that would result in death. A state trial court authorized the termination, finding that a person in Cruzan's condition has a fundamental right under the State and Federal Constitutions to direct or refuse the withdrawal of death-prolonging procedures, and that Cruzan's expression to a former housemate that she would not wish to continue her life if sick or injured unless she could live at least halfway normally suggested that she would not wish to continue on with her nutrition and hydration. The State Supreme Court reversed. While recognizing a right to refuse treatment embodied in the common-law doctrine of informed consent, the court questioned its applicability in this case. It also declined to read into the State Constitution a broad right to privacy that would support an unrestricted right to refuse treatment and expressed doubt that the Federal Constitution embodied such a right. The court then decided that the State Living Will statute embodied a state policy strongly favoring the preservation of life, and that Cruzan's statements to her housemate were unreliable for the purpose of determining her intent. It rejected the argument that her parents were entitled to order the termination of her medical treatment, concluding that no person can assume that choice for an incompetent in the absence of the formalities required by the Living Will statute or clear and convincing evidence of the patient's wishes.

Held:

1. The United States Constitution does not forbid Missouri to require that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence. Pp. 269–285.

(a) Most state courts have based a right to refuse treatment on the common-law right to informed consent, see, *e. g.*, *In re Storar*, 52 N. Y. 2d 363, 420 N. E. 2d 64, or on both that right and a constitutional privacy right, see, *e. g.*, *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N. E. 2d 417. In addition to relying on state constitutions and the common law, state courts have also turned to state statutes for guidance, see, *e. g.*, *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840. However, these sources are not available to this Court, where the question is simply whether the Federal Constitution prohibits Missouri from choosing the rule of law which it did. Pp. 269–278.

(b) A competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. Cf., *e. g.*, *Jacobson* v. *Massachusetts*, 197 U. S. 11, 24–30. However, the question whether that constitutional right has been violated must be determined by balancing the liberty interest against relevant state interests. For purposes of this case, it is assumed that a competent person would have a constitutionally protected right to refuse lifesaving hydration and nutrition. This does not mean that an incompetent person should possess the same right, since such a person is unable to make an informed and voluntary choice to exercise that hypothetical right or any other right. While Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to withdraw hydration and nutrition and thus cause death, it has established a procedural safeguard to assure that the surrogate's action conforms as best it may to the wishes expressed by the patient while competent. Pp. 278–280.

(c) It is permissible for Missouri, in its proceedings, to apply a clear and convincing evidence standard, which is an appropriate standard when the individual interests at stake are both particularly important and more substantial than mere loss of money, *Santosky* v. *Kramer*, 455 U. S. 745, 756. Here, Missouri has a general interest in the protection and preservation of human life, as well as other, more particular interests, at stake. It may legitimately seek to safeguard the personal element of an individual's choice between life and death. The State is also entitled to guard against potential abuses by surrogates who may not act to protect the patient. Similarly, it is entitled to consider that a judicial proceeding regarding an incompetent's wishes may not be adversarial, with the added guarantee of accurate factfinding that the adversary process brings with it. The State may also properly decline to make judgments about the "quality" of a particular individual's life and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. It is self-evident that these interests are more substantial, both on

an individual and societal level, than those involved in a common civil dispute. The clear and convincing evidence standard also serves as a societal judgment about how the risk of error should be distributed between the litigants. Missouri may permissibly place the increased risk of an erroneous decision on those seeking to terminate life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo, with at least the potential that a wrong decision will eventually be corrected or its impact mitigated by an event such as an advancement in medical science or the patient's unexpected death. However, an erroneous decision to withdraw such treatment is not susceptible of correction. Although Missouri's proof requirement may have frustrated the effectuation of Cruzan's not-fully-expressed desires, the Constitution does not require general rules to work flawlessly. Pp. 280–285.

2. The State Supreme Court did not commit constitutional error in concluding that the evidence adduced at trial did not amount to clear and convincing proof of Cruzan's desire to have hydration and nutrition withdrawn. The trial court had not adopted a clear and convincing evidence standard, and Cruzan's observations that she did not want to live life as a "vegetable" did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. P. 285.

3. The Due Process Clause does not require a State to accept the "substituted judgment" of close family members in the absence of substantial proof that their views reflect the patient's. This Court's decision upholding a State's favored treatment of traditional family relationships, *Michael H.* v. *Gerald D.*, 491 U. S. 110, may not be turned into a constitutional requirement that a State must recognize the primacy of these relationships in a situation like this. Nor may a decision upholding a State's right to permit family decisionmaking, *Parham* v. *J. R.*, 442 U. S. 584, be turned into a constitutional requirement that the State recognize such decisionmaking. Nancy Cruzan's parents would surely be qualified to exercise such a right of "substituted judgment" were it required by the Constitution. However, for the same reasons that Missouri may require clear and convincing evidence of a patient's wishes, it may also choose to defer only to those wishes rather than confide the decision to close family members. Pp. 285–287.

760 S. W. 2d 408, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., *post*, p. 287, and SCALIA, J., *post*, p. 292, filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN,

JJ., joined, *post*, p. 301. STEVENS, J., filed a dissenting opinion, *post*, p. 330.

William H. Colby argued the cause for petitioners. With him on the briefs were *David J. Waxse*, *Walter E. Williams*, *Edward J. Kelly III*, *John A. Powell*, and *Steven R. Shapiro*.

Robert L. Presson, Assistant Attorney General of Missouri, argued the cause for respondent Director, Missouri Department of Health, et al. With him on the brief were *William L. Webster*, Attorney General, and *Robert Northcutt*.

Thad C. McCanse, *pro se*, and *David B. Mouton* filed a brief for respondent guardian ad litem.

Solicitor General Starr argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Merrill*, and *Brian J. Martin*.*

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*Briefs of *amici curiae* urging reversal were filed for the AIDS Civil Rights Project by *Walter R. Allan;* for the American Academy of Neurology by *John H. Pickering;* for the American College of Physicians by *Nancy J. Bregstein;* for the American Geriatrics Society by *Keith R. Anderson;* for the American Hospital Association by *Paul W. Armstrong;* for the American Medical Association et al. by *Rex E. Lee*, *Carter G. Phillips*, *Elizabeth H. Esty*, *Jack R. Bierig*, *Russell M. Pelton*, *Paul G. Gebhard*, *Laurie R. Rockett*, and *Henry Hart;* for the Colorado Medical Society et al. by *Garth C. Grissom;* for Concern for Dying by *Henry Putzel III* and *George J. Annas;* for the Evangelical Lutheran Church in America by *Susan D. Reece Martyn* and *Henry J. Bourguignon;* for the General Board of Church and Society of the United Methodist Church by *Thomas S. Martin* and *Magda Lopez;* for Missouri Hospitals et al. by *Mark A. Thornhill*, *E. J. Holland, Jr.*, and *John C. Shepherd*; for the National Hospice Organization by *Barbara F. Mishkin* and *Walter A. Smith, Jr.;* for the National Academy of Elder Law Attorneys by *Robert K. Huffman;* for the Society of Critical Care Medicine et al. by *Stephan E. Lawton;* for the Society for the Right to Die, Inc., by *Fenella Rouse;* for Wisconsin Bioethicists et al. by *Robyn S. Shapiro*, *Charles H. Barr*, and *Jay A. Gold;* for Barbara Burgoon et al. by *Vicki Gottlich*, *Leslie Blair Fried*, and *Stephanie M. Edelstein;* and for John E. McConnell et al. by *Stephen A. Wise*.

Briefs of *amici curiae* urging affirmance were filed for Agudath Israel of America by *David Zwiebel;* for the American Academy of Medical Ethics by *James Bopp, Jr.;* for the Association of American Physicians and Sur-

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari, 492 U. S. 917 (1989), and now affirm.

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geons et al. by *Edward R. Grant* and *Kent Masterson Brown;* for the Association for Retarded Citizens of the United States et al. by *James Bopp, Jr.*, *Thomas J. Marzen*, and *Stanley S. Herr;* for the Catholic Lawyers Guild of the Archdiocese of Boston, Inc., by *Calum B. Anderson* and *Leonard F. Zandrow, Jr.;* for the District Attorney of Milwaukee County, Wisconsin, by *E. Michael McCann, pro se*, and *John M. Stoiber;* for Doctors for Life et al. by *David O. Danis* and *Gerard F. Hempstead;* for Families for Life et al. by *Robert L. Mauro;* for Focus on the Family et al. by *Clarke D. Forsythe*, *Paul Benjamin Linton*, and *H. Robert Showers;* for Free Speech Advocates et al. by *Thomas Patrick Monaghan* and *Jay Alan Sekulow;* for the International Anti-Euthanasia Task Force et al. by *Jordan Lorence;* for the Knights of Columbus by *James H. Burnley IV*, *Robert J. Cynkar*, and *Carl A. Anderson;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the New Jersey Right to Life Committee, Inc., et al. by *Donald D. Campbell* and *Anne M. Perone;* for the Rutherford Institute et al. by *John W. Whitehead*, *James J. Knicely*, *David E. Morris*, *William B. Hollberg*, *Amy Dougherty*, *Thomas W. Strahan*, *William Bonner*, *John F. Southworth, Jr.*, and *W. Charles Bundren;* for the United States Catholic Conference by *Mark E. Chopko* and *Phillip H. Harris;* for the Value of Life Committee, Inc., by *Walter M. Weber;* and for Elizabeth Sadowski et al. by *Robert L. Mauro.*

Briefs of *amici curiae* were filed for the American Nurses Association et al. by *Diane Trace Warlick;* and for the SSM Health Care System et al. by *J. Jerome Mansmann* and *Melanie DiPietro.*

On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function.[1] The State of Missouri is bearing the cost of her care.

[1] The State Supreme Court, adopting much of the trial court's findings, described Nancy Cruzan's medical condition as follows:

". . . (1) [H]er respiration and circulation are not artificially maintained and are within the normal limits of a thirty-year-old female; (2) she is oblivious to her environment except for reflexive responses to sound and perhaps painful stimuli; (3) she suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated and [her] cerebral cortical atrophy is irreversible, permanent, progressive and ongoing; (4) her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and apparent response to sound; (5) she is a spastic quadriplegic; (6) her four extremities are contracted with irreversible muscular and tendon damage to all ex-

After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a

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tremities; (7) she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs and . . . she will never recover her ability to swallow sufficient *[sic]* to satisfy her needs. In sum, Nancy is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years." *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 411 (Mo. 1989) (en banc) (quotations omitted; footnote omitted).

In observing that Cruzan was not dead, the court referred to the following Missouri statute:

"For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

"(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or

"(2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician." Mo. Rev. Stat. § 194.005 (1986).

Since Cruzan's respiration and circulation were not being artificially maintained, she obviously fit within the first proviso of the statute.

Dr. Fred Plum, the creator of the term "persistent vegetative state" and a renowned expert on the subject, has described the "vegetative state" in the following terms:

"'Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.'" *In re Jobes*, 108 N. J. 394, 403, 529 A. 2d 434, 438 (1987).

See also Brief for American Medical Association et al. as *Amici Curiae* 6 ("The persistent vegetative state can best be understood as one of the conditions in which patients have suffered a loss of consciousness").

removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination. The court found that a person in Nancy's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures." App. to Pet. for Cert. A99. The court also found that Nancy's "expressed thoughts at age twenty-five in somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration." *Id.*, at A97–A98.

The Supreme Court of Missouri reversed by a divided vote. The court recognized a right to refuse treatment embodied in the common-law doctrine of informed consent, but expressed skepticism about the application of that doctrine in the circumstances of this case. *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 416–417 (1988) (en banc). The court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance," and expressed doubt as to whether such a right existed under the United States Constitution. *Id.*, at 417–418. It then decided that the Missouri Living Will statute, Mo. Rev. Stat. § 459.010 *et seq.* (1986), embodied a state policy strongly favoring the preservation of life. 760 S. W. 2d, at 419–420. The court found that Cruzan's statements to her roommate regarding her desire to live or die under certain conditions were "unreliable for the purpose of determining her intent," *id.*, at 424, "and thus insufficient to support the co-guardians['] claim to exercise substituted judgment on Nancy's behalf." *Id.*, at 426. It rejected the argument that Cruzan's parents were entitled to order the termination of her medical treatment,

concluding that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." *Id.*, at 425. The court also expressed its view that "[b]road policy questions bearing on life and death are more properly addressed by representative assemblies" than judicial bodies. *Id.*, at 426.

We granted certiorari to consider the question whether Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances.

At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39–42 (5th ed. 1984). Before the turn of the century, this Court observed that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff* v. *Society of New York Hospital*, 211 N. Y. 125, 129–130, 105 N. E. 92, 93 (1914). The informed consent doctrine has become firmly entrenched in American tort law. See Keeton, Dobbs, Keeton, & Owen, *supra*, § 32, pp. 189–192; F. Rozovsky, Consent to Treatment, A Practical Guide 1–98 (2d ed. 1990).

The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment. Until about 15 years ago and the seminal decision in *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647, cert. denied *sub nom. Garger* v. *New Jersey*, 429 U. S. 922 (1976), the number of right-to-refuse-treatment decisions was relatively few.[2] Most of the earlier cases involved patients who refused medical treatment forbidden by their religious beliefs, thus implicating First Amendment rights as well as common-law rights of self-determination.[3] More recently, however, with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned. See 760 S. W. 2d, at 412, n. 4 (collecting 54 reported decisions from 1976 through 1988).

In the *Quinlan* case, young Karen Quinlan suffered severe brain damage as the result of anoxia and entered a persistent vegetative state. Karen's father sought judicial approval to disconnect his daughter's respirator. The New Jersey Supreme Court granted the relief, holding that Karen had a right of privacy grounded in the Federal Constitution to terminate treatment. *In re Quinlan*, 70 N. J., at 38–42, 355 A. 2d, at 662–664. Recognizing that this right was not absolute, however, the court balanced it against asserted state interests. Noting that the State's interest "weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims," the court concluded that the state interests had to give way in that case. *Id.*, at

[2] See generally Karnezis, Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life, 93 A. L. R. 3d 67 (1979) (collecting cases); Cantor, A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life, 26 Rutgers L. Rev. 228, 229, and n. 5 (1973) (noting paucity of cases).

[3] See Chapman, The Uniform Rights of the Terminally Ill Act: Too Little, Too Late?, 42 Ark. L. Rev. 319, 324, n. 15 (1989); see also F. Rozovsky, Consent to Treatment, A Practical Guide 415–423 (1984).

41, 355 A. 2d, at 664. The court also concluded that the "only practical way" to prevent the loss of Karen's privacy right due to her incompetence was to allow her guardian and family to decide "whether she would exercise it in these circumstances." *Ibid.*

After *Quinlan*, however, most courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right. See L. Tribe, American Constitutional Law § 15–11, p. 1365 (2d ed. 1988). In *Superintendent of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N. E. 2d 417 (1977), the Supreme Judicial Court of Massachusetts relied on both the right of privacy and the right of informed consent to permit the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia. *Id.*, at 737–738, 370 N. E. 2d, at 424. Reasoning that an incompetent person retains the same rights as a competent individual "because the value of human dignity extends to both," the court adopted a "substituted judgment" standard whereby courts were to determine what an incompetent individual's decision would have been under the circumstances. *Id.*, at 745, 752–753, 757–758, 370 N. E. 2d, at 427, 431, 434. Distilling certain state interests from prior case law—the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession—the court recognized the first interest as paramount and noted it was greatest when an affliction was curable, "as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended." *Id.*, at 742, 370 N. E. 2d, at 426.

In *In re Storar*, 52 N. Y. 2d 363, 420 N. E. 2d 64, cert. denied, 454 U. S. 858 (1981), the New York Court of Appeals declined to base a right to refuse treatment on a constitutional privacy right. Instead, it found such a right "ade-

quately supported" by the informed consent doctrine. *Id.*, at 376–377, 420 N. E. 2d, at 70. In *In re Eichner* (decided with *In re Storar*, *supra*), an 83-year-old man who had suffered brain damage from anoxia entered a vegetative state and was thus incompetent to consent to the removal of his respirator. The court, however, found it unnecessary to reach the question whether his rights could be exercised by others since it found the evidence clear and convincing from statements made by the patient when competent that he "did not want to be maintained in a vegetative coma by use of a respirator." *Id.*, at 380, 420 N. E. 2d, at 72. In the companion *Storar* case, a 52-year-old man suffering from bladder cancer had been profoundly retarded during most of his life. Implicitly rejecting the approach taken in *Saikewicz*, *supra*, the court reasoned that due to such life-long incompetency, "it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent." 52 N. Y. 2d, at 380, 420 N. E. 2d, at 72. As the evidence showed that the patient's required blood transfusions did not involve excessive pain and without them his mental and physical abilities would deteriorate, the court concluded that it should not "allow an incompetent patient to bleed to death because someone, even someone as close as a parent or sibling, feels that this is best for one with an incurable disease." *Id.*, at 382, 420 N. E. 2d, at 73.

Many of the later cases build on the principles established in *Quinlan*, *Saikewicz*, and *Storar/Eichner*. For instance, in *In re Conroy*, 98 N. J. 321, 486 A. 2d 1209 (1985), the same court that decided *Quinlan* considered whether a nasogastric feeding tube could be removed from an 84-year-old incompetent nursing-home resident suffering irreversible mental and physical ailments. While recognizing that a federal right of privacy might apply in the case, the court, contrary to its approach in *Quinlan*, decided to base its decision on the common-law right to self-determination and informed con-

sent. 98 N. J., at 348, 486 A. 2d, at 1223. "On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment, even at the risk of death. Most of the cases that have held otherwise, unless they involved the interest in protecting innocent third parties, have concerned the patient's competency to make a rational and considered choice." *Id.*, at 353–354, 486 A. 2d, at 1225.

Reasoning that the right of self-determination should not be lost merely because an individual is unable to sense a violation of it, the court held that incompetent individuals retain a right to refuse treatment. It also held that such a right could be exercised by a surrogate decisionmaker using a "subjective" standard when there was clear evidence that the incompetent person would have exercised it. Where such evidence was lacking, the court held that an individual's right could still be invoked in certain circumstances under objective "best interest" standards. *Id.*, at 361–368, 486 A. 2d, at 1229–1233. Thus, if some trustworthy evidence existed that the individual would have wanted to terminate treatment, but not enough to clearly establish a person's wishes for purposes of the subjective standard, and the burden of a prolonged life from the experience of pain and suffering markedly outweighed its satisfactions, treatment could be terminated under a "limited-objective" standard. Where no trustworthy evidence existed, and a person's suffering would make the administration of life-sustaining treatment inhumane, a "pure-objective" standard could be used to terminate treatment. If none of these conditions obtained, the court held it was best to err in favor of preserving life. *Id.*, at 364–368, 486 A. 2d, at 1231–1233.

The court also rejected certain categorical distinctions that had been drawn in prior refusal-of-treatment cases as lacking substance for decision purposes: the distinction between actively hastening death by terminating treatment and pas-

sively allowing a person to die of a disease; between treating individuals as an initial matter versus withdrawing treatment afterwards; between ordinary versus extraordinary treatment; and between treatment by artificial feeding versus other forms of life-sustaining medical procedures. *Id.*, at 369–374, 486 A. 2d, at 1233–1237. As to the last item, the court acknowledged the "emotional significance" of food, but noted that feeding by implanted tubes is a "medical procedur[e] with inherent risks and possible side effects, instituted by skilled health-care providers to compensate for impaired physical functioning" which analytically was equivalent to artificial breathing using a respirator. *Id.*, at 373, 486 A. 2d, at 1236.[4]

In contrast to *Conroy*, the Court of Appeals of New York recently refused to accept less than the clearly expressed wishes of a patient before permitting the exercise of her right to refuse treatment by a surrogate decisionmaker. *In re Westchester County Medical Center on behalf of O'Connor*, 72 N. Y. 2d 517, 531 N. E. 2d 607 (1988) *(O'Connor)*. There, the court, over the objection of the patient's family members, granted an order to insert a feeding tube into a 77-year-old

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[4] In a later trilogy of cases, the New Jersey Supreme Court stressed that the analytic framework adopted in *Conroy* was limited to elderly, incompetent patients with shortened life expectancies, and established alternative approaches to deal with a different set of situations. See *In re Farrell*, 108 N. J. 335, 529 A. 2d 404 (1987) (37-year-old competent mother with terminal illness had right to removal of respirator based on common law and constitutional principles which overrode competing state interests); *In re Peter*, 108 N. J. 365, 529 A. 2d 419 (1987) (65-year-old woman in persistent vegetative state had right to removal of nasogastric feeding tube—under *Conroy* subjective test, power of attorney and hearsay testimony constituted clear and convincing proof of patient's intent to have treatment withdrawn); *In re Jobes*, 108 N. J. 394, 529 A. 2d 434 (1987) (31-year-old woman in persistent vegetative state entitled to removal of jejunostomy feeding tube—even though hearsay testimony regarding patient's intent insufficient to meet clear and convincing standard of proof, under *Quinlan*, family or close friends entitled to make a substituted judgment for patient).

woman rendered incompetent as a result of several strokes. While continuing to recognize a common-law right to refuse treatment, the court rejected the substituted judgment approach for asserting it "because it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another. Consequently, we adhere to the view that, despite its pitfalls and inevitable uncertainties, the inquiry must always be narrowed to the patient's expressed intent, with every effort made to minimize the opportunity for error." *Id.*, at 530, 531 N. E. 2d, at 613 (citation omitted). The court held that the record lacked the requisite clear and convincing evidence of the patient's expressed intent to withhold life-sustaining treatment. *Id.*, at 531–534, 531 N. E. 2d, at 613–615.

Other courts have found state statutory law relevant to the resolution of these issues. In *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U. S. 958 (1988), the California Court of Appeal authorized the removal of a nasogastric feeding tube from a 44-year-old man who was in a persistent vegetative state as a result of an auto accident. Noting that the right to refuse treatment was grounded in both the common law and a constitutional right of privacy, the court held that a state probate statute authorized the patient's conservator to order the withdrawal of life-sustaining treatment when such a decision was made in good faith based on medical advice and the conservatee's best interests. While acknowledging that "to claim that [a patient's] 'right to choose' survives incompetence is a legal fiction at best," the court reasoned that the respect society accords to persons as individuals is not lost upon incompetence and is best preserved by allowing others "to make a decision that reflects [a patient's] interests more closely than would a purely technological decision to do whatever is possible."[5]

[5] The *Drabick* court drew support for its analysis from earlier, influential decisions rendered by California Courts of Appeal. See *Bouvia* v. *Su-*

Id., at 208, 245 Cal. Rptr., at 854–855. See also *In re Conservatorship of Torres*, 357 N. W. 2d 332 (Minn. 1984) (Minnesota court had constitutional and statutory authority to authorize a conservator to order the removal of an incompetent individual's respirator since in patient's best interests).

In *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N. E. 2d 292 (1989), the Supreme Court of Illinois considered whether a 76-year-old woman rendered incompetent from a series of strokes had a right to the discontinuance of artificial nutrition and hydration. Noting that the boundaries of a federal right of privacy were uncertain, the court found a right to refuse treatment in the doctrine of informed consent. *Id.*, at 43–45, 549 N. E. 2d, at 296–297. The court further held that the State Probate Act impliedly authorized a guardian to exercise a ward's right to refuse artificial sustenance in the event that the ward was terminally ill and irreversibly comatose. *Id.*, at 45–47, 549 N. E. 2d, at 298. Declining to adopt a best interests standard for deciding when it would be appropriate to exercise a ward's right because it "lets another make a determination of a patient's quality of life," the court opted instead for a substituted judgment standard. *Id.*, at 49, 549 N. E. 2d, at 299. Finding the "expressed intent" standard utilized in *O'Connor*, *supra*, too rigid, the court noted that other clear and convincing evidence of the patient's intent could be considered. 133 Ill. 2d, at 50–51, 549 N. E. 2d, at 300. The court also adopted the "consensus opinion [that] treats artificial nutrition and hydration as medical treatment." *Id.*, at 42, 549 N. E. 2d, at 296. Cf. *McConnell* v. *Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705,

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perior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (competent 28-year-old quadriplegic had right to removal of nasogastric feeding tube inserted against her will); *Bartling* v. *Superior Court*, 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (1984) (competent 70-year-old, seriously ill man had right to the removal of respirator); *Barber* v. *Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (physicians could not be prosecuted for homicide on account of removing respirator and intravenous feeding tubes of patient in persistent vegetative state).

553 A. 2d 596, 603 (1989) (right to withdraw artificial nutrition and hydration found in the Connecticut Removal of Life Support Systems Act, which "provid[es] functional guidelines for the exercise of the common law and constitutional rights of self-determination"; attending physician authorized to remove treatment after finding that patient is in a terminal condition, obtaining consent of family, and considering expressed wishes of patient).[6]

As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond that, these cases demonstrate both similarity and diversity in their approaches to decision of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a "right to die." We follow the judicious counsel of our decision in *Twin City Bank* v. *Nebeker*, 167 U. S. 196, 202 (1897), where we said that in deciding "a ques-

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[6] Besides the Missouri Supreme Court in *Cruzan* and the courts in *McConnell*, *Longeway*, *Drabick*, *Bouvia*, *Barber*, *O'Connor*, *Conroy*, *Jobes*, and *Peter*, appellate courts of at least four other States and one Federal District Court have specifically considered and discussed the issue of withholding or withdrawing artificial nutrition and hydration from incompetent individuals. See *Gray* v. *Romeo*, 697 F. Supp. 580 (RI 1988); *In re Gardner*, 534 A. 2d 947 (Me. 1987); *In re Grant*, 109 Wash. 2d 545, 747 P. 2d 445 (1987); *Brophy* v. *New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N. E. 2d 626 (1986); *Corbett* v. *D'Alessandro*, 487 So. 2d 368 (Fla. App. 1986). All of these courts permitted or would permit the termination of such measures based on rights grounded in the common law, or in the State or Federal Constitution.

tion of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 24–30 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease. Decisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests. See, *e. g.*, *Breithaupt* v. *Abram*, 352 U. S. 432, 439 (1957) ("As against the right of an individual that his person be held inviolable . . . must be set the interests of society . . .").

Just this Term, in the course of holding that a State's procedures for administering antipsychotic medication to prisoners were sufficient to satisfy due process concerns, we recognized that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990); see also *id.*, at 229 ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Still other cases support the recognition of a general liberty interest in refusing medical treatment. *Vitek* v. *Jones*, 445 U. S. 480, 494 (1980) (transfer to mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty

interest in not being confined unnecessarily for medical treatment").

But determining that a person has a "liberty interest" under the Due Process Clause does not end the inquiry;[7] "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Youngberg* v. *Romeo*, 457 U. S. 307, 321 (1982). See also *Mills* v. *Rogers*, 457 U. S. 291, 299 (1982).

Petitioners insist that under the general holdings of our cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest. Although we think the logic of the cases discussed above would embrace such a liberty interest, the dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible. But for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.

Petitioners go on to assert that an incompetent person should possess the same right in this respect as is possessed by a competent person. They rely primarily on our decisions in *Parham* v. *J. R.*, *supra*, and *Youngberg* v. *Romeo*, *supra*. In *Parham*, we held that a mentally disturbed minor child had a liberty interest in "not being confined unnecessarily for medical treatment," 442 U. S., at 600, but we certainly did not intimate that such a minor child, after commitment, would have a liberty interest in refusing treatment. In *Youngberg*, we held that a seriously retarded adult had a lib-

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[7] Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest. See *Bowers* v. *Hardwick*, 478 U. S. 186, 194–195 (1986).

erty interest in safety and freedom from bodily restraint, 457 U. S., at 320. *Youngberg*, however, did not deal with decisions to administer or withhold medical treatment.

The difficulty with petitioners' claim is that in a sense it begs the question: An incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right. Such a "right" must be exercised for her, if at all, by some sort of surrogate. Here, Missouri has in effect recognized that under certain circumstances a surrogate may act for the patient in electing to have hydration and nutrition withdrawn in such a way as to cause death, but it has established a procedural safeguard to assure that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent. Missouri requires that evidence of the incompetent's wishes as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not.

Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.[8] We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.

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[8] See Smith, All's Well That Ends Well: Toward a Policy of Assisted Rational Suicide or Merely Enlightened Self-Determination?, 22 U. C. D. L. Rev. 275, 290–291, and n. 106 (1989) (compiling statutes).

But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, 108 N. J. 394, 419, 529 A. 2d 434, 447 (1987). A State is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one, with the added guarantee of accurate factfinding that the adversary process brings with it.[9] See *Ohio* v. *Akron Center for Reproductive*

[9] Since Cruzan was a patient at a state hospital when this litigation commenced, the State has been involved as an adversary from the beginning. However, it can be expected that many disputes of this type will arise in private institutions, where a guardian ad litem or similar party will have been appointed as the sole representative of the incompetent individual in the litigation. In such cases, a guardian may act in entire good faith, and yet not maintain a position truly adversarial to that of the family. Indeed, as noted by the court below, "[t]he guardian *ad litem* [in this case] finds himself in the predicament of believing that it is in Nancy's 'best interest to have the tube feeding discontinued,' but 'feeling that an appeal should be made because our responsibility to her as attorneys and guardians *ad litem* was to pursue this matter to the highest court in the state in view of the fact that this is a case of first impression in the State of Missouri.'" 760 S. W. 2d, at 410, n. 1. Cruzan's guardian ad litem has also filed a brief in this Court urging reversal of the Missouri Supreme Court's decision. None of this is intended to suggest that the guardian acted the least bit improperly in this proceeding. It is only meant to illustrate the limits which may obtain on the adversarial nature of this type of litigation.

Health, *post*, at 515–516. Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.

In our view, Missouri has permissibly sought to advance these interests through the adoption of a "clear and convincing" standard of proof to govern such proceedings. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington* v. *Texas*, 441 U. S. 418, 423 (1979) (quoting *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring)). "This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky* v. *Kramer*, 455 U. S. 745, 756 (1982) (quoting *Addington*, *supra*, at 424). Thus, such a standard has been required in deportation proceedings, *Woodby* v. *INS*, 385 U. S. 276 (1966), in denaturalization proceedings, *Schneiderman* v. *United States*, 320 U. S. 118 (1943), in civil commitment proceedings, *Addington*, *supra*, and in proceedings for the termination of parental rights, *Santosky*, *supra*.[10] Fur-

[10] We recognize that these cases involved instances where the government sought to take action against an individual. See *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 253 (1989) (plurality opinion). Here, by contrast, the government seeks to protect the interests of an individual, as well as its own institutional interests, in life. We do not see any reason why important individual interests should be afforded less protection simply because the government finds itself in the position of defending them. "[W]e find it significant that . . . the defendant rather than the plaintiff" seeks the clear and convincing standard of proof—"suggesting that this standard

ther, this level of proof, "or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as . . . lost wills, oral contracts to make bequests, and the like." *Woodby*, *supra*, at 285, n. 18.

We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as "a societal judgment about how the risk of error should be distributed between the litigants." *Santosky*, *supra*, at 755; *Addington*, *supra*, at 423. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. We believe that Missouri may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. In *Santosky*, one of the factors which led the Court to require proof by clear and convincing evidence in a proceeding to terminate parental rights was that a decision in such a case was final and irrevocable. *Santosky*, *supra*, at 759. The same must surely be said of the decision to discontinue hydration and nutrition of a patient such as Nancy Cruzan, which all agree will result in her death.

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ordinarily serves as a shield rather than . . . a sword." *Id.*, at 253. That it is the government that has picked up the shield should be of no moment.

It is also worth noting that most, if not all, States simply forbid oral testimony entirely in determining the wishes of parties in transactions which, while important, simply do not have the consequences that a decision to terminate a person's life does. At common law and by statute in most States, the parol evidence rule prevents the variations of the terms of a written contract by oral testimony. The statute of frauds makes unenforceable oral contracts to leave property by will, and statutes regulating the making of wills universally require that those instruments be in writing. See 2 A. Corbin, Contracts § 398, pp. 360–361 (1950); 2 W. Page, Law of Wills §§ 19.3–19.5, pp. 61–71 (1960). There is no doubt that statutes requiring wills to be in writing, and statutes of frauds which require that a contract to make a will be in writing, on occasion frustrate the effectuation of the intent of a particular decedent, just as Missouri's requirement of proof in this case may have frustrated the effectuation of the not-fully-expressed desires of Nancy Cruzan. But the Constitution does not require general rules to work faultlessly; no general rule can.

In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. We note that many courts which have adopted some sort of substituted judgment procedure in situations like this, whether they limit consideration of evidence to the prior expressed wishes of the incompetent individual, or whether they allow more general proof of what the individual's decision would have been, require a clear and convincing standard of proof for such evidence. See, *e. g.*, *Longeway*, 133 Ill. 2d, at 50–51, 549 N. E. 2d, at 300; *McConnell*, 209 Conn., at 707–710, 553 A. 2d, at 604–605; *O'Connor*, 72 N. Y. 2d, at 529–530, 531 N. E. 2d, at 613; *In re Gardner*, 534 A. 2d 947, 952–953 (Me. 1987); *In re Jobes*, 108 N. J., at 412–413, 529 A. 2d,

at 443; *Leach* v. *Akron General Medical Center*, 68 Ohio Misc. 1, 11, 426 N. E. 2d 809, 815 (1980).

The Supreme Court of Missouri held that in this case the testimony adduced at trial did not amount to clear and convincing proof of the patient's desire to have hydration and nutrition withdrawn. In so doing, it reversed a decision of the Missouri trial court which had found that the evidence "suggest[ed]" Nancy Cruzan would not have desired to continue such measures, App. to Pet. for Cert. A98, but which had not adopted the standard of "clear and convincing evidence" enunciated by the Supreme Court. The testimony adduced at trial consisted primarily of Nancy Cruzan's statements made to a housemate about a year before her accident that she would not want to live should she face life as a "vegetable," and other observations to the same effect. The observations did not deal in terms with withdrawal of medical treatment or of hydration and nutrition. We cannot say that the Supreme Court of Missouri committed constitutional error in reaching the conclusion that it did.[11]

Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views re-

[11] The clear and convincing standard of proof has been variously defined in this context as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," *In re Westchester County Medical Center on behalf of O'Connor*, 72 N. Y. 2d 517, 531, 531 N. E. 2d 607, 613 (1988) *(O'Connor)*, and as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Jobes*, 108 N. J., at 407–408, 529 A. 2d, at 441 (quotation omitted). In both of these cases the evidence of the patient's intent to refuse medical treatment was arguably stronger than that presented here. The New York Court of Appeals and the Supreme Court of New Jersey, respectively, held that the proof failed to meet a clear and convincing threshold. See *O'Connor*, *supra*, at 526–534, 531 N. E. 2d, at 610–615; *Jobes*, *supra*, at 442–443.

flect the views of the patient. They rely primarily upon our decisions in *Michael H.* v. *Gerald D.*, 491 U. S. 110 (1989), and *Parham* v. *J. R.*, 442 U. S. 584 (1979). But we do not think these cases support their claim. In *Michael H.*, we *upheld* the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around into a constitutional requirement that a State *must* recognize the primacy of those relationships in a situation like this. And in *Parham*, where the patient was a minor, we also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way.

No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself. Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. All of the reasons previously discussed for allowing Missouri to require clear and convincing evidence of the patient's wishes lead us to conclude that the State may

choose to defer only to those wishes, rather than confide the decision to close family members.[12]

The judgment of the Supreme Court of Missouri is

Affirmed.

JUSTICE O'CONNOR, concurring.

I agree that a protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, see *ante*, at 278–279, and that the refusal of artificially delivered food and water is encompassed within that liberty interest. See *ante*, at 279. I write separately to clarify why I believe this to be so.

As the Court notes, the liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. See *ante*, at 278–279. Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. See, *e. g.*, *Rochin* v. *California*, 342 U. S. 165, 172 (1952) ("Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his

[12] We are not faced in this case with the question whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.

Petitioners also adumbrate in their brief a claim based on the Equal Protection Clause of the Fourteenth Amendment to the effect that Missouri has impermissibly treated incompetent patients differently from competent ones, citing the statement in *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 439 (1985), that the Clause is "essentially a direction that all persons similarly situated should be treated alike." The differences between the choice made *by* a competent person to refuse medical treatment, and the choice made *for* an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.

stomach's contents . . . is bound to offend even hardened sensibilities"); *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891). Our Fourth Amendment jurisprudence has echoed this same concern. See *Schmerber* v. *California*, 384 U. S. 757, 772 (1966) ("The integrity of an individual's person is a cherished value of our society"); *Winston* v. *Lee*, 470 U. S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"). The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions. Such forced treatment may burden that individual's liberty interests as much as any state coercion. See, *e. g.*, *Washington* v. *Harper*, 494 U. S. 210, 221 (1990); *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment").

The State's artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment. See, *e. g.*, Council on Ethical and Judicial Affairs, American Medical Association, AMA Ethical Opinion 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment, Current Opinions 13 (1989); The Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying 59 (1987). Whether or not the techniques used to pass food and water into the patient's alimentary tract are termed "medical treatment," it is clear they all involve some degree of intrusion and restraint. Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's

nose, throat, and esophagus and into the stomach. Because of the discomfort such a tube causes, "[m]any patients need to be restrained forcibly and their hands put into large mittens to prevent them from removing the tube." Major, The Medical Procedures for Providing Food and Water: Indications and Effects, in By No Extraordinary Means: The Choice to Forgo Life-Sustaining Food and Water 25 (J. Lynn ed. 1986). A gastrostomy tube (as was used to provide food and water to Nancy Cruzan, see *ante*, at 266) or jejunostomy tube must be surgically implanted into the stomach or small intestine. Office of Technology Assessment Task Force, Life-Sustaining Technologies and the Elderly 282 (1988). Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. See *ante*, at 287, n. 12. In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment. Few individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent.[1]

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[1] See 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 241–242 (1982) (36% of those surveyed gave instructions regarding how they would like to be treated if they ever became too sick to make decisions; 23% put those instructions in writing) (Lou Harris Poll, September 1982); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29–30 (1988) (56% of those surveyed had told family members their wishes concerning the use of life-sustaining treatment if they entered an irreversible coma; 15% had filled out a living will specifying those wishes).

States which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent. Such failures might be avoided if the State considered an equally probative source of evidence: the patient's appointment of a proxy to make health care decisions on her behalf. Delegating the authority to make medical decisions to a family member or friend is becoming a common method of planning for the future. See, *e. g.*, Areen, The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment, 258 JAMA 229, 230 (1987). Several States have recognized the practical wisdom of such a procedure by enacting durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment decisions.[2] Some state courts have suggested that an agent appointed pursuant to a general durable power of attorney statute would also be empowered to make health care decisions on behalf of the patient.[3] See, *e. g.*, *In re Peter*, 108 N. J. 365, 378–379, 529

[2] At least 13 States and the District of Columbia have durable power of attorney statutes expressly authorizing the appointment of proxies for making health care decisions. See Alaska Stat. Ann. §§ 13.26.335, 13.26.344(*l*) (Supp. 1989); Cal. Civ. Code Ann. § 2500 (West Supp. 1990); D. C. Code Ann. § 21–2205 (1989); Idaho Code § 39–4505 (Supp. 1989); Ill. Rev. Stat., ch. 110½, ¶¶ 804–1 to 804–12 (Supp. 1988); Kan. Stat. Ann. § 58–625 (Supp. 1989); Me. Rev. Stat. Ann., Tit. 18–A, § 5–501 (Supp. 1989); Nev. Rev. Stat. § 449.800 (Supp. 1989); Ohio Rev. Code Ann. § 1337.11 *et seq.* (Supp. 1989); Ore. Rev. Stat. § 127.510 (1989); Pa. Stat. Ann., Tit. 20, § 5603(h) (Purdon Supp. 1989); R. I. Gen. Laws § 23–4.10–1 *et seq.* (1989); Tex. Rev. Civ. Stat. Ann., Art. 4590h–1 (Vernon Supp. 1990); Vt. Stat. Ann., Tit. 14, § 3451 *et seq.* (1989).

[3] All 50 States and the District of Columbia have general durable power of attorney statutes. See Ala. Code § 26–1–2 (1986); Alaska Stat. Ann. §§ 13–26–350 to 13–26–356 (Supp. 1989); Ariz. Rev. Stat. Ann. § 14–5501 (1975); Ark. Code Ann. §§ 28–68–201 to 28–68–203 (1987); Cal. Civ. Code Ann. § 2400 (West Supp. 1990); Colo. Rev. Stat. § 15–14–501 *et seq.* (1987); Conn. Gen. Stat. § 45–69*o* (Supp. 1989); Del. Code Ann., Tit. 12, §§ 4901–4905 (1987); D. C. Code Ann. § 21–2081 *et. seq.* (1989); Fla. Stat. § 709.08 (1989); Ga. Code Ann. § 10–6–36 (1989); Haw. Rev. Stat. §§ 551D–1 to 551D–7 (Supp. 1989); Idaho Code § 15–5–501 *et seq.* (Supp. 1989); Ill. Rev. Stat.,

A. 2d 419, 426 (1987); see also 73 Op. Md. Atty. Gen. No. 88–046 (1988) (interpreting Md. Est. & Trusts Code Ann. §§ 13–601 to 13–602 (1974), as authorizing a delegatee to make health care decisions). Other States allow an individual to designate a proxy to carry out the intent of a living will.[4] These procedures for surrogate decisionmaking, which appear to be rapidly gaining in acceptance, may be a

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ch. 110½, ¶ 802–6 (1987); Ind. Code §§ 30–2–11–1 to 30–2–11–7 (1988); Iowa Code § 633.705 (Supp. 1989); Kan. Stat. Ann. § 58–610 (1983); Ky. Rev. Stat. Ann. § 386.093 (Baldwin 1983); La. Civ. Code Ann., Art. 3027 (West Supp. 1990); Me. Rev. Stat. Ann., Tit. 18–A, § 5–501 *et seq.* (Supp. 1989); Md. Est. & Trusts Code Ann. §§ 13–601 to 13–602 (1974) (as interpreted by the Attorney General, see 73 Op. Md. Atty. Gen. No. 88–046 (Oct. 17, 1988)); Mass. Gen. Laws §§ 201B:1 to 201B:7 (1988); Mich. Comp. Laws §§ 700.495, 700.497 (1979); Minn. Stat. § 523.01 *et seq.* (1988); Miss. Code Ann. § 87– 3–13 (Supp. 1989); Mo. Rev. Stat. § 404.700 (Supp. 1990); Mont. Code Ann. §§ 72–5–501 to 72–5–502 (1989); Neb. Rev. Stat. §§ 30–2664 to 30–2672, 30–2667 (1985); Nev. Rev. Stat. § 111.460 *et seq.* (1986); N. H. Rev. Stat. Ann. § 506:6 *et seq.* (Supp. 1989); N. J. Stat. Ann. § 46:2B–8 (West 1989); N. M. Stat. Ann. § 45–5–501 *et seq.* (1989); N. Y. Gen. Oblig. Law § 5–1602 (McKinney 1989); N. C. Gen. Stat. § 32A–1 *et seq.* (1987); N. D. Cent. Code §§ 30.1–30–01 to 30.1–30–05 (Supp. 1989); Ohio Rev. Code Ann. § 1337.09 (Supp. 1989); Okla. Stat., Tit. 58, §§ 1071–1077 (Supp. 1989); Ore. Rev. Stat. § 127.005 (1989); Pa. Stat. Ann., Tit. 20, §§ 5601 *et seq.*, 5602(a)(9) (Purdon Supp. 1989); R. I. Gen. Laws § 34–22–6.1 (1984); S. C. Code Ann. §§ 62–5–501 to 62–5–502 (1987); S. D. Codified Laws § 59–7–2.1 (1978); Tenn. Code Ann. § 34–6–101 *et seq.* (1984); Tex. Prob. Code Ann. § 36A (Supp. 1990); Utah Code Ann. § 75–5–501 *et seq.* (1978); Vt. Stat. Ann., Tit. 14, § 3051 *et seq.* (1989); Va. Code Ann. § 11–9.1 *et seq.* (1989); Wash. Rev. Code § 11.94.020 (1989); W. Va. Code § 39–4–1 *et seq.* (Supp. 1989); Wis. Stat. § 243.07 (1987–1988) (as interpreted by the Attorney General, see Wis. Op. Atty. Gen. 35–88 (1988)); Wyo. Stat. § 3–5–101 *et seq.* (1985).

[4] Thirteen States have living will statutes authorizing the appointment of health care proxies. See Ark. Code Ann. § 20–17–202 (Supp. 1989); Del. Code Ann., Tit. 16, § 2502 (1983); Fla. Stat. § 765.05(2) (1989); Idaho Code § 39–4504 (Supp. 1989); Ind. Code § 16–8–11–14(g)(2) (1988); Iowa Code § 144A.7(1)(a) (1989); La. Rev. Stat. Ann. §§ 40:1299.58.1, 40:1299.58.3(C) (West Supp. 1990); Minn. Stat. § 145B.01 *et seq.* (Supp. 1989); Tex. Health & Safety Code Ann. § 672.003(d) (Supp. 1990); Utah Code Ann. §§ 75–2–1105, 75–2–1106 (Supp. 1989); Va. Code Ann. § 54.1–2986(2) (1988); 1987 Wash. Laws, ch. 162, § 1(1)(b); Wyo. Stat. § 35–22–102 (1988).

valuable additional safeguard of the patient's interest in directing his medical care. Moreover, as patients are likely to select a family member as a surrogate, see 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 240 (1982), giving effect to a proxy's decisions may also protect the "freedom of personal choice in matters of . . . family life." *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632, 639 (1974).

Today's decision, holding only that the Constitution permits a State to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate. Nor does it prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment. As is evident from the Court's survey of state court decisions, see *ante*, at 271–277, no national consensus has yet emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States, *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), in the first instance.

JUSTICE SCALIA, concurring.

The various opinions in this case portray quite clearly the difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it. The States have begun to grapple with these problems through legislation. I am concerned, from the tenor of today's opinions, that we are poised to confuse that

enterprise as successfully as we have confused the enterprise of legislating concerning abortion—requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

While I agree with the Court's analysis today, and therefore join in its opinion, I would have preferred that we announce, clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it *is* demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve his or her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about "life and death" than they do) that they will decide upon a line less reasonable.

The text of the Due Process Clause does not protect individuals against deprivations of liberty *simpliciter*. It protects them against deprivations of liberty "without due process of law." To determine that such a deprivation would not occur if Nancy Cruzan were forced to take nourishment against her will, it is unnecessary to reopen the historically recurrent debate over whether "due process" includes substantive restrictions. Compare *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272 (1856), with *Scott*

v. *Sandford*, 19 How. 393, 450 (1857); compare *Tyson & Brother* v. *Banton*, 273 U. S. 418 (1927), with *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn., Inc.*, 313 U. S. 236, 246–247 (1941); compare *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963), with *Moore* v. *East Cleveland*, 431 U. S. 494 (1977) (plurality opinion); see Easterbrook, Substance and Due Process, 1982 S. Ct. Rev. 85; Monaghan, Our Perfect Constitution, 56 N. Y. U. L. Rev. 353 (1981). It is at least true that no "substantive due process" claim can be maintained unless the claimant demonstrates that the State has deprived him of a right historically and traditionally protected against state interference. *Michael H.* v. *Gerald D.*, 491 U. S. 110, 122 (1989) (plurality opinion); *Bowers* v. *Hardwick*, 478 U. S. 186, 192 (1986); *Moore*, *supra*, at 502–503 (plurality opinion). That cannot possibly be established here.

At common law in England, a suicide—defined as one who "deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death," 4 W. Blackstone, Commentaries *189—was criminally liable. *Ibid.* Although the States abolished the penalties imposed by the common law (*i. e.*, forfeiture and ignominious burial), they did so to spare the innocent family and not to legitimize the act. Case law at the time of the adoption of the Fourteenth Amendment generally held that assisting suicide was a criminal offense. See Marzen, O'Dowd, Crone, & Balch, Suicide: A Constitutional Right?, 24 Duquesne L. Rev. 1, 76 (1985) ("In short, twenty-one of the thirty-seven states, and eighteen of the thirty ratifying states prohibited assisting suicide. Only eight of the states, and seven of the ratifying states, definitely did not"); see also 1 F. Wharton, Criminal Law § 122 (6th rev. ed. 1868). The System of Penal Law presented to the House of Representatives by Representative Livingston in 1828 would have criminalized assisted suicide. E. Livingston, A System of Penal Law, Penal Code 122 (1828). The Field Penal Code,

adopted by the Dakota Territory in 1877, proscribed attempted suicide and assisted suicide. Marzen, O'Dowd, Crone, & Balch, *supra*, at 76–77. And most States that did not explicitly prohibit assisted suicide in 1868 recognized, when the issue arose in the 50 years following the Fourteenth Amendment's ratification, that assisted and (in some cases) attempted suicide were unlawful. *Id.*, at 77–100; *id.*, at 148–242 (surveying development of States' laws). Thus, "there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.*, at 100 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)).

Petitioners rely on three distinctions to separate Nancy Cruzan's case from ordinary suicide: (1) that she is permanently incapacitated and in pain; (2) that she would bring on her death not by any affirmative act but by merely declining treatment that provides nourishment; and (3) that preventing her from effectuating her presumed wish to die requires violation of her bodily integrity. None of these suffices. Suicide was not excused even when committed "to avoid those ills which [persons] had not the fortitude to endure." 4 Blackstone, *supra*, at *189. "The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." *Blackburn* v. *State*, 23 Ohio St. 146, 163 (1873). Thus, a man who prepared a poison, and placed it within reach of his wife, "to put an end to her suffering" from a terminal illness was convicted of murder, *People* v. *Roberts*, 211 Mich. 187, 198, 178 N. W. 690, 693 (1920); the "incurable suffering of the suicide, as a legal question, could hardly affect the degree of criminality . . . ." Note, 30 Yale L. J. 408, 412 (1921) (discussing *Roberts*). Nor would the imminence of the patient's death have

affected liability. "The lives of all are equally under the protection of the law, and under that protection to their last moment. . . . [Assisted suicide] is declared by the law to be murder, irrespective of the wishes or the condition of the party to whom the poison is administered . . . ." *Blackburn*, *supra*, at 163; see also *Commonwealth* v. *Bowen*, 13 Mass. 356, 360 (1816).

The second asserted distinction—suggested by the recent cases canvassed by the Court concerning the right to refuse treatment, *ante*, at 270–277—relies on the dichotomy between action and inaction. Suicide, it is said, consists of an affirmative act to end one's life; refusing treatment is not an affirmative act "causing" death, but merely a passive acceptance of the natural process of dying. I readily acknowledge that the distinction between action and inaction has some bearing upon the legislative judgment of what ought to be prevented as suicide—though even there it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction. It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing. Even as a legislative matter, in other words, the intelligent line does not fall between action and inaction but between those forms of inaction that consist of abstaining from "ordinary" care and those that consist of abstaining from "excessive" or "heroic" measures. Unlike action versus inaction, that is not a line to be discerned by logic or legal analysis, and we should not pretend that it is.

But to return to the principal point for present purposes: the irrelevance of the action-inaction distinction. Starving oneself to death is no different from putting a gun to one's temple as far as the common-law definition of suicide is concerned; the cause of death in both cases is the suicide's con-

scious decision to "pu[t] an end to his own existence." 4 Blackstone, *supra*, at *189. See *In re Caulk*, 125 N. H. 226, 232, 480 A. 2d 93, 97 (1984); *State ex rel. White* v. *Narick*, 170 W. Va. 195, 292 S. E. 2d 54 (1982); *Von Holden* v. *Chapman*, 87 App. Div. 2d 66, 450 N. Y. S. 2d 623 (1982). Of course the common law rejected the action-inaction distinction in other contexts involving the taking of human life as well. In the prosecution of a parent for the starvation death of her infant, it was no defense that the infant's death was "caused" by no action of the parent but by the natural process of starvation, or by the infant's natural inability to provide for itself. See *Lewis* v. *State*, 72 Ga. 164 (1883); *People* v. *McDonald*, 49 Hun 67, 1 N. Y. S. 703 (5th Dept., App. Div. 1888); *Commonwealth* v. *Hall*, 322 Mass. 523, 528, 78 N. E. 2d 644, 647 (1948) (collecting cases); F. Wharton, Law of Homicide §§ 134–135, 304 (2d ed. 1875); 2 J. Bishop, Commentaries on Criminal Law § 686 (5th ed. 1872); J. Hawley & M. McGregor, Criminal Law 152 (3d ed. 1899). A physician, moreover, could be criminally liable for failure to provide care that could have extended the patient's life, even if death was immediately caused by the underlying disease that the physician failed to treat. *Barrow* v. *State*, 17 Okla. Cr. 340, 188 P. 351 (1920); *People* v. *Phillips*, 64 Cal. 2d 574, 414 P. 2d 353 (1966).

It is not surprising, therefore, that the early cases considering the claimed right to refuse medical treatment dismissed as specious the nice distinction between "passively submitting to death and actively seeking it. The distinction may be merely verbal, as it would be if an adult sought death by starvation instead of a drug. If the State may interrupt one mode of self-destruction, it may with equal authority interfere with the other." *John F. Kennedy Memorial Hosp.* v. *Heston*, 58 N. J. 576, 581–582, 279 A. 2d 670, 672–673 (1971); see also *Application of President & Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 88–89, 331 F. 2d 1000,

1008–1009 (Wright, J., in chambers), cert. denied, 377 U. S. 978 (1964).

The third asserted basis of distinction—that frustrating Nancy Cruzan's wish to die in the present case requires interference with her bodily integrity—is likewise inadequate, because such interference is impermissible only if one begs the question whether her refusal to undergo the treatment on her own is suicide. It has always been lawful not only for the State, but even for private citizens, to interfere with bodily integrity to prevent a felony. See *Phillips* v. *Trull*, 11 Johns. 486 (N. Y. 1814); *City Council* v. *Payne*, 2 Nott & McCord 475 (S. C. 1821); *Vandeveer* v. *Mattocks*, 3 Ind. 479 (1852); T. Cooley, Law of Torts 174–175 (1879); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 673 (1924); Restatement of Torts § 119 (1934). That general rule has of course been applied to suicide. At common law, even a private person's use of force to prevent suicide was privileged. *Colby* v. *Jackson*, 12 N. H. 526, 530–531 (1842); *Look* v. *Choate*, 108 Mass. 116, 120 (1871); *Commonwealth* v. *Mink*, 123 Mass. 422, 429 (1877); *In re Doyle*, 16 R. I. 537, 539, 18 A. 159, 159–160 (1889); *Porter* v. *Ritch*, 70 Conn. 235, 255, 39 A. 169, 175 (1898); *Emmerich* v. *Thorley*, 35 App. Div. 452, 456, 54 N. Y. S. 791, 793–794 (1898); *State* v. *Hembd*, 305 Minn. 120, 130, 232 N. W. 2d 872, 878 (1975); 2 C. Addison, Law of Torts § 819 (1876); Cooley, *supra*, at 179–180. It is not even reasonable, much less required by the Constitution, to maintain that although the State has the right to prevent a person from slashing his wrists, it does not have the power to apply physical force to prevent him from doing so, nor the power, should he succeed, to apply, coercively if necessary, medical measures to stop the flow of blood. The state-run hospital, I am certain, is not liable under 42 U. S. C. § 1983 for violation of constitutional rights, nor the private hospital liable under general tort law, if, in a State where suicide is unlawful, it pumps out the stomach of a person who has inten-

tionally taken an overdose of barbiturates, despite that person's wishes to the contrary.

The dissents of JUSTICES BRENNAN and STEVENS make a plausible case for our intervention here only by embracing—the latter explicitly and the former by implication—a political principle that the States are free to adopt, but that is demonstrably not imposed by the Constitution. "[T]he State," says JUSTICE BRENNAN, "has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice *to avoid medical treatment*." *Post*, at 313 (emphasis added). The italicized phrase sounds moderate enough and is all that is needed to cover the present case—but the proposition cannot *logically* be so limited. One who accepts it must also accept, I think, that the State has no such legitimate interest that could outweigh "the person's choice *to put an end to her life*." Similarly, if one agrees with JUSTICE BRENNAN that "the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination *in her choice of medical treatment*," *post*, at 314 (emphasis added), he must also believe that the State must accede to her "particularized and intense interest in self-determination *in her choice whether to continue living or to die*." For insofar as balancing the relative interests of the State and the individual is concerned, there is nothing distinctive about accepting death through the refusal of "medical treatment," as opposed to accepting it through the refusal of food, or through the failure to shut off the engine and get out of the car after parking in one's garage after work. Suppose that Nancy Cruzan were in precisely the condition she is in today, except that she could be fed and digest food and water *without* artificial assistance. How is the State's "interest" in keeping her alive thereby increased, or her interest in deciding whether she wants to continue living reduced? It seems to me, in other words, that JUSTICE BRENNAN's position ultimately rests upon the proposition that it is none of the State's

business if a person wants to commit suicide. JUSTICE STEVENS is explicit on the point: "Choices about death touch the core of liberty. . . . [N]ot much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience." *Post*, at 343. This is a view that some societies have held, and that our States are free to adopt if they wish. But it is not a view imposed by our constitutional traditions, in which the power of the State to prohibit suicide is unquestionable.

What I have said above is not meant to suggest that I would think it desirable, if we were sure that Nancy Cruzan wanted to die, to keep her alive by the means at issue here. I assert only that the Constitution has nothing to say about the subject. To raise up a constitutional right here we would have to create out of nothing (for it exists neither in text nor tradition) some constitutional principle whereby, although the State may insist that an individual come in out of the cold and eat food, it may not insist that he take medicine; and although it may pump his stomach empty of poison he has ingested, it may not fill his stomach with food he has failed to ingest. Are there, then, no reasonable and humane limits that ought not to be exceeded in requiring an individual to preserve his own life? There obviously are, but they are not set forth in the Due Process Clause. What assures us that those limits will not be exceeded is the same constitutional guarantee that is the source of most of our protection—what protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day, none of which horribles are categorically prohibited by the Constitution. Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me. This Court need not, and has no authority to, inject itself into every field of human activity

where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself.

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

> "Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues. Some patients, however, want no part of a life sustained only by medical technology. Instead, they prefer a plan of medical treatment that allows nature to take its course and permits them to die with dignity."[1]

Nancy Cruzan has dwelt in that twilight zone for six years. She is oblivious to her surroundings and will remain so. *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 411 (Mo. 1988). Her body twitches only reflexively, without consciousness. *Ibid.* The areas of her brain that once thought, felt, and experienced sensations have degenerated badly and are continuing to do so. The cavities remaining are filling with cerebrospinal fluid. The "'cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.'" *Ibid.* "Nancy will never interact meaningfully with her environment again. She will remain in a persistent vegetative state until her death." *Id.*, at 422.[2] Because she cannot swallow, her nutrition and hydration are delivered through a tube surgically implanted in her stomach.

A grown woman at the time of the accident, Nancy had previously expressed her wish to forgo continuing medical care under circumstances such as these. Her family and her

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[1] *Rasmussen* v. *Fleming*, 154 Ariz. 207, 211, 741 P. 2d 674, 678 (1987) (en banc).

[2] Vegetative state patients may *react reflexively* to sounds, movements, and normally painful stimuli, but they do not *feel* any pain or *sense* anybody or anything. Vegetative state patients may appear awake but are completely unaware. See Cranford, The Persistent Vegetative State: The Medical Reality, 18 Hastings Ctr. Rep. 27, 28, 31 (1988).

friends are convinced that this is what she would want. See n. 20, *infra*. A guardian ad litem appointed by the trial court is also convinced that this is what Nancy would want. See 760 S. W. 2d, at 444 (Higgins, J., dissenting from denial of rehearing). Yet the Missouri Supreme Court, alone among state courts deciding such a question, has determined that an irreversibly vegetative patient will remain a passive prisoner of medical technology—for Nancy, perhaps for the next 30 years. See *id.*, at 424, 427.

Today the Court, while tentatively accepting that there is some degree of constitutionally protected liberty interest in avoiding unwanted medical treatment, including life-sustaining medical treatment such as artificial nutrition and hydration, affirms the decision of the Missouri Supreme Court. The majority opinion, as I read it, would affirm that decision on the ground that a State may require "clear and convincing" evidence of Nancy Cruzan's prior decision to forgo life-sustaining treatment under circumstances such as hers in order to ensure that her actual wishes are honored. See *ante*, at 282–283, 286–287. Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity.

I

A

"[T]he timing of death—once a matter of fate—is now a matter of human choice." Office of Technology Assessment Task Force, Life Sustaining Technologies and the Elderly 41 (1988). Of the approximately 2 million people who die each year, 80% die in hospitals and long-term care institutions,[3]

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[3] See President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life

and perhaps 70% of those after a decision to forgo life-sustaining treatment has been made.[4] Nearly every death involves a decision whether to undertake some medical procedure that could prolong the process of dying. Such decisions are difficult and personal. They must be made on the basis of individual values, informed by medical realities, yet within a framework governed by law. The role of the courts is confined to defining that framework, delineating the ways in which government may and may not participate in such decisions.

The question before this Court is a relatively narrow one: whether the Due Process Clause allows Missouri to require a now-incompetent patient in an irreversible persistent vegetative state to remain on life support absent rigorously clear and convincing evidence that avoiding the treatment represents the patient's prior, express choice. See *ante*, at 277–278. If a fundamental right is at issue, Missouri's rule of decision must be scrutinized under the standards this Court has always applied in such circumstances. As we said in *Zablocki* v. *Redhail*, 434 U. S. 374, 388 (1978), if a requirement imposed by a State "significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." The Constitution imposes on this Court the obligation to "examine carefully . . . the extent to which [the legitimate government interests advanced] are served by the challenged regulation." *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977). See also *Carey* v. *Population Services International*, 431 U. S. 678, 690 (1977) (invalidating a requirement that bore "no relation to the State's interest"). An evidentiary rule, just as a substantive prohibition, must meet these standards if it significantly burdens a fundamental liberty interest. Funda-

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Sustaining Treatment 15, n. 1, and 17–18 (1983) (hereafter President's Commission).

[4] See Lipton, Do-Not-Resuscitate Decisions in a Community Hospital: Incidence, Implications and Outcomes, 256 JAMA 1164, 1168 (1986).

mental rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates* v. *Little Rock*, 361 U. S. 516, 523 (1960).

B

The starting point for our legal analysis must be whether a competent person has a constitutional right to avoid unwanted medical care. Earlier this Term, this Court held that the Due Process Clause of the Fourteenth Amendment confers a significant liberty interest in avoiding unwanted medical treatment. *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990). Today, the Court concedes that our prior decisions "support the recognition of a general liberty interest in refusing medical treatment." See *ante*, at 278. The Court, however, avoids discussing either the measure of that liberty interest or its application by assuming, for purposes of this case only, that a competent person has a constitutionally protected liberty interest in being free of unwanted artificial nutrition and hydration. See *ante*, at 279. JUSTICE O'CONNOR's opinion is less parsimonious. She openly affirms that "the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause," that there is a liberty interest in avoiding unwanted medical treatment, and that it encompasses the right to be free of "artificially delivered food and water." See *ante*, at 287.

But if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and JUSTICE O'CONNOR concede, it must be fundamental. "We are dealing here with [a decision] which involves one of the basic civil rights of man." *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942) (invalidating a statute authorizing sterilization of certain felons). Whatever other liberties protected by the Due Process Clause are fundamental, "those liberties that are 'deeply rooted in this Nation's history and tradition'" are among them. *Bowers* v. *Hardwick*,

478 U. S. 186, 192 (1986) (quoting *Moore* v. *East Cleveland*, *supra*, at 503 (plurality opinion). "Such a tradition commands respect in part because the Constitution carries the gloss of history." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 589 (1980) (BRENNAN, J., concurring in judgment).

The right to be free from medical attention without consent, to determine what shall be done with one's own body, *is* deeply rooted in this Nation's traditions, as the majority acknowledges. See *ante*, at 270. This right has long been "firmly entrenched in American tort law" and is securely grounded in the earliest common law. *Ante*, at 269. See also *Mills* v. *Rogers*, 457 U. S. 291, 294, n. 4 (1982) ("[T]he right to refuse any medical treatment emerged from the doctrines of trespass and battery, which were applied to unauthorized touchings by a physician"). "Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment." *Natanson* v. *Kline*, 186 Kan. 393, 406–407, 350 P. 2d 1093, 1104 (1960). "The inviolability of the person" has been held as "sacred" and "carefully guarded" as any common-law right. *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251–252 (1891). Thus, freedom from unwanted medical attention is unquestionably among those principles "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934).[5]

[5] See, *e. g.*, *Canterbury* v. *Spence*, 150 U. S. App. D. C. 263, 271, 464 F. 2d 772, 780, cert. denied, 409 U. S. 1064 (1972) ("The root premise" of informed consent "is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body' ") (quoting *Schloendorff* v. *Society of New York Hospital*, 211 N. Y. 125, 129–130, 105 N. E. 92, 93 (1914) (Cardozo, J.)). See generally *Washington* v. *Harper*, 494 U. S. 210, 241 (1990) (STEVENS, J., dissenting) ("There is no doubt . . . that a

That there may be serious consequences involved in refusal of the medical treatment at issue here does not vitiate the right under our common-law tradition of medical self-determination. It is "a well-established rule of general law . . . that it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all. . . . The rule has never been qualified in its application by either the nature or purpose of the treatment, or the gravity of the consequences of acceding to or foregoing it." *Tune* v. *Walter Reed Army Medical Hospital*, 602 F. Supp. 1452, 1455 (DC 1985). See also *Downer* v. *Veilleux*, 322 A. 2d 82, 91 (Me. 1974) ("The rationale of this rule lies in the fact that every competent adult has the right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks, however unwise his sense of values may be to others").[6]

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competent individual's right to refuse [psychotropic] medication is a fundamental liberty interest deserving the highest order of protection").

[6] Under traditional tort law, exceptions have been found only to protect dependent children. See *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 422, n. 17 (Mo. 1988) (citing cases where Missouri courts have ordered blood transfusions for children over the religious objection of parents); see also *Winthrop University Hospital* v. *Hess*, 128 Misc. 2d 804, 490 N. Y. S. 2d 996 (Sup. Ct. Nassau Cty. 1985) (court ordered blood transfusion for religious objector because she was the mother of an infant and had explained that her objection was to the signing of the consent, not the transfusion itself); *Application of President & Directors of Georgetown College, Inc.*, 118 U. S. App. D. C. 80, 88, 331 F. 2d 1000, 1008 (blood transfusion ordered for mother of infant), cert. denied, 377 U. S. 978 (1964). Cf. *In re Estate of Brooks*, 32 Ill. 2d 361, 373, 205 N. E. 2d 435, 441–442 (1965) (finding that lower court erred in ordering a blood transfusion for a woman—whose children were grown—and concluding: "Even though we may consider appellant's beliefs unwise, foolish or ridiculous, in the absence of an overriding danger to society we may not permit interference therewith in the form of a conservatorship established in the waning hours of her life for the sole purpose of compelling her to accept medical treatment forbidden by her religious principles, and previously refused by her with full knowledge of the probable consequences").

No material distinction can be drawn between the treatment to which Nancy Cruzan continues to be subject—artificial nutrition and hydration—and any other medical treatment. See *ante*, at 288–289 (O'CONNOR, J., concurring). The artificial delivery of nutrition and hydration is undoubtedly medical treatment. The technique to which Nancy Cruzan is subject—artificial feeding through a gastrostomy tube—involves a tube implanted surgically into her stomach through incisions in her abdominal wall. It may obstruct the intestinal tract, erode and pierce the stomach wall, or cause leakage of the stomach's contents into the abdominal cavity. See Page, Andrassy, & Sandler, Techniques in Delivery of Liquid Diets, in Nutrition in Clinical Surgery 66–67 (M. Deitel 2d ed. 1985). The tube can cause pneumonia from reflux of the stomach's contents into the lung. See Bernard & Forlaw, Complications and Their Prevention, in Enteral and Tube Feeding 553 (J. Rombeau & M. Caldwell eds. 1984). Typically, and in this case (see Tr. 377), commercially prepared formulas are used, rather than fresh food. See Matarese, Enteral Alimentation, in Surgical Nutrition 726 (J. Fischer ed. 1983). The type of formula and method of administration must be experimented with to avoid gastrointestinal problems. *Id.*, at 748. The patient must be monitored daily by medical personnel as to weight, fluid intake, and fluid output; blood tests must be done weekly. *Id.*, at 749, 751.

Artificial delivery of food and water is regarded as medical treatment by the medical profession and the Federal Government.[7] According to the American Academy of Neurology:

[7] The Missouri court appears to be alone among state courts to suggest otherwise, 760 S. W. 2d, at 419 and 423, although the court did not rely on a distinction between artificial feeding and other forms of medical treatment. *Id.*, at 423. See, *e. g.*, *Delio* v. *Westchester County Medical Center*, 129 App. Div. 2d 1, 19, 516 N. Y. S. 2d 677, 689 (1987) ("[R]eview of the decisions in other jurisdictions . . . failed to uncover a single case in which a court confronted with an application to discontinue feeding by artificial means has evaluated medical procedures to provide nutrition and hydration differently from other types of life-sustaining procedures").

"The artificial provision of nutrition and hydration is a form of medical treatment . . . analogous to other forms of life-sustaining treatment, such as the use of the respirator. When a patient is unconscious, both a respirator and an artificial feeding device serve to support or replace normal bodily functions that are compromised as a result of the patient's illness." Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 Neurology 125 (Jan. 1989). See also Council on Ethical and Judicial Affairs of the American Medical Association, Current Opinions, Opinion 2.20 (1989) ("Life-prolonging medical treatment includes medication and artifically or technologically supplied respiration, nutrition or hydration"); President's Commission 88 (life-sustaining treatment includes respirators, kidney dialysis machines, and special feeding procedures). The Federal Government permits the cost of the medical devices and formulas used in enteral feeding to be reimbursed under Medicare. See Pub. L. 99–509, § 9340, note following 42 U. S. C. § 1395u, p. 592 (1982 ed., Supp. V). The formulas are regulated by the federal Food and Drug Administration as "medical foods," see 21 U. S. C. § 360ee, and the feeding tubes are regulated as medical devices, 21 CFR § 876.5980 (1989).

Nor does the fact that Nancy Cruzan is now incompetent deprive her of her fundamental rights. See *Youngberg* v. *Romeo*, 457 U. S. 307, 315–316, 319 (1982) (holding that severely retarded man's liberty interests in safety, freedom from bodily restraint, and reasonable training survive involuntary commitment); *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) (recognizing a child's substantial liberty interest in not being confined unnecessarily for medical treatment); *Jackson* v. *Indiana*, 406 U. S. 715, 730, 738 (1972) (holding that Indiana could not violate the due process and equal protection rights of a mentally retarded deaf mute by committing him for an indefinite amount of time simply because he was incompetent to stand trial on the criminal charges filed against

him). As the majority recognizes, *ante*, at 280, the question is not whether an incompetent has constitutional rights, but how such rights may be exercised. As we explained in *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988): "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." *Id.*, at 825, n. 23 (emphasis added). "To deny [its] exercise because the patient is unconscious or incompetent would be to deny the right." *Foody* v. *Manchester Memorial Hospital*, 40 Conn. Super. 127, 133, 482 A. 2d 713, 718 (1984).

II

A

The right to be free from unwanted medical attention is a right to evaluate the potential benefit of treatment and its possible consequences according to one's own values and to make a personal decision whether to subject oneself to the intrusion. For a patient like Nancy Cruzan, the sole benefit of medical treatment is being kept metabolically alive. Neither artificial nutrition nor any other form of medical treatment available today can cure or in any way ameliorate her condition.[8] Irreversibly vegetative patients are devoid of thought,

[8] While brain stem cells can survive 15 to 20 minutes without oxygen, cells in the cerebral hemispheres are destroyed if they are deprived of oxygen for as few as 4 to 6 minutes. See Cranford & Smith, Some Critical Distinctions Between Brain Death and the Persistent Vegetative State, 6 Ethics Sci. & Med. 199, 203 (1979). It is estimated that Nancy's brain was deprived of oxygen from 12 to 14 minutes. See *ante*, at 266. Out of the 100,000 patients who, like Nancy, have fallen into persistive vegetative states in the past 20 years due to loss of oxygen to the brain, there have been only three even partial recoveries documented in the medical literature. Brief for American Medical Association et al. as *Amici Curiae*

emotion, and sensation; they are permanently and completely unconscious. See n. 2, *supra*.[9] As the President's Commission concluded in approving the withdrawal of life support equipment from irreversibly vegetative patients:

> "[T]reatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." President's Commission 181–182.

There are also affirmative reasons why someone like Nancy might choose to forgo artificial nutrition and hydration under these circumstances. Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integ-

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11–12. The longest any person has ever been in a persistent vegetative state and recovered was 22 months. See Snyder, Cranford, Rubens, Bundlie, & Rockswold, Delayed Recovery from Postanoxic Persistent Vegetative State, 14 Annals Neurol. 156 (1983). Nancy has been in this state for seven years.

[9] The American Academy of Neurology offers three independent bases on which the medical profession rests these neurological conclusions:

"First, direct clinical experience with these patients demonstrates that there is no behavioral indication of any awareness of pain or suffering.

"Second, in all persistent vegetative state patients studied to date, postmortem examination reveals overwhelming bilateral damage to the cerebral hemispheres to a degree incompatible with consciousness . . . .

"Third, recent data utilizing positron emission tomography indicates that the metabolic rate for glucose in the cerebral cortex is greatly reduced in persistent vegetative state patients, to a degree incompatible with consciousness." Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient, 39 Neurology 125 (Jan. 1989).

rity intact, is a matter of extreme consequence. "In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." *Brophy* v. *New England Sinai Hospital, Inc.*, 398 Mass. 417, 434, 497 N. E. 2d 626, 635–636 (1986) (finding the subject of the proceeding "in a condition which [he] has indicated he would consider to be degrading and without human dignity" and holding that "[t]he duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity"). Another court, hearing a similar case, noted:

> "It is apparent from the testimony that what was on [the patient's] mind was not only the invasiveness of life-sustaining systems, such as the [nasogastric] tube, upon the integrity of his body. It was also the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others." *In re Gardner*, 534 A. 2d 947, 953 (Me. 1987).

Such conditions are, for many, humiliating to contemplate,[10] as is visiting a prolonged and anguished vigil on one's parents, spouse, and children. A long, drawn-out death can have a debilitating effect on family members. See Carnwath & Johnson, Psychiatric Morbidity Among Spouses of Patients With Stroke, 294 Brit. Med. J. 409 (1987); Livingston, Families Who Care, 291 Brit. Med. J. 919 (1985). For some, the idea of being remembered in their persistent vegetative

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[10] Nancy Cruzan, for instance, is totally and permanently disabled. All four of her limbs are severely contracted; her fingernails cut into her wrists. App. to Pet. for Cert. A93. She is incontinent of bowel and bladder. The most intimate aspects of her existence are exposed to and controlled by strangers. Brief for Respondent Guardian Ad Litem 2. Her family is convinced that Nancy would find this state degrading. See n. 20, *infra*.

states rather than as they were before their illness or accident may be very disturbing.[11]

B

Although the right to be free of unwanted medical intervention, like other constitutionally protected interests, may not be absolute,[12] no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so. Missouri does not claim, nor could it, that society as a whole will be benefited by Nancy's receiving medical treatment.

[11] What general information exists about what most people would choose or would prefer to have chosen for them under these circumstances also indicates the importance of ensuring a means for now-incompetent patients to exercise their right to avoid unwanted medical treatment. A 1988 poll conducted by the American Medical Association found that 80% of those surveyed favored withdrawal of life-support systems from hopelessly ill or irreversibly comatose patients if they or their families requested it. New York Times, June 5, 1988, p. 14, col. 4 (citing American Medical News, June 3, 1988, p. 9, col. 1). Another 1988 poll conducted by the Colorado University Graduate School of Public Affairs showed that 85% of those questioned would not want to have their own lives maintained with artificial nutrition and hydration if they became permanently unconscious. The Coloradoan, Sept. 29, 1988, p. 1.

Such attitudes have been translated into considerable political action. Since 1976, 40 States and the District of Columbia have enacted natural death Acts, expressly providing for self-determination under some or all of these situations. See Brief for Society for the Right to Die, Inc., as *Amicus Curiae* 8; Weiner, Privacy, Family, and Medical Decision Making for Persistent Vegetative Patients, 11 Cardozo L. Rev. 713, 720 (1990). Thirteen States and the District of Columbia have enacted statutes authorizing the appointment of proxies for making health care decisions. See *ante*, at 290, n. 2 (O'CONNOR, J., concurring).

[12] See *Jacobson* v. *Massachusetts*, 197 U. S. 11, 26–27 (1905) (upholding a Massachusetts law imposing fines or imprisonment on those refusing to be vaccinated as "of paramount necessity" to that State's fight against a smallpox epidemic).

No third party's situation will be improved and no harm to others will be averted. Cf. nn. 6 and 8, *supra*.[13]

The only state interest asserted here is a general interest in the preservation of life.[14] But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment. "[T]he regulation of constitutionally protected decisions . . . must be predicated on legitimate state concerns *other than* disagreement with the choice the individual has made. . . . Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity." *Hodgson* v. *Minnesota*, *post*, at

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[13] Were such interests at stake, however, I would find that the Due Process Clause places limits on what invasive medical procedures could be forced on an unwilling comatose patient in pursuit of the interests of a third party. If Missouri were correct that its interests outweigh Nancy's interest in avoiding medical procedures as long as she is free of pain and physical discomfort, see 760 S. W. 2d, at 424, it is not apparent why a State could not choose to remove one of her kidneys without consent on the ground that society would be better off if the recipient of that kidney were saved from renal poisoning. Nancy cannot feel surgical pain. See n. 2, *supra*. Nor would removal of one kidney be expected to shorten her life expectancy. See The American Medical Association Family Medical Guide 506 (J. Kunz ed. 1982). Patches of her skin could also be removed to provide grafts for burn victims and scrapings of bone marrow to provide grafts for someone with leukemia. Perhaps the State could lawfully remove more vital organs for transplanting into others who would then be cured of their ailments, provided the State placed Nancy on some other life-support equipment to replace the lost function. Indeed, why could the State not perform medical experiments on her body, experiments that might save countless lives, and would cause her no greater burden than she already bears by being fed through the gastrostomy tube? This would be too brave a new world for me and, I submit, for our Constitution.

[14] The Missouri Supreme Court reviewed the state interests that had been identified by other courts as potentially relevant—prevention of homicide and suicide, protection of interests of innocent third parties, maintenance of the ethical integrity of the medical profession, and preservation of life—and concluded that: "In this case, only the state's interest in the preservation of life is implicated." 760 S. W. 2d, at 419.

435 (opinion of STEVENS, J.) (emphasis added). Thus, the State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's purview to be gained by superseding her decision.

Moreover, there may be considerable danger that Missouri's rule of decision would impair rather than serve any interest the State does have in sustaining life. Current medical practice recommends use of heroic measures if there is a scintilla of a chance that the patient will recover, on the assumption that the measures will be discontinued should the patient improve. When the President's Commission in 1982 approved the withdrawal of life-support equipment from irreversibly vegetative patients, it explained that "[a]n even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit and greatly burdens the patient." President's Commission 75. A New Jersey court recognized that families as well as doctors might be discouraged by an inability to stop life-support measures from "even attempting certain types of care [which] could thereby force them into hasty and premature decisions to allow a patient to die." *In re Conroy*, 98 N. J. 321, 370, 486 A. 2d 1209, 1234 (1985). See also Brief for American Academy of Neurology as *Amicus Curiae* 9 (expressing same concern).[15]

[15] In any event, the state interest identified by the Missouri Supreme Court—a comprehensive and "unqualified" interest in preserving life, *id.*, at 420, 424—is not even well supported by that State's own enactments. In the first place, Missouri has no law requiring every person to procure any needed medical care nor a state health insurance program to underwrite such care. *Id.*, at 429 (Blackmar, J., dissenting). Second, as the state court admitted, Missouri has a living will statute which specifically "allows and encourages the pre-planned termination of life." *Ibid.*; see Mo. Rev. Stat. § 459.015(1) (1986). The fact that Missouri actively pro-

III

This is not to say that the State has no legitimate interests to assert here. As the majority recognizes, *ante*, at 281–282, Missouri has a *parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances. Second, if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment. But *until* Nancy's wishes have been deter-

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vides for its citizens to choose a natural death under certain circumstances suggests that the State's interest in life is not so unqualified as the court below suggests. It is true that this particular statute does not apply to nonterminal patients and does not include artificial nutrition and hydration as one of the measures that may be declined. Nonetheless, Missouri has also not chosen to require court review of every decision to withhold or withdraw life support made on behalf of an incompetent patient. Such decisions are made every day, without state participation. See 760 S. W. 2d, at 428 (Blackmar, J., dissenting).

In addition, precisely what implication can be drawn from the statute's limitations is unclear given the inclusion of a series of "interpretive" provisions in the Act. The first such provision explains that the Act is to be interpreted consistently with the following: "Each person has the primary right to request or refuse medical treatment subject to the state's interest in protecting innocent third parties, preventing homicide and suicide and preserving good ethical standards in the medical profession." Mo. Rev. Stat. § 459.055(1) (1986). The second of these subsections explains that the Act's provisions are cumulative and not intended to increase or decrease the right of a patient to make decisions or lawfully effect the withholding or withdrawal of medical care. § 459.055(2). The third subsection provides that "no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of medical procedures" shall be created. § 459.055(3).

Thus, even if it were conceivable that a State could assert an interest sufficiently compelling to overcome Nancy Cruzan's constitutional right, Missouri law demonstrates a more modest interest at best. See generally *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 715 (1984) (finding that state regulations narrow in scope indicated that State had only a moderate interest in its professed goal).

mined, the only state interest that may be asserted is an interest in safeguarding the accuracy of that determination.

Accuracy, therefore, must be our touchstone. Missouri may constitutionally impose only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination. The Missouri "safeguard" that the Court upholds today does not meet that standard. The determination needed in this context is whether the incompetent person would choose to live in a persistent vegetative state on life support or to avoid this medical treatment. Missouri's rule of decision imposes a markedly asymmetrical evidentiary burden. Only evidence of specific statements of treatment choice made by the patient when competent is admissible to support a finding that the patient, now in a persistent vegetative state, would wish to avoid further medical treatment. Moreover, this evidence must be clear and convincing. No proof is required to support a finding that the incompetent person would wish to continue treatment.

A

The majority offers several justifications for Missouri's heightened evidentiary standard. First, the majority explains that the State may constitutionally adopt this rule to govern determinations of an incompetent's wishes in order to advance the State's substantive interests, including its unqualified interest in the preservation of human life. See *ante*, at 282–283, and n. 10. Missouri's evidentiary standard, however, cannot rest on the State's own interest in a particular substantive result. To be sure, courts have long erected clear and convincing evidence standards to place the greater risk of erroneous decisions on those bringing disfavored claims.[16] In such cases, however, the choice to discourage

[16] See *Colorado* v. *New Mexico*, 467 U. S. 310 (1984) (requiring clear and convincing evidence before one State is permitted to divert water from another to accommodate society's interests in stabile property rights and effi-

certain claims was a legitimate, constitutional policy choice. In contrast, Missouri has no such power to disfavor a choice by Nancy Cruzan to avoid medical treatment, because Missouri has no legitimate interest in providing Nancy with treatment until it is established that this represents her choice. See *supra*, at 312–314. Just as a State may not override Nancy's choice directly, it may not do so indirectly through the imposition of a procedural rule.

Second, the majority offers two explanations for why Missouri's clear and convincing evidence standard is a means of enhancing accuracy, but neither is persuasive. The majority initially argues that a clear and convincing evidence standard is necessary to compensate for the possibility that such proceedings will lack the "guarantee of accurate factfinding that the adversary process brings with it," citing *Ohio* v. *Akron Center for Reproductive Health*, *post*, at 515–516 (upholding a clear and convincing evidence standard for an *ex parte* proceeding). *Ante*, at 281–282. Without supporting the Court's decision in that case, I note that the proceeding to determine an incompetent's wishes is quite different from a proceeding to determine whether a minor may bypass notifying her parents before undergoing an abortion on the ground that she is mature enough to make the decision or that the abortion is in her best interests.

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cient use of resources); *New York* v. *New Jersey*, 256 U. S. 296 (1921) (promoting federalism by requiring clear and convincing evidence before using Court's power to control the conduct of one State at the behest of another); *Maxwell Land-Grant Case*, 121 U. S. 325 (1887) (requiring clear, unequivocal, and convincing evidence to set aside, annul, or correct a patent or other title to property issued by the Government in order to secure settled expectations concerning property rights); *Marcum* v. *Zaring*, 406 P. 2d 970 (Okla. 1965) (promoting stability of marriage by requiring clear and convincing evidence to prove its invalidity); *Stevenson* v. *Stein*, 412 Pa. 478, 195 A. 2d 268 (1963) (promoting settled expectations concerning property rights by requiring clear and convincing evidence to prove adverse possession).

An adversarial proceeding is of particular importance when one side has a strong personal interest which needs to be counterbalanced to assure the court that the questions will be fully explored. A minor who has a strong interest in obtaining permission for an abortion without notifying her parents may come forward whether or not society would be satisfied that she has made the decision with the seasoned judgment of an adult. The proceeding here is of a different nature. Barring venal motives, which a trial court has the means of ferreting out, the decision to come forward to request a judicial order to stop treatment represents a slowly and carefully considered resolution by at least one adult and more frequently several adults that discontinuation of treatment is the patient's wish.

In addition, the bypass procedure at issue in *Akron*, *supra*, is *ex parte* and secret. The court may not notify the minor's parents, siblings, or friends. No one may be present to submit evidence unless brought forward by the minor herself. In contrast, the proceeding to determine Nancy Cruzan's wishes was neither *ex parte* nor secret. In a hearing to determine the treatment preferences of an incompetent person, a court is not limited to adjusting burdens of proof as its only means of protecting against a possible imbalance. Indeed, any concern that those who come forward will present a one-sided view would be better addressed by appointing a guardian ad litem, who could use the State's powers of discovery to gather and present evidence regarding the patient's wishes. A guardian ad litem's task is to uncover any conflicts of interest and ensure that each party likely to have relevant evidence is consulted and brought forward—for example, other members of the family, friends, clergy, and doctors. See, *e. g.*, *In re Colyer*, 99 Wash. 2d 114, 133, 660 P. 2d 738, 748–749 (1983). Missouri's heightened evidentiary standard attempts to achieve balance by discounting evidence; the guardian ad litem technique achieves balance by probing for additional evidence. Where, as here, the family members,

friends, doctors, and guardian ad litem agree, it is not because the process has failed, as the majority suggests. See *ante*, at 281, n. 9. It is because there is no genuine dispute as to Nancy's preference.

The majority next argues that where, as here, important individual rights are at stake, a clear and convincing evidence standard has long been held to be an appropriate means of enhancing accuracy, citing decisions concerning what process an individual is due before he can be deprived of a liberty interest. See *ante*, at 283. In those cases, however, this Court imposed a clear and convincing standard as a constitutional minimum on the basis of its evaluation that one side's interests clearly outweighed the second side's interests and therefore the second side should bear the risk of error. See *Santosky* v. *Kramer*, 455 U. S. 745, 753, 766–767 (1982) (requiring a clear and convincing evidence standard for termination of parental rights because the parent's interest is fundamental but the State has no legitimate interest in termination unless the parent is unfit, and finding that the State's interest in finding the best home for the child does not arise until the parent has been found unfit); *Addington* v. *Texas*, 441 U. S. 418, 426–427 (1979) (requiring clear and convincing evidence in an involuntary commitment hearing because the interest of the individual far outweighs that of a State, which has no legitimate interest in confining individuals who are not mentally ill and do not pose a danger to themselves or others). Moreover, we have always recognized that shifting the risk of error reduces the likelihood of errors in one direction at the cost of increasing the likelihood of errors in the other. See *Addington*, *supra*, at 423 (contrasting heightened standards of proof to a preponderance standard in which the two sides "share the risk of error in roughly equal fashion" because society does not favor one outcome over the other). In the cases cited by the majority, the imbalance imposed by a heightened evidentiary standard was not only acceptable but required because the standard was deployed to protect an in-

dividual's exercise of a fundamental right, as the majority admits, *ante*, at 282–283, n. 10. In contrast, the Missouri court imposed a clear and convincing evidence standard as an obstacle to the exercise of a fundamental right.

The majority claims that the allocation of the risk of error is justified because it is more important not to terminate life support for someone who would wish it continued than to honor the wishes of someone who would not. An erroneous decision to terminate life support is irrevocable, says the majority, while an erroneous decision not to terminate "results in a maintenance of the status quo." See *ante*, at 283.[17] But, from the point of view of the patient, an erroneous decision in either direction is irrevocable. An erroneous decision to terminate artificial nutrition and hydration, to be sure, will lead to failure of that last remnant of physiological life, the brain stem, and result in complete brain death. An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.

Even a later decision to grant him his wish cannot undo the intervening harm. But a later decision is unlikely in any event. "[T]he discovery of new evidence," to which the ma-

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[17] The majority's definition of the "status quo," of course, begs the question. Artificial delivery of nutrition and hydration represents the "status quo" only if the State has chosen to permit doctors and hospitals to keep a patient on life-support systems over the protests of his family or guardian. The "status quo" absent that state interference would be the natural result of his accident or illness (and the family's decision). The majority's definition of status quo, however, is "to a large extent a predictable, yet accidental confluence of technology, psyche, and inertia. The general citizenry . . . never said that it favored the creation of coma wards where permanently unconscious patients would be tended for years and years. Nor did the populace as a whole authorize the preeminence of doctors over families in making treatment decisions for incompetent patients." Rhoden, Litigating Life and Death, 102 Harv. L. Rev. 375, 433–434 (1988).

jority refers, *ibid.*, is more hypothetical than plausible. The majority also misconceives the relevance of the possibility of "advancements in medical science," *ibid.*, by treating it as a reason to force someone to continue medical treatment against his will. The possibility of a medical miracle is indeed part of the calculus, but it is a part of the *patient's* calculus. If current research suggests that some hope for cure or even moderate improvement is possible within the lifespan projected, this is a factor that should be and would be accorded significant weight in assessing what the patient himself would choose.[18]

B

Even more than its heightened evidentiary standard, the Missouri court's categorical exclusion of relevant evidence dispenses with any semblance of accurate factfinding. The court adverted to no evidence supporting its decision, but held that no clear and convincing, inherently reliable evidence had been presented to show that Nancy would want to avoid further treatment. In doing so, the court failed to consider statements Nancy had made to family members and a close friend.[19] The court also failed to consider testimony

[18] For Nancy Cruzan, no such cure or improvement is in view. So much of her brain has deteriorated and been replaced by fluid, see App. to Pet. for Cert. A94, that apparently the only medical advance that could restore consciousness to her body would be a brain transplant. Cf. n. 22, *infra*.

[19] The trial court had relied on the testimony of Athena Comer, a longtime friend, co-worker, and housemate for several months, as sufficient to show that Nancy Cruzan would wish to be free of medical treatment under her present circumstances. App. to Pet. for Cert. A94. Ms. Comer described a conversation she and Nancy had while living together, concerning Ms. Comer's sister who had become ill suddenly and died during the night. The Comer family had been told that if she had lived through the night, she would have been in a vegetative state. Nancy had lost a grandmother a few months before. Ms. Comer testified: "Nancy said she would never want to live [in a vegetative state] because if she couldn't be normal or even, you know, like half way, and do things for yourself, because Nancy always did, that she didn't want to live . . . and we talked about it a lot." Tr. 388–389. She said "several times" that "she wouldn't want to

from Nancy's mother and sister that they were certain that Nancy would want to discontinue artificial nutrition and hydration,[20] even after the court found that Nancy's family was loving and without malignant motive. See 760 S. W. 2d, at 412. The court also failed to consider the conclusions of the guardian ad litem, appointed by the trial court, that there was clear and convincing evidence that Nancy would want to

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live that way because if she was going to live, she wanted to be able to live, not to just lay in a bed and not be able to move because you can't do anything for yourself." *Id.*, at 390, 396. "[S]he said that she hoped that [all the] people in her family knew that she wouldn't want to live [in a vegetative state] because she knew it was usually up to the family whether you lived that way or not." *Id.*, at 399.

The conversation took place approximately a year before Nancy's accident and was described by Ms. Comer as a "very serious" conversation that continued for approximately half an hour without interruption. *Id.*, at 390. The Missouri Supreme Court dismissed Nancy's statement as "unreliable" on the ground that it was an informally expressed reaction to other people's medical conditions. 760 S. W. 2d, at 424.

The Missouri Supreme Court did not refer to other evidence of Nancy's wishes or explain why it was rejected. Nancy's sister Christy, to whom she was very close, testified that she and Nancy had had two very serious conversations about a year and a half before the accident. A day or two after their niece was stillborn (but would have been badly damaged if she had lived), Nancy had said that maybe it was part of a "greater plan" that the baby had been stillborn and did not have to face "the possible life of mere existence." Tr. 537. A month later, after their grandmother had died after a long battle with heart problems, Nancy said that "it was better for my grandmother not to be kind of brought back and forth [by] medical [treatment], brought back from a critical near point of death . . . ." *Id.*, at 541.

[20] Nancy's sister Christy, Nancy's mother, and another of Nancy's friends testified that Nancy would want to discontinue the hydration and nutrition. Christy said that "Nancy would be horrified at the state she is in." *Id.*, at 535. She would also "want to take that burden away from [her family]." *Id.*, at 544. Based on "a lifetime of experience [I know Nancy's wishes] are to discontinue the hydration and the nutrition." *Id.*, at 542. Nancy's mother testified: "Nancy would not want to be like she is now. [I]f it were me up there or Christy or any of us, she would be doing for us what we are trying to do for her. I know she would, . . . as her mother." *Id.*, at 526.

discontinue medical treatment and that this was in her best interests. *Id.*, at 444 (Higgins, J., dissenting from denial of rehearing); Brief for Respondent Guardian Ad Litem 2–3. The court did not specifically define what kind of evidence it would consider clear and convincing, but its general discussion suggests that only a living will or equivalently formal directive from the patient when competent would meet this standard. See 760 S. W. 2d, at 424–425.

Too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored.[21] While it might be a wise social policy to encourage people to furnish such instructions, no general conclusion about a patient's choice can be drawn from the absence of formalities. The probability of becoming irreversibly vegetative is so low that many people may not feel an urgency to marshal formal evidence of their preferences. Some may not wish to dwell on their own physical deterioration and mortality. Even someone with a resolute determination to avoid life support under circumstances such as Nancy's would still need to know that such things as living wills exist and how to execute one. Often legal help would be necessary, especially given the majority's apparent willingness to permit States to insist that a person's wishes are not truly known unless the particular medical treatment is specified. See *ante*, at 285.

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[21] Surveys show that the overwhelming majority of Americans have not executed such written instructions. See Emmanuel & Emmanuel, The Medical Directive: A New Comprehensive Advance Care Document, 261 JAMA 3288 (1989) (only 9% of Americans execute advance directives about how they would wish treatment decisions to be handled if they became incompetent); American Medical Association Surveys of Physician and Public Opinion on Health Care Issues 29–30 (1988) (only 15% of those surveyed had executed living wills); 2 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 241–242 (1982) (23% of those surveyed said that they had put treatment instructions in writing).

As a California appellate court observed: "The lack of generalized public awareness of the statutory scheme and the typically human characteristics of procrastination and reluctance to contemplate the need for such arrangements however makes this a tool which will all too often go unused by those who might desire it." *Barber* v. *Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484, 489 (1983). When a person tells family or close friends that she does not want her life sustained artificially, she is "express[ing] her wishes in the only terms familiar to her, and . . . as clearly as a lay person should be asked to express them. To require more is unrealistic, and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment." *In re O'Connor*, 72 N. Y. 2d 517, 551, 531 N. E. 2d 607, 626 (1988) (Simons, J., dissenting).[22] When Missouri enacted a living will statute, it specifically provided that the absence of a living will does not warrant a presumption that a patient wishes continued medical treatment. See n. 15, *supra*.

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[22] New York is the only State besides Missouri to deny a request to terminate life support on the ground that clear and convincing evidence of prior, expressed intent was absent, although New York did so in the context of very different situations. Mrs. O'Connor, the subject of *In re O'Connor*, had several times expressed her desire not to be placed on life support if she were not going to be able to care for herself. However, both of her daughters testified that they did not know whether their mother would want to decline artificial nutrition and hydration under her present circumstances. Cf. n. 13, *supra*. Moreover, despite damage from several strokes, Mrs. O'Connor was conscious and capable of responding to simple questions and requests and the medical testimony suggested she might improve to some extent. Cf. *supra*, at 301. The New York Court of Appeals also denied permission to terminate blood transfusions for a severely retarded man with terminal cancer because there was no evidence of a treatment choice made by the man when competent, as he had never been competent. See *In re Storar*, 52 N. Y. 2d 363, 420 N. E. 2d 64, cert. denied, 454 U. S. 858 (1981). Again, the court relied on evidence that the man was conscious, functioning in the way he always had, and that the transfusions did not cause him substantial pain (although it was clear he did not like them).

Thus, apparently not even Missouri's own legislature believes that a person who does not execute a living will fails to do so because he wishes continuous medical treatment under all circumstances.

The testimony of close friends and family members, on the other hand, may often be the best evidence available of what the patient's choice would be. It is they with whom the patient most likely will have discussed such questions and they who know the patient best. "Family members have a unique knowledge of the patient which is vital to any decision on his or her behalf." Newman, Treatment Refusals for the Critically and Terminally Ill: Proposed Rules for the Family, the Physician, and the State, 3 N. Y. L. S. Human Rights Annual 35, 46 (1985). The Missouri court's decision to ignore this whole category of testimony is also at odds with the practices of other States. See, *e. g.*, *In re Peter*, 108 N. J. 365, 529 A. 2d 419 (1987); *Brophy* v. *New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N. E. 2d 626 (1986); *In re Severns*, 425 A. 2d 156 (Del. Ch. 1980).

The Missouri court's disdain for Nancy's statements in serious conversations not long before her accident, for the opinions of Nancy's family and friends as to her values, beliefs and certain choice, and even for the opinion of an outside objective factfinder appointed by the State evinces a disdain for Nancy Cruzan's own right to choose. The rules by which an incompetent person's wishes are determined must represent every effort to determine those wishes. The rule that the Missouri court adopted and that this Court upholds, however, skews the result away from a determination that as accurately as possible reflects the individual's own preferences and beliefs. It is a rule that transforms human beings into passive subjects of medical technology.

> "[M]edical care decisions must be guided by the individual patient's interests and values. Allowing persons to determine their own medical treatment is an important way in which society respects persons as individuals.

> Moreover, the respect due to persons as individuals does not diminish simply because they have become incapable of participating in treatment decisions. . . . [I]t is still possible for others to make a decision that reflects [the patient's] interests more closely than would a purely technological decision to do whatever is possible. Lacking the ability to decide, [a patient] has a right to a decision that takes his interests into account." *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 208, 245 Cal. Rptr. 840, 854–855, cert. denied, 488 U. S. 958 (1988).

C

I do not suggest that States must sit by helplessly if the choices of incompetent patients are in danger of being ignored. See *ante*, at 281. Even if the Court had ruled that Missouri's rule of decision is unconstitutional, as I believe it should have, States would nevertheless remain free to fashion procedural protections to safeguard the interests of incompetents under these circumstances. The Constitution provides merely a framework here: Protections must be genuinely aimed at ensuring decisions commensurate with the will of the patient, and must be reliable as instruments to that end. Of the many States which have instituted such protections, Missouri is virtually the only one to have fashioned a rule that lessens the likelihood of accurate determinations. In contrast, nothing in the Constitution prevents States from reviewing the advisability of a family decision, by requiring a court proceeding or by appointing an impartial guardian ad litem.

There are various approaches to determining an incompetent patient's treatment choice in use by the several States today, and there may be advantages and disadvantages to each and other approaches not yet envisioned. The choice, in largest part, is and should be left to the States, so long as each State is seeking, in a reliable manner, to discover what the patient would want. But with such momentous interests in the balance, States must avoid procedures that will preju-

dice the decision. "To err either way—to keep a person alive under circumstances under which he would rather have been allowed to die, or to allow that person to die when he would have chosen to cling to life—would be deeply unfortunate." *In re Conroy*, 98 N. J., at 343, 486 A. 2d, at 1220.

D

Finally, I cannot agree with the majority that where it is not possible to determine what choice an incompetent patient would make, a State's role as *parens patriae* permits the State automatically to make that choice itself. See *ante*, at 286 (explaining that the Due Process Clause does not require a State to confide the decision to "anyone but the patient herself"). Under fair rules of evidence, it is improbable that a court could not determine what the patient's choice would be. Under the rule of decision adopted by Missouri and upheld today by this Court, such occasions might be numerous. But in neither case does it follow that it is constitutionally acceptable for the State invariably to assume the role of deciding for the patient. A State's legitimate interest in safeguarding a patient's choice cannot be furthered by simply appropriating it.

The majority justifies its position by arguing that, while close family members may have a strong feeling about the question, "there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." *Ibid.* I cannot quarrel with this observation. But it leads only to another question: Is there any reason to suppose that a State is *more* likely to make the choice that the patient would have made than someone who knew the patient intimately? To ask this is to answer it. As the New Jersey Supreme Court observed: "Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also

because of their special bonds with him or her. . . . It is . . . they who treat the patient as a person, rather than a symbol of a cause." *In re Jobes*, 108 N. J. 394, 416, 529 A. 2d 434, 445 (1987). The State, in contrast, is a stranger to the patient.

A State's inability to discern an incompetent patient's choice still need not mean that a State is rendered powerless to protect that choice. But I would find that the Due Process Clause prohibits a State from doing more than that. A State may ensure that the person who makes the decision on the patient's behalf is the one whom the patient himself would have selected to make that choice for him. And a State may exclude from consideration anyone having improper motives. But a State generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family.[23]

IV

As many as 10,000 patients are being maintained in persistent vegetative states in the United States, and the number is expected to increase significantly in the near future. See Cranford, *supra* n. 2, at 27, 31. Medical technology, developed over the past 20 or so years, is often capable of resuscitating people after they have stopped breathing or their hearts have stopped beating. Some of those people are brought fully back to life. Two decades ago, those who were not and could not swallow and digest food, died. Intravenous solutions could not provide sufficient calories to maintain people for more than a short time. Today, various forms of artificial feeding have been developed that are able to keep people metabolically alive for years, even decades. See Spencer & Palmisano, Specialized Nutritional Support of

[23] Only in the exceedingly rare case where the State cannot find any family member or friend who can be trusted to endeavor genuinely to make the treatment choice the patient would have made does the State become the legitimate surrogate decisionmaker.

Patients—A Hospital's Legal Duty?, 11 Quality Rev. Bull. 160, 160–161 (1985). In addition, in this century, chronic or degenerative ailments have replaced communicable diseases as the primary causes of death. See R. Weir, Abating Treatment with Critically Ill Patients 12–13 (1989); President's Commission 15–16. The 80% of Americans who die in hospitals are "likely to meet their end . . . 'in a sedated or comatose state; betubed nasally, abdominally and intravenously; and far more like manipulated objects than like moral subjects.'"[24] A fifth of all adults surviving to age 80 will suffer a progressive dementing disorder prior to death. See Cohen & Eisdorfer, Dementing Disorders, in The Practice of Geriatrics 194 (E. Calkins, P. Davis, & A. Ford eds. 1986).

"[L]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of." *In re Quinlan*, 70 N. J. 10, 44, 355 A. 2d 647, 665, cert. denied, 429 U. S. 922 (1976). The new medical technology can reclaim those who would have been irretrievably lost a few decades ago and restore them to active lives. For Nancy Cruzan, it failed, and for others with wasting incurable disease, it may be doomed to failure. In these unfortunate situations, the bodies and preferences and memories of the victims do not escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as *parens patriae*. The President's Commission, after years of research, concluded:

> "In few areas of health care are people's evaluations of their experiences so varied and uniquely personal as in their assessments of the nature and value of the processes associated with dying. For some, every moment of life is of inestimable value; for others, life without

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[24] Fadiman, The Liberation of Lolly and Gronky, Life Magazine, Dec. 1986, p. 72 (quoting medical ethicist Joseph Fletcher).

> some desired level of mental or physical ability is worthless or burdensome. A moderate degree of suffering may be an important means of personal growth and religious experience to one person, but only frightening or despicable to another." President's Commission 276.

Yet Missouri and this Court have displaced Nancy's own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her values, and deprived her of the right to a decision as closely approximating her own choice as humanly possible. They have done so disingenuously in her name and openly in Missouri's own. That Missouri and this Court may truly be motivated only by concern for incompetent patients makes no matter. As one of our most prominent jurists warned us decades ago: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." *Olmstead* v. *United States*, 277 U. S. 438, 479 (1928) (Brandeis, J., dissenting).

I respectfully dissent.

JUSTICE STEVENS, dissenting.

Our Constitution is born of the proposition that all legitimate governments must secure the equal right of every person to "Life, Liberty, and the pursuit of Happiness."[1] In the ordinary case we quite naturally assume that these three

[1] It is stated in the Declaration of Independence that:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

ends are compatible, mutually enhancing, and perhaps even coincident.

The Court would make an exception here. It permits the State's abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment. Ironically, the Court reaches this conclusion despite endorsing three significant propositions which should save it from any such dilemma. First, a competent individual's decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment. See *ante*, at 278–279. Second, upon a proper evidentiary showing, a qualified guardian may make that decision on behalf of an incompetent ward. See, *e. g.*, *ante*, at 284–285. Third, in answering the important question presented by this tragic case, it is wise "'not to attempt, by any general statement, to cover every possible phase of the subject.'" See *ante*, at 278 (citation omitted). Together, these considerations suggest that Nancy Cruzan's liberty to be free from medical treatment must be understood in light of the facts and circumstances particular to her.

I would so hold: In my view, the Constitution requires the State to care for Nancy Cruzan's life in a way that gives appropriate respect to her own best interests.

I

This case is the first in which we consider whether, and how, the Constitution protects the liberty of seriously ill patients to be free from life-sustaining medical treatment. So put, the question is both general and profound. We need not, however, resolve the question in the abstract. Our responsibility as judges both enables and compels us to treat the problem as it is illuminated by the facts of the controversy before us.

The most important of those facts are these: "Clear and convincing evidence" established that Nancy Cruzan is "oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli"; that "she has no cognitive or reflexive ability to swallow food or water"; that "she will never recover" these abilities; and that her "cerebral cortical atrophy is irreversible, permanent, progressive and ongoing." App. to Pet. for Cert. A94–A95. Recovery and consciousness are impossible; the highest cognitive brain function that can be hoped for is a grimace in "recognition of ordinarily painful stimuli" or an "apparent response to sound." *Id.*, at A95.[2]

After thus evaluating Nancy Cruzan's medical condition, the trial judge next examined how the interests of third parties would be affected if Nancy's parents were allowed to withdraw the gastrostomy tube that had been implanted in

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[2] The trial court found as follows on the basis of "clear and convincing evidence":

"1. That her respiration and circulation are not artificially maintained and within essentially normal limits for a 30 year old female with vital signs recently reported as BP 130/80; pulse 78 and regular; respiration spontaneous at 16 to 18 per minute.

"2. That she is oblivious to her environment except for reflexive responses to sound and perhaps to painful stimuli.

"3. That she has suffered anoxia of the brain resulting in massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated. This cerebral cortical atrophy is irreversible, permanent, progressive and ongoing.

"4. That her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and her apparent response to sound.

"5. That she is spastic quadriplegic.

"6. That she has contractures of her four extremities which are slowly progressive with irreversible muscular and tendon damage to all extremities.

"7. That she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs. That she will never recover her ability to swallow sufficient to satisfy her needs." App. to Pet. for Cert. A94–A95.

their daughter. His findings make it clear that the parents' request had no economic motivation,[3] and that granting their request would neither adversely affect any innocent third parties nor breach the ethical standards of the medical profession.[4] He then considered, and rejected, a religious objection to his decision,[5] and explained why he concluded that the ward's constitutional "right to liberty" outweighed the general public policy on which the State relied:

> "There is a fundamental natural right expressed in our Constitution as the 'right to liberty,' which permits an individual to refuse or direct the withholding or withdrawal of artificial death prolonging procedures when the person has no more cognitive brain function than our Ward and all the physicians agree there is no hope of further recovery while the deterioration of the brain continues with further overall worsening physical contractures. To the extent that the statute or public policy prohibits withholding or withdrawal of nutrition and hydration or euthanasia or mercy killing, if such be the definition, under all circumstances, arbitrarily and with no exceptions, it is in violation of our ward's constitutional rights by depriving her of liberty without due process of

[3] "The only economic considerations in this case rest with Respondent's employer, the State of Missouri, which is bearing the entire cost of care. Our ward is an adult without financial resources other than Social Security whose not inconsiderable medical insurance has been exhausted since January 1986." *Id.*, at A96.

[4] "In this case there are no innocent third parties requiring state protection, neither homicide nor suicide will be committed and the consensus of the medical witnesses indicated concerns personal to themselves or the legal consequences of such actions rather than any objections that good ethical standards of the profession would be breached if the nutrition and hydration were withdrawn the same as any other artificial death prolonging procedures the statute specifically authorizes." *Id.*, at A98.

[5] "Nancy's present unresponsive and hopeless existence is not the will of the Supreme Ruler but of man's will to forcefully feed her when she herself cannot swallow thus fueling respiratory and circulatory pumps to no cognitive purpose for her except sound and perhaps pain." *Id.*, at A97.

law. To decide otherwise that medical treatment once undertaken must be continued irrespective of its lack of success or benefit to the patient in effect gives one's body to medical science without their *[sic]* consent.

. . . . .

"The Co-guardians are required only to exercise their legal authority to act in the best interests of their Ward as they discharge their duty and are free to act or not with this authority as they may determine." *Id.*, at A98–A99 (footnotes omitted).

II

Because he believed he had a duty to do so, the independent guardian ad litem appealed the trial court's order to the Missouri Supreme Court. In that appeal, however, the guardian advised the court that he did not disagree with the trial court's decision. Specifically, he endorsed the critical finding that "it was in Nancy Cruzan's best interests to have the tube feeding discontinued."[6]

That important conclusion thus was not disputed by the litigants. One might reasonably suppose that it would be dispositive: If Nancy Cruzan has no interest in continued treatment, and if she has a liberty interest in being free from unwanted treatment, and if the cessation of treatment would have no adverse impact on third parties, and if no reason exists to doubt the good faith of Nancy's parents, then what possible basis could the State have for insisting upon continued medical treatment? Yet, instead of questioning or endorsing the trial court's conclusions about Nancy Cruzan's interests, the State Supreme Court largely ignored them.

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[6] "Appellant guardian ad litem advises this court:

"'we informed the [trial] court that we felt it was in Nancy Cruzan's best interests to have the tube feeding discontinued. We now find ourselves in the position of appealing from a judgment we basically agree with.'" *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 435 (Mo. 1988) (Higgins, J., dissenting).

The opinion of that court referred to four different state interests that have been identified in other somewhat similar cases, but acknowledged that only the State's general interest in "the preservation of life" was implicated by this case.[7] It defined that interest as follows:

> "The state's interest in life embraces two separate concerns: an interest in the prolongation of the life of the individual patient and an interest in the sanctity of life itself." *Cruzan* v. *Harmon*, 760 S. W. 2d 408, 419 (1988).

Although the court did not characterize this interest as absolute, it repeatedly indicated that it outweighs any countervailing interest that is based on the "quality of life" of any individual patient.[8] In the view of the state-court majority,

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[7] "Four state interests have been identified: preservation of life, prevention of homicide and suicide, the protection of interests of innocent third parties and the maintenance of the ethical integrity of the medical profession. *See* Section 459.055(1), RSMo 1986; *Brophy*, 497 N. E. 2d at 634. In this case, only the state's interest in the preservation of life is implicated." *Id.*, at 419.

[8] "The state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality." *Ibid.*

"It is tempting to equate the state's interest in the preservation of life with some measure of quality of life. As the discussion which follows shows, some courts find quality of life a convenient focus when justifying the termination of treatment. But the state's interest is not in quality of life. The broad policy statements of the legislature make no such distinction; nor shall we. Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives. Instead, the state's interest is in life; that interest is unqualified." *Id.*, at 420.

"As we previously stated, however, the state's interest is not in quality of life. The state's interest is an unqualified interest in life." *Id.*, at 422. "The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death." *Ibid.*

"Given the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a com-

that general interest is strong enough to foreclose any decision to refuse treatment for an incompetent person unless that person had previously evidenced, in a clear and convincing terms, such a decision for herself. The best interests of the incompetent individual who had never confronted the issue—or perhaps had been incompetent since birth—are entirely irrelevant and unprotected under the reasoning of the State Supreme Court's four-judge majority.

The three dissenting judges found Nancy Cruzan's interests compelling. They agreed with the trial court's evaluation of state policy. In his persuasive dissent, Judge Blackmar explained that decisions about the care of chronically ill patients were traditionally private:

> "My disagreement with the principal opinion lies fundamentally in its emphasis on the interest of and the role of the state, represented by the Attorney General. Decisions about prolongation of life are of recent origin. For most of the world's history, and presently in most parts of the world, such decisions would never arise because the technology would not be available. Decisions about medical treatment have customarily been made by the patient, or by those closest to the patient if the patient, because of youth or infirmity, is unable to make the decisions. This is nothing new in substituted decisionmaking. The state is seldom called upon to be the decisionmaker.
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> "I would not accept the assumption, inherent in the principal opinion, that, with our advanced technology, the state must necessarily become involved in a decision about using extraordinary measures to prolong life. Decisions of this kind are made daily by the patient or relatives, on the basis of medical advice and their conclusion as to what is best. Very few cases reach court, and

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mon law right to refuse treatment, outweighs the immense, clear fact of life in which the state maintains a vital interest." *Id.*, at 424.

> I doubt whether this case would be before us but for the fact that Nancy lies in a state hospital. I do not place primary emphasis on the patient's expressions, except possibly in the very unusual case, of which I find no example in the books, in which the patient expresses a view that all available life supports should be made use of. Those closest to the patient are best positioned to make judgments about the patient's best interest." *Id.*, at 428.

Judge Blackmar then argued that Missouri's policy imposed upon dying individuals and their families a controversial and objectionable view of life's meaning:

> "It is unrealistic to say that the preservation of life is an absolute, without regard to the quality of life. I make this statement only in the context of a case in which the trial judge has found that there is no chance for amelioration of Nancy's condition. The principal opinion accepts this conclusion. It is appropriate to consider the quality of life in making decisions about the extraordinary medical treatment. Those who have made decisions about such matters without resort to the courts certainly consider the quality of life, and balance this against the unpleasant consequences to the patient. There is evidence that Nancy may react to pain stimuli. If she has any awareness of her surroundings, her life must be a living hell. She is unable to express herself or to do anything at all to alter her situation. Her parents, who are her closest relatives, are best able to feel for her and to decide what is best for her. The state should not substitute its decisions for theirs. Nor am I impressed with the crypto-philosophers cited in the principal opinion, who declaim about the sanctity of any life without regard to its quality. They dwell in ivory towers." *Id.*, at 429.

Finally, Judge Blackmar concluded that the Missouri policy was illegitimate because it treats life as a theoretical abstraction, severed from, and indeed opposed to, the person of Nancy Cruzan.

> "The Cruzan family appropriately came before the court seeking relief. The circuit judge properly found the facts and applied the law. His factual findings are supported by the record and his legal conclusions by overwhelming weight of authority. The principal opinion attempts to establish absolutes, but does so at the expense of human factors. In so doing it unnecessarily subjects Nancy and those close to her to continuous torture which no family should be forced to endure." *Id.*, at 429–430.

Although Judge Blackmar did not frame his argument as such, it propounds a sound constitutional objection to the Missouri majority's reasoning: Missouri's regulation is an unreasonable intrusion upon traditionally private matters encompassed within the liberty protected by the Due Process Clause.

The portion of this Court's opinion that considers the merits of this case is similarly unsatisfactory. It, too, fails to respect the best interests of the patient.[9] It, too, relies on what is tantamount to a waiver rationale: The dying patient's best interests are put to one side, and the entire inquiry is focused on her prior expressions of intent.[10] An innocent person's constitutional right to be free from unwanted medical treatment is thereby categorically limited to those patients who had the foresight to make an unambiguous state-

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[9] See especially *ante*, at 282 ("[W]e think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual"); *ante*, at 282, n. 10 (stating that the government is seeking to protect "its own institutional interests" in life).

[10] See, *e. g.*, *ante*, at 284.

ment of their wishes while competent. The Court's decision affords no protection to children, to young people who are victims of unexpected accidents or illnesses, or to the countless thousands of elderly persons who either fail to decide, or fail to explain, how they want to be treated if they should experience a similar fate. Because Nancy Beth Cruzan did not have the foresight to preserve her constitutional right in a living will, or some comparable "clear and convincing" alternative, her right is gone forever and her fate is in the hands of the state legislature instead of in those of her family, her independent neutral guardian ad litem, and an impartial judge—all of whom agree on the course of action that is in her best interests. The Court's willingness to find a waiver of this constitutional right reveals a distressing misunderstanding of the importance of individual liberty.

III

It is perhaps predictable that courts might undervalue the liberty at stake here. Because death is so profoundly personal, public reflection upon it is unusual. As this sad case shows, however, such reflection must become more common if we are to deal responsibly with the modern circumstances of death. Medical advances have altered the physiological conditions of death in ways that may be alarming: Highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. But those same advances, and the reorganization of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: People are less likely to die at home, and more likely to die in relatively public places, such as hospitals or nursing homes.[11]

[11] "Until the latter part of this century, medicine had relatively little treatment to offer the dying and the vast majority of persons died at home rather than in the hospital." Brief for American Medical Association et al. as *Amici Curiae* 6. "In 1985, 83% of deaths [of] Americans age 65 or over occurred in a hospital or nursing home. Sager, Easterling, *et. al.*,

Ultimate questions that might once have been dealt with in intimacy by a family and its physician[12] have now become the concern of institutions. When the institution is a state hos-

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Changes in the Location of Death After Passage of Medicare's Prospective Payment System: A National Study, 320 New Eng. J. Med. 433, 435 (1989)." *Id.*, at 6, n. 2.

According to the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"Just as recent years have seen alterations in the underlying causes of death, the places where people die have also changed. For most of recorded history, deaths (of natural causes) usually occurred in the home. "'Everyone knew about death at first hand; there was nothing unfamiliar or even queer about the phenomenon. People seem to have known a lot more about the process itself than is the case today. The "deathbed" was a real place, and the dying person usually knew where he was and when it was time to assemble the family and call for the priest.'

"Even when people did get admitted to a medical care institution, those whose conditions proved incurable were discharged to the care of their families. This was not only because the health care system could no longer be helpful, but also because alcohol and opiates (the only drugs available to ease pain and suffering) were available without a prescription. Institutional care was reserved for the poor or those without family support; hospitals often aimed more at saving patients' souls than at providing medical care.

"As medicine has been able to do more for dying patients, their care has increasingly been delivered in institutional settings. By 1949, institutions were the sites of 50% of all deaths; by 1958, the figure was 61%; and by 1977, over 70%. Perhaps 80% of all deaths in the United States now occur in hospitals and long-term care institutions, such as nursing homes. The change in where very ill patients are treated permits health care professionals to marshall the instruments of scientific medicine more effectively. But people who are dying may well find such a setting alienating and unsupportive." Deciding to Forego Life-Sustaining Treatment 17–18 (1983) (footnotes omitted), quoting Thomas, Dying as Failure, 447 Annals Am. Acad. Pol. & Soc. Sci. 1, 3 (1980).

[12] We have recognized that the special relationship between patient and physician will often be encompassed within the domain of private life protected by the Due Process Clause. See, *e. g.*, *Griswold* v. *Connecticut*, 381 U. S. 479, 481 (1965); *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 759 (1986).

pital, as it is in this case, the government itself becomes involved.[13] Dying nonetheless remains a part of "the life which characteristically has its place in the home," *Poe* v. *Ullman*, 367 U. S. 497, 551 (1961) (Harlan, J., dissenting). The "integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right," *id.*, at 551–552, and our decisions have demarcated a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S. 158, 166–167 (1944). The physical boundaries of the home, of course, remain crucial guarantors of the life within it. See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 589 (1980); *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969). Nevertheless, this Court has long recognized that the liberty to make the decisions and choices constitutive of private life is so fundamental to our "concept of ordered liberty," *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), that those choices must occasionally be afforded more direct pro-

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[13] The Court recognizes that "the State has been involved as an adversary from the beginning" in this case only because Nancy Cruzan "was a patient at a state hospital when this litigation commenced," *ante*, at 281, n. 9. It seems to me, however, that the Court draws precisely the wrong conclusion from this insight. The Court apparently believes that the absence of the State from the litigation would have created a problem, because agreement among the family and the independent guardian ad litem as to Nancy Cruzan's best interests might have prevented her treatment from becoming the focus of a "truly adversarial" proceeding. *Ibid.* It may reasonably be debated whether some judicial process should be required before life-sustaining treatment is discontinued; this issue has divided the state courts. Compare *In re Estate of Longeway*, 133 Ill. 2d 33, 51, 549 N. E. 2d 292, 300 (1989) (requiring judicial approval of guardian's decision), with *In re Hamlin*, 102 Wash. 2d 810, 818–819, 689 P. 2d 1372, 1377–1378 (1984) (discussing circumstances in which judicial approval is unnecessary). Cf. *In re Conservatorship of Torres*, 357 N. W. 2d 332, 341, n. 4 (Minn. 1984) ("At oral argument it was disclosed that on an average about 10 life support systems are disconnected weekly in Minnesota"). I tend, however, to agree with Judge Blackmar that the intervention of the State in these proceedings as an *adversary* is not so much a cure as it is part of the disease.

tection. See, *e. g.*, *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Roe* v. *Wade*, 410 U. S. 113 (1973); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 772–782 (1986) (STEVENS, J., concurring).

Respect for these choices has guided our recognition of rights pertaining to bodily integrity. The constitutional decisions identifying those rights, like the common-law tradition upon which they built,[14] are mindful that the "makers of our Constitution . . . recognized the significance of man's spiritual nature." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). It may truly be said that "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." *Ante*, at 287 (O'CONNOR, J., concurring). Thus we have construed the Due Process Clause to preclude physically invasive recoveries of evidence not only because such procedures are "brutal" but also because they are "offensive to human dignity." *Rochin* v. *California*, 342 U. S. 165, 174 (1952). We have interpreted the Constitution to interpose barriers to a State's efforts to sterilize some criminals not only because the proposed punishment would do "irreparable injury" to bodily integrity, but because "[m]arriage and procreation" concern "the basic civil rights of man." *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535, 541 (1942). The sanctity, and individual privacy, of the human body is obviously fundamental to liberty. "Every violation of a person's bodily integrity is an invasion of his or her liberty." *Washington* v. *Harper*, 494 U. S. 210, 237 (1990) (STEVENS, J., concurring in part and dissenting in part). Yet, just as the constitutional protection for the "physical curtilage of the home . . . is surely

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[14] See *ante*, at 269, 278. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891).

. . . a result of solicitude to protect the privacies of the life within," *Poe* v. *Ullman*, 367 U. S., at 551 (Harlan, J., dissenting), so too the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein.

It is against this background of decisional law, and the constitutional tradition which it illuminates, that the right to be free from unwanted life-sustaining medical treatment must be understood. That right presupposes no abandonment of the desire for life. Nor is it reducible to a protection against batteries undertaken in the name of treatment, or to a guarantee against the infliction of bodily discomfort. Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934), and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator. See *Meachum* v. *Fano*, 427 U. S. 215, 230 (1976) (STEVENS, J., dissenting).

The more precise constitutional significance of death is difficult to describe; not much may be said with confidence about death unless it is said from faith, and that alone is reason enough to protect the freedom to conform choices about death to individual conscience. We may also, however, justly assume that death is not life's simple opposite, or its necessary terminus,[15] but rather its completion. Our ethical tradition has long regarded an appreciation of mortality as essential to understanding life's significance. It may, in fact, be impossible to live for anything without being prepared to die for something. Certainly there was no disdain for life in Nathan Hale's most famous declaration or in Patrick Henry's;

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[15] Many philosophies and religions have, for example, long venerated the idea that there is a "life after death," and that the human soul endures even after the human body has perished. Surely Missouri would not wish to define its interest in life in a way antithetical to this tradition.

their words instead bespeak a passion for life that forever preserves their own lives in the memories of their countrymen.[16] From such "honored dead we take increased devotion to that cause for which they gave the last full measure of devotion."[17]

These considerations cast into stark relief the injustice, and unconstitutionality, of Missouri's treatment of Nancy Beth Cruzan. Nancy Cruzan's death, when it comes, cannot be an historic act of heroism; it will inevitably be the consequence of her tragic accident. But Nancy Cruzan's interest in life, no less than that of any other person, includes an interest in how she will be thought of after her death by those whose opinions mattered to her. There can be no doubt that her life made her dear to her family and to others. How she dies will affect how that life is remembered. The trial court's order authorizing Nancy's parents to cease their daughter's treatment would have permitted the family that cares for Nancy to bring to a close her tragedy and her death. Missouri's objection to that order subordinates Nancy's body, her family, and the lasting significance of her life to the State's own interests. The decision we review thereby interferes with constitutional interests of the highest order.

To be constitutionally permissible, Missouri's intrusion upon these fundamental liberties must, at a minimum, bear a reasonable relationship to a legitimate state end. See, *e. g.*, *Meyer* v. *Nebraska*, 262 U. S., at 400; *Doe* v. *Bolton*, 410 U. S. 179, 194–195, 199 (1973). Missouri asserts that its policy is related to a state interest in the protection of life. In my view, however, it is an effort to define life, rather than to protect it, that is the heart of Missouri's policy. Missouri insists, without regard to Nancy Cruzan's own interests, upon

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[16] See, *e. g.*, H. Johnston, Nathan Hale 1776: Biography and Memorials 128–129 (1914); J. Axelrad, Patrick Henry: The Voice of Freedom 110–111 (1947).

[17] A. Lincoln, Gettysburg Address, 1 Documents of American History 429 (H. Commager ed.) (9th ed. 1973).

equating her life with the biological persistence of her bodily functions. Nancy Cruzan, it must be remembered, is not now simply incompetent. She is in a persistent vegetative state and has been so for seven years. The trial court found, and no party contested, that Nancy has no possibility of recovery and no consciousness.

It seems to me that the Court errs insofar as it characterizes this case as involving "judgments about the 'quality' of life that a particular individual may enjoy," *ante*, at 282. Nancy Cruzan is obviously "*alive*" in a physiological sense. But for patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is "*life*" as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence.[18] The State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity.

This much should be clear from the oddity of Missouri's definition alone. Life, particularly human life, is not commonly thought of as a merely physiological condition or func-

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[18] The Supreme Judicial Court of Massachusetts observed in this connection: "When we balance the State's interest in prolonging a patient's life against the rights of the patient to reject such prolongation, we must recognize that the State's interest in life encompasses a broader interest than mere corporeal existence. In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it was meant to serve." *Brophy* v. *New England Sinai Hospital, Inc.*, 398 Mass. 417, 433–434, 497 N. E. 2d 626, 635 (1986). The *Brophy* court then stressed that this reflection upon the nature of the State's interest in life was distinguishable from any considerations related to the quality of a particular patient's life, considerations which the court regarded as irrelevant to its inquiry. See also *In re Eichner*, 73 App. Div. 2d 431, 465, 426 N. Y. S. 2d 517, 543 (1980) (A patient in a persistent vegetative state "has *no* health, and, in the true sense, no life, for the State to protect"), modified in *In re Storar*, 52 N. Y. 2d 363, 420 N. E. 2d 64 (1981).

tion.[19] Its sanctity is often thought to derive from the impossibility of any such reduction. When people speak of life, they often mean to describe the experiences that comprise a person's history, as when it is said that somebody "led a good life."[20] They may also mean to refer to the practical manifestation of the human spirit, a meaning captured by the familiar observation that somebody "added life" to an assembly. If there is a shared thread among the various opinions on this subject, it may be that life is an activity which is at once the matrix for, and an integration of, a person's interests. In

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[19] One learned observer suggests, in the course of discussing persistent vegetative states, that "few of us would accept the preservation of such a reduced level of function as a proper *goal* for medicine, even though we sadly accept it as an unfortunate and unforeseen *result* of treatment that had higher aspirations, and even if we refuse actively to cause such vegetative life to cease." L. Kass, Toward a More Natural Science 203 (1985). This assessment may be controversial. Nevertheless, I again tend to agree with Judge Blackmar, who in his dissent from the Missouri Supreme Court's decision contended that it would be unreasonable for the State to assume that most people *did* in fact hold a view contrary to the one described by Dr. Kass.

My view is further buttressed by the comments of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research:

"The primary basis for medical treatment of patients is the prospect that each individual's interests (specifically, the interest in well-being) will be promoted. Thus, treatment ordinarily aims to benefit a patient through preserving life, relieving pain and suffering, protecting against disability, and returning maximally effective functioning. If a prognosis of permanent unconsciousness is correct, however, continued treatment cannot confer such benefits. Pain and suffering are absent, as are joy, satisfaction, and pleasure. Disability is total and no return to an even minimal level of social or human functioning is possible." Deciding to Forego Life-Sustaining Treatment 181–182 (1983).

[20] It is this sense of the word that explains its use to describe a biography: for example, Boswell's Life of Johnson or Beveridge's The Life of John Marshall. The reader of a book so titled would be surprised to find that it contained a compilation of biological data.

any event, absent some theological abstraction, the idea of life is not conceived separately from the idea of a living person. Yet, it is by precisely such a separation that Missouri asserts an interest in Nancy Cruzan's life in opposition to Nancy Cruzan's own interests. The resulting definition is uncommon indeed.

The laws punishing homicide, upon which the Court relies, *ante*, at 280, do not support a contrary inference. Obviously, such laws protect both the life *and* interests of those who would otherwise be victims. Even laws against suicide presuppose that those inclined to take their own lives have *some* interest in living, and, indeed, that the depressed people whose lives are preserved may later be thankful for the State's intervention. Likewise, decisions that address the "quality of life" of incompetent, but conscious, patients rest upon the recognition that these patients have *some* interest in continuing their lives, even if that interest pales in some eyes when measured against interests in dignity or comfort. Not so here. Contrary to the Court's suggestion, Missouri's protection of life in a form abstracted from the living is not commonplace; it is aberrant.

Nor does Missouri's treatment of Nancy Cruzan find precedent in the various state-law cases surveyed by the majority. Despite the Court's assertion that state courts have demonstrated "both similarity and diversity in their approaches" to the issue before us, *none* of the decisions surveyed by the Court interposed an absolute bar to the termination of treatment for a patient in a persistent vegetative state. For example, *In re Westchester County Medical Center on behalf of O'Connor*, 72 N. Y. 2d 517, 531 N. E. 2d 607 (1988), pertained to an incompetent patient who "was not in a coma or vegetative state. She was conscious, and capable of responding to simple questions or requests sometimes by squeezing the questioner's hand and sometimes verbally."

Id., at 524–525, 531 N. E. 2d, at 609–610. Likewise, *In re Storar*, 52 N. Y. 2d 363, 420 N. E. 2d 64 (1981), involved a conscious patient who was incompetent because "profoundly retarded with a mental age of about 18 months." *Id.*, at 373, 420 N. E. 2d, at 68. When it decided *In re Conroy*, 98 N. J. 321, 486 A. 2d 1209 (1985), the New Jersey Supreme Court noted that "Ms. Conroy was not brain dead, comatose, or in a chronic vegetative state," 98 N. J., at 337, 486 A. 2d, at 1217, and then distinguished *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647 (1976), on the ground that Karen Quinlan had been in a "persistent vegetative or comatose state." 98 N. J., at 358–359, 486 A. 2d, at 1228. By contrast, an unbroken stream of cases has authorized procedures for the cessation of treatment of patients in persistent vegetative states.[21] Con-

[21] See, *e. g.*, *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N. E. 2d 292 (1989) (authorizing removal of a gastrostomy tube from a permanently unconscious patient after judicial approval is obtained); *McConnell* v. *Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A. 2d 596, 603 (1989) (authorizing, pursuant to statute, removal of a gastrostomy tube from patient in a persistent vegetative state, where patient had previously expressed a wish not to have treatment sustained); *Gray* v. *Romeo*, 697 F. Supp. 580 (RI 1988) (authorizing removal of a feeding tube from a patient in a persistent vegetative state); *Rasmussen* v. *Fleming*, 154 Ariz. 207, 741 P. 2d 674 (1987) (en banc) (authorizing procedures for the removal of a feeding tube from a patient in a persistent vegetative state); *In re Gardner*, 534 A. 2d 947 (Me. 1987) (allowing discontinuation of life-sustaining procedures for a patient in a persistent vegetative state); *In re Peter*, 108 N. J. 365, 529 A. 2d 419 (1987) (authorizing procedures for cessation of treatment to elderly nursing home patient in a persistent vegetative state); *In re Jobes*, 108 N. J. 394, 529 A. 2d 434 (1987) (authorizing procedures for cessation of treatment to nonelderly patient determined by "clear and convincing" evidence to be in a persistent vegetative state); *Brophy* v. *New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N. E. 2d 626 (1986) (permitting removal of a feeding tube from a patient in a persistent vegetative state); *John F. Kennedy Memorial Hospital, Inc.* v. *Bludworth*, 452 So. 2d 921 (Fla. 1984) (holding that court approval was not needed to authorize cessation of life-support for patient in a persistent vegetative state who had executed a living will); *In re Conservatorship of Torres*, 357 N. W. 2d 332 (Minn. 1984) (authorizing removal of a permanently unconscious patient from life-support systems); *In re L. H. R.*, 253 Ga. 439, 321 S. E. 2d

sidered against the background of other cases involving patients in persistent vegetative states, instead of against the broader—and inapt—category of cases involving chronically ill incompetent patients, Missouri's decision is anomolous.

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716 (1984) (allowing parents to terminate life support for infant in a chronic vegetative state); *In re Hamlin*, 102 Wash. 2d 810, 689 P. 2d 1372 (1984) (allowing termination, without judicial intervention, of life support for patient in a vegetative state if doctors and guardian concur; conflicts among doctors and the guardian with respect to cessation of treatment are to be resolved by a trial court); *In re Colyer*, 99 Wash. 2d 114, 660 P. 2d 738 (1983), modified on other grounds, *In re Hamlin*, 102 Wash. 2d 810, 689 P. 2d 1372 (1984) (allowing court-appointed guardian to authorize cessation of treatment of patient in persistent vegetative state); *In re Eichner* (decided with *In re Storar*), 52 N. Y. 2d 363, 420 N. E. 2d 64 (authorizing the removal of a patient in a persistent vegetative state from a respirator), cert. denied, 454 U. S. 858 (1981); *In re Quinlan*, 70 N. J. 10, 355 A. 2d 647 (authorizing, on constitutional grounds, the removal of a patient in a persistent vegetative state from a respirator), cert. denied, 429 U. S. 922 (1976); *Corbett* v. *D'Alessandro*, 487 So. 2d 368 (Fla. App. 1986) (authorizing removal of nasogastric feeding tube from patient in persistent vegetative state); *In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 218, 245 Cal. Rptr. 840, 861 (1988) ("Life sustaining treatment is not 'necessary' under Probate Code section 2355 if it offers no reasonable possibility of returning the conservatee to cognitive life and if it is not otherwise in the conservatee's best interests, as determined by the conservator in good faith") (footnote omitted); *Delio* v. *Westchester County Medical Center*, 129 App. Div. 2d 1, 516 N. Y. S. 2d 677 (1987) (authorizing discontinuation of artificial feeding for a 33-year-old patient in a persistent vegetative state); *Leach* v. *Akron General Medical Center*, 68 Ohio Misc. 1, 426 N. E. 2d 809 (1980) (authorizing removal of a patient in a persistent vegetative state from a respirator); *In re Severns*, 425 A. 2d 156 (Del. Ch. 1980) (authorizing discontinuation of all medical support measures for a patient in a "virtual vegetative state").

These cases are not the only ones which have allowed the cessation of life-sustaining treatment to incompetent patients. See, *e. g.*, *Superintendant of Belchertown State School* v. *Saikewicz*, 373 Mass. 728, 370 N. E. 2d 417 (1977) (holding that treatment could have been withheld from a profoundly mentally retarded patient); *Bouvia* v. *Superior Court of Los Angeles County*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (allowing removal of lifesaving nasogastric tube from competent, highly intelligent patient who was in extreme pain).

In short, there is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life. As I have already suggested, it would be possible to hypothesize such an interest on the basis of theological or philosophical conjecture. But even to posit such a basis for the State's action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life. See *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 566–572 (1989) (STEVENS, J., dissenting).

My disagreement with the Court is thus unrelated to its endorsement of the clear and convincing standard of proof for cases of this kind. Indeed, I agree that the controlling facts must be established with unmistakable clarity. The critical question, however, is not how to prove the controlling facts but rather what proven facts should be controlling. In my view, the constitutional answer is clear: The best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests.[22] Indeed, the only apparent *secular* basis for the State's interest in life is the policy's persuasive impact upon people other than Nancy and her family. Yet, "[a]lthough the State may properly perform a teaching function," and although that teaching may foster respect for the sanctity of life, the State may not pursue its project by infringing constitutionally protected inter-

[22] Although my reasoning entails the conclusion that the best interests of the incompetent patient must be respected even when the patient is conscious, rather than in a vegetative state, considerations pertaining to the "quality of life," in addition to considerations about the definition of life, might then be relevant. The State's interest in protecting the life, and thereby the interests, of the incompetent patient would accordingly be more forceful, and the constitutional questions would be correspondingly complicated.

ests for "*symbolic* effect." *Carey* v. *Population Services International*, 431 U. S. 678, 715 (1977) (STEVENS, J., concurring in part and concurring in judgment). The failure of Missouri's policy to heed the interests of a dying individual with respect to matters so private is ample evidence of the policy's illegitimacy.

Only because Missouri has arrogated to itself the power to define life, and only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life. Conversely, if there were *any* evidence that Nancy Cruzan herself defined life to encompass every form of biological persistence by a human being, so that the continuation of treatment would serve Nancy's own liberty, then once again there would be no conflict between life and liberty. The opposition of life and liberty in this case are thus not the result of Nancy Cruzan's tragic accident, but are instead the artificial consequence of Missouri's effort, and this Court's willingness, to abstract Nancy Cruzan's life from Nancy Cruzan's person.

IV

Both this Court's majority and the state court's majority express great deference to the policy choice made by the state legislature.[23] That deference is, in my view, based

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[23] Thus, the state court wrote:

"This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life. If there is to be a change in that policy, it must come from the people through their elected representatives. Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to

upon a severe error in the Court's constitutional logic. The Court believes that the liberty interest claimed here on behalf of Nancy Cruzan is peculiarly problematic because "[a]n incompetent person is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right." *Ante*, at 280. The impossibility of such an exercise affords the State, according to the Court, some discretion to interpose "a procedural requirement" that effectively compels the continuation of Nancy Cruzan's treatment.

There is, however, nothing "hypothetical" about Nancy Cruzan's constitutionally protected interest in freedom from unwanted treatment, and the difficulties involved in ascertaining what her interests are do not in any way justify the State's decision to oppose her interests with its own. As this case comes to us, the crucial question—and the question addressed by the Court—is not what Nancy Cruzan's interests are, but whether the State must give effect to them. There is certainly nothing novel about the practice of permitting a next friend to assert constitutional rights on behalf of an incompetent patient who is unable to do so. See, *e. g.*, *Youngberg* v. *Romeo*, 457 U. S. 307, 310 (1982); *Whitmore* v. *Arkansas*, 495 U. S. 149, 161–164 (1990). Thus, if Nancy Cruzan's incapacity to "exercise" her rights is to alter the balance between her interests and the State's, there must be some further explanation of how it does so. The Court offers two possibilities, neither of them satisfactory.

The first possibility is that the State's policy favoring life is by its nature less intrusive upon the patient's interest than any alternative. The Court suggests that Missouri's policy "results in a maintenance of the status quo," and is subject to reversal, while a decision to terminate treatment "is not sus-

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courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide." 760 S. W. 2d, at 426.

ceptible of correction" because death is irreversible. *Ante*, at 283. Yet, this explanation begs the question, for it assumes either that the State's policy is consistent with Nancy Cruzan's own interests, or that no damage is done by ignoring her interests. The first assumption is without basis in the record of this case, and would obviate any need for the State to rely, as it does, upon its own interests rather than upon the patient's. The second assumption is unconscionable. Insofar as Nancy Cruzan has an interest in being remembered for how she lived rather than how she died, the damage done to those memories by the prolongation of her death is irreversible. Insofar as Nancy Cruzan has an interest in the cessation of any pain, the continuation of her pain is irreversible. Insofar as Nancy Cruzan has an interest in a closure to her life consistent with her own beliefs rather than those of the Missouri Legislature, the State's imposition of its contrary view is irreversible. To deny the importance of these consequences is in effect to deny that Nancy Cruzan has interests at all, and thereby to deny her personhood in the name of preserving the sanctity of her life.

The second possibility is that the State must be allowed to define the interests of incompetent patients with respect to life-sustaining treatment because there is no procedure capable of determining what those interests are in any particular case. The Court points out various possible "abuses" and inaccuracies that may affect procedures authorizing the termination of treatment. See *ante*, at 281–282. The Court correctly notes that in some cases there may be a conflict between the interests of an incompetent patient and the interests of members of his or her family. A State's procedures must guard against the risk that the survivors' interests are not mistaken for the patient's. Yet, the appointment of the neutral guardian ad litem, coupled with the searching inquiry conducted by the trial judge and the imposition of the clear and convincing standard of proof, all effectively avoided that risk in this case. Why such procedural safeguards should not

be adequate to avoid a similar risk in other cases is a question the Court simply ignores.

Indeed, to argue that the mere possibility of error in *any* case suffices to allow the State's interests to override the particular interests of incompetent individuals in *every* case, or to argue that the interests of such individuals are unknowable and therefore may be subordinated to the State's concerns, is once again to deny Nancy Cruzan's personhood. The meaning of respect for her personhood, and for that of others who are gravely ill and incapacitated, is, admittedly, not easily defined: Choices about life and death are profound ones, not susceptible of resolution by recourse to medical or legal rules. It may be that the best we can do is to ensure that these choices are made by those who will care enough about the patient to investigate his or her interests with particularity and caution. The Court seems to recognize as much when it cautions against formulating any general or inflexible rule to govern all the cases that might arise in this area of the law. *Ante*, at 277–278. The Court's deference to the legislature is, however, itself an inflexible rule, one that the Court is willing to apply in this case even though the Court's principal grounds for deferring to Missouri's Legislature are hypothetical circumstances not relevant to Nancy Cruzan's interests.

On either explanation, then, the Court's deference seems ultimately to derive from the premise that chronically incompetent persons have no constitutionally cognizable interests at all, and so are not persons within the meaning of the Constitution. Deference of this sort is patently unconstitutional. It is also dangerous in ways that may not be immediately apparent. Today the State of Missouri has announced its intent to spend several hundred thousand dollars in preserving the life of Nancy Beth Cruzan in order to vindicate its general policy favoring the preservation of human life. Tomorrow, another State equally eager to champion an interest in the "quality of life" might favor a policy designed to ensure quick

and comfortable deaths by denying treatment to categories of marginally hopeless cases. If the State in fact has an interest in defining life, and if the State's policy with respect to the termination of life-sustaining treatment commands deference from the judiciary, it is unclear how any resulting conflict between the best interests of the individual and the general policy of the State would be resolved.[24] I believe the Constitution requires that the individual's vital interest in liberty should prevail over the general policy in that case, just as in this.

That a contrary result is readily imaginable under the majority's theory makes manifest that this Court cannot defer to any state policy that drives a theoretical wedge between a person's life, on the one hand, and that person's liberty or happiness, on the other.[25] The consequence of such a theory

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[24] The Supreme Judicial Court of Massachusetts anticipated this possibility in its *Brophy* decision, where it observed that the "duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity," because otherwise the State's defense of life would be tantamount to an effort by "the State to make decisions regarding the individual's quality of life." 398 Mass., at 434, 497 N. E. 2d, at 635. Accord, *Gray* v. *Romeo*, 697 F. Supp., at 588.

[25] Judge Campbell said on behalf of the Florida District Court of Appeal for the Second District:

"[W]e want to acknowledge that we began our deliberations in this matter, as did those who drafted our Declaration of Independence, with the solemnity and the gratefulness of the knowledge 'that all men are . . . endowed by their Creator with . . . Life.' It was not without considerable searching of our hearts, souls, and minds, as well as the jurisprudence of this great Land that we have reached our conclusions. We forcefully affirm that Life having been endowed by our Creator should not be lightly taken nor relinquished. We recognize, however, that we are also endowed with a certain amount of dignity and the right to the 'Pursuit of Happiness.' When, therefore, it may be determined by reason of the advanced scientific and medical technologies of this day that Life has, through causes beyond our control, reached the unconscious and vegetative state where all that remains is the forced function of the body's vital functions, including the artificial sustenance of the body itself, then we recognize the right to allow

is to deny the personhood of those whose lives are defined by the State's interests rather than their own. This consequence may be acceptable in theology or in speculative philosophy, see *Meyer*, 262 U. S., at 401–402, but it is radically inconsistent with the foundation of all legitimate government. Our Constitution presupposes a respect for the personhood of every individual, and nowhere is strict adherence to that principle more essential than in the judicial branch. See, *e. g.*, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S., at 781–782 (STEVENS, J., concurring).

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In this case, as is no doubt true in many others, the predicament confronted by the healthy members of the Cruzan family merely adds emphasis to the best interests finding made by the trial judge. Each of us has an interest in the kind of memories that will survive after death. To that end, individual decisions are often motivated by their impact on others. A member of the kind of family identified in the trial court's findings in this case would likely have not only a normal interest in minimizing the burden that her own illness imposes on others, but also an interest in having their memories of her filled predominantly with thoughts about her past vitality rather than her current condition. The meaning and completion of her life should be controlled by persons who have her best interests at heart—not by a state legislature concerned only with the "preservation of human life."

The Cruzan family's continuing concern provides a concrete reminder that Nancy Cruzan's interests did not disappear with her vitality or her consciousness. However commendable may be the State's interest in human life, it cannot pursue that interest by appropriating Nancy Cruzan's life as a symbol for its own purposes. Lives do not exist in abstrac-

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the natural consequence of the removal of those artificial life sustaining measures." *Corbett* v. *D'Alessandro*, 487 So. 2d, at 371.

tion from persons, and to pretend otherwise is not to honor but to desecrate the State's responsiblity for protecting life. A State that seeks to demonstrate its commitment to life may do so by aiding those who are actively struggling for life and health. In this endeavor, unfortunately, no State can lack for opportunities: There can be no need to make an example of tragic cases like that of Nancy Cruzan.

I respectfully dissent.

SISSON *v.* RUBY ET AL.

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

No. 88–2041. Argued April 23, 1990—Decided June 25, 1990

A fire erupted in the washer/dryer area of petitioner Sisson's pleasure yacht while it was docked at a Lake Michigan marina, destroying the yacht and damaging several neighboring vessels and the marina. Respondents filed claims against Sisson for over $275,000 in damages. Invoking a Limited Liability Act provision that limits a vessel owner's liability for any damage done without the owner's privity or knowledge to the value of the vessel and its freight, Sisson filed a petition for declaratory and injunctive relief in the Federal District Court to limit his liability to $800, his yacht's salvage value after the fire. The court dismissed the petition for lack of subject-matter jurisdiction, rejecting Sisson's argument that it had, *inter alia*, jurisdiction under 28 U. S. C. § 1333(1), which grants district courts maritime jurisdiction. The Court of Appeals affirmed.

Held: The District Court has jurisdiction over Sisson's limitation claim pursuant to § 1333(1). Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668, 675, n. 5. The first half of the test—that there be a potential hazard to maritime activity—is met because the fire, which began on a noncommercial vessel at a marina on a navigable waterway, could have spread to nearby commercial vessels or made the marina inaccessible to such vessels. Respondents' argument that the potential effect on maritime commerce was minimal because no commercial vessels were docked in the marina misunderstands the nature of the inquiry, which determines an activity's potential impact by examining its general character, not the actual effects on maritime commerce nor the particular facts about the incident that may have rendered it more or less likely to disrupt commercial activity. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249; *Foremost*, *supra*. In determining, as to the second half of the test, whether there is a substantial relationship between the activity giving rise to the incident and traditional maritime activity, the relevant activity in this case was the storage and maintenance of a vessel at a marina on navigable waters. A vessel's storage and maintenance is substantially related to a traditional maritime activity. Respondents' contention that navigation is the sole instance, rather

than an example, of an activity substantially related to traditional maritime activity is incorrect. Were navigation the only activity, *Foremost* could have stated the jurisdictional test much more clearly and economically. Moreover, a narrow focus on navigation would not serve the federal policies underlying the jurisdictional test since the need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by commercial or noncommercial vessels. Pp. 360–367.

867 F. 2d 341, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 368.

Warren J. Marwedel argued the cause for petitioner. With him on the briefs was *Dennis Minichello.*

Robert J. Kopka argued the cause for respondents. With him on the brief was *Jeffrey S. Herden.**

JUSTICE MARSHALL delivered the opinion of the Court.

We must decide whether 28 U. S. C. § 1333(1), which grants federal district courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction," confers federal jurisdiction over petitioner's limitation of liability suit brought in connection with a fire on his vessel. We hold that it does.[1]

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*Briefs of *amici curiae* urging reversal were filed for American Auto, Inc., by *Terence S. Cox;* and for the Maritime Law Association of the United States by *Richard H. Brown, Jr.*, and *Richard W. Palmer.*

John A. Flynn filed a brief for the Hatteras Yachts Division of Genmar Industries, Inc., as *amicus curiae* urging affirmance.

Solicitor General Starr, *Deputy Solicitor General Shapiro*, and *Stephen L. Nightingale* filed a brief for the United States as *amicus curiae.*

[1] Sisson has also argued throughout this litigation that the Limited Liability Act, Rev. Stat. § 4281 *et seq.*, 46 U. S. C. App. § 181 *et seq.* (1982 ed., Supp. V), provides an independent basis for federal jurisdiction. Respondents contend that the Act does not create jurisdiction, but instead may be invoked only in cases otherwise within the maritime jurisdiction of § 1333(1). We need not decide which party is correct, for even were we to agree that the Limited Liability Act does not independently provide a basis for this action, § 1333(1) is sufficient to confer jurisdiction. Petitioner also argues that the Admiralty Extension Act, 62 Stat. 496, 46 U. S. C. App.

Everett Sisson was the owner of the *Ultorian*, a 56-foot pleasure yacht. On September 24, 1985, while the *Ultorian* was docked at a marina on Lake Michigan, a navigable waterway, a fire erupted in the area of the vessel's washer/dryer unit. The fire destroyed the *Ultorian* and damaged several neighboring vessels and the marina. In the wake of the fire, respondents filed claims against Sisson for over $275,000 for damages to the marina and the other vessels. Invoking the provision of the Limited Liability Act that limits the liability of an owner of a vessel for any damage done "without the privity or knowledge of such owner" to the value of the vessel and its freight, 46 U. S. C. App. § 183(a) (1982 ed., Supp. V), Sisson filed a petition for declaratory and injunctive relief in Federal District Court to limit his liability to $800, the salvage value of the *Ultorian* after the fire. Sisson argued that the federal court had maritime jurisdiction over his limitation of liability action pursuant to § 1333(1). The District Court disagreed, dismissing the petition for lack of subject-matter jurisdiction. *In re Complaint of Sisson*, 663 F. Supp. 858 (ND Ill. 1987). Sisson sought reconsideration on the ground that the Limited Liability Act independently conferred jurisdiction over the action. The District Court denied Sisson's motion, both on the merits and on the basis of Sisson's failure to raise the argument before the dismissal of the action. *In re Complaint of Sisson*, 668 F. Supp. 1196 (ND Ill. 1987). The Court of Appeals for the Seventh Circuit affirmed, holding that neither § 1333(1) nor the Limited Liability Act conferred jurisdiction. *In re Complaint of Sisson*, 867 F. 2d 341 (1989). We granted certiorari, 493 U. S. 1055 (1990), and now reverse.

Until recently, § 1333(1) jurisdiction over tort actions was determined largely by the application of a "locality" test. As this Court stated the test in *The Plymouth*, 3 Wall. 20,

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§ 740 (1982 ed., Supp. V), provides an independent basis for jurisdiction. We decline to consider that argument because it was not raised below.

36 (1866): "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See also *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249, 253–254 (1972) (describing the locality test). *Executive Jet* marked this Court's first clear departure from the strict locality test. There, a jet aircraft struck a flock of sea gulls while taking off, lost power, and crashed into the navigable waters of Lake Erie, which lay just past the end of the runway. The owner of the aircraft sued the city of Cleveland, the owner of the airport, in federal court, arguing that § 1333(1) conferred federal jurisdiction over the action. Noting "serious difficulties with the locality test," *id.*, at 255, we refused to enter into a debate over whether the tort occurred where the plane had crashed and been destroyed (the navigable waters of Lake Erie) or where it had struck the sea gulls (over land), *id.*, at 266–267. Rather, we held that jurisdiction was lacking because "the wrong [did not] bear a significant relationship to traditional maritime activity." *Id.*, at 268.

Although our holding in *Executive Jet* was limited by its terms to cases involving aviation torts, that case's "thorough discussion of the theoretical and practical problems inherent in broadly applying the traditional locality rule . . . prompted several courts and commentators to construe *Executive Jet* as applying to determinations of federal admiralty jurisdiction outside the context of aviation torts." *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668, 673 (1982). In *Foremost*, we approved this broader interpretation of *Executive Jet*. 457 U. S., at 673. *Foremost* involved a collision, on what we assumed to be navigable waters, *id.*, at 670, n. 2, between an 18-foot pleasure boat and a 16-foot recreational fishing boat, see *Richardson* v. *Foremost Ins. Co.*, 470 F. Supp. 699, 700 (MD La. 1979). Neither vessel had ever been engaged in any commercial maritime activity. 457 U. S., at 670–671.

We began our application of *Executive Jet* by rejecting "petitioners' argument that a substantial relationship with *commercial* maritime activity is necessary" to a finding of maritime jurisdiction. 457 U. S., at 674 (emphasis added). Although we recognized that protecting commercial shipping is at the heart of admiralty jurisdiction, we also noted that that interest

> "cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. The failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce." *Id.*, at 674–675 (footnote omitted).

In a footnote to the above passage, we noted that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction," *id.*, at 675, n. 5 (citing *Executive Jet*), but that when a "potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of boats in this case, admiralty jurisdiction is appropriate." 457 U. S., at 675, n. 5.

This case involves a fire that began on a noncommercial vessel at a marina located on a navigable waterway. Certainly, such a fire has a potentially disruptive impact on maritime commerce, as it can spread to nearby commercial vessels or make the marina inaccessible to such vessels. Indeed, fire is one of the most significant hazards facing commercial vessels.

See, *e. g.*, *Southport Fisheries, Inc.* v. *Saskatchewan Govt. Ins. Office*, 161 F. Supp. 81, 83–84 (EDNC 1958).

Respondents' only argument to the contrary is that the potential effect on maritime commerce in this case was minimal because no commercial vessels happened to be docked at the marina when the fire occurred. This argument misunderstands the nature of our inquiry. We determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the fire on Sisson's vessel; nor does it turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina, that may have rendered the fire on the *Ultorian* more or less likely to disrupt commercial activity. Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity. Here, the general features—a fire on a vessel docked at a marina on navigable waters—plainly satisfy the requirement of potential disruption to commercial maritime activity.

Our approach here comports with the way in which we characterized the potential disruption of the types of incidents involved in *Executive Jet* and *Foremost*. This first aspect of the jurisdictional test was satisfied in *Executive Jet* because "an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity." *Foremost*, 457 U. S., at 675, n. 5. Likewise, in *Foremost* the Court noted "[t]he potential[ly] disruptive impact of a collision between boats on navigable waters." *Id.*, at 675. Indeed, we supported our finding of potential disruption there with a description of the likely effects of a collision at the mouth of the St. Lawrence Seaway, *ibid.*, an area heavily traveled by commercial vessels, even though the place where the collision actually had occurred apparently was "seldom, if ever, used for commercial traffic," *id.*, at 670, n. 2. Our

cases thus lead us to eschew the fact-specific jurisdictional inquiry urged on us by respondents.[2]

We now turn to the second half of the *Foremost* test, under which the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity. As a first step, we must define the relevant activity in this case. Our cases have made clear that the relevant "activity" is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose. In *Executive Jet*, for example, the relevant activity was not a plane sinking in Lake Erie, but air travel generally. 409 U. S., at 269–270. See also *Foremost*, *supra*, at 675–677 (relevant activity is navigation of vessels generally). This

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[2] JUSTICE SCALIA argues that we should abandon the requirement that the incident have the potential for disrupting maritime commerce. He argues that, "as a practical matter, *every* tort occurring on a vessel in navigable waters" should give rise to maritime jurisdiction, *post*, at 373 (emphasis added), no matter how divorced the incident from the purposes that give rise to such jurisdiction. JUSTICE SCALIA is correct that his approach would be simpler to apply than the one embraced by *Executive Jet* and *Foremost* and that, all things being equal, simpler jurisdictional formulae are to be preferred. Such a preference, in fact, informs our refusal to consider the particulars of the fire on the *Ultorian* in determining whether maritime jurisdiction lies. See *supra*, at 363. But the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In *Foremost*, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction. Compare *Foremost*, 457 U. S., at 674–675, with *id.*, at 679–680 (Powell, J., dissenting). The only point of debate in *Foremost* was whether the Court was straying too *far* from that purpose by requiring no more than that the wrong have a potentially disruptive impact on maritime commerce and arise from an activity with a substantial relationship to traditional maritime activity. JUSTICE SCALIA's view that *Foremost* did not go far *enough* is thus plainly inconsistent with the unanimous view of the Court in *Foremost*.

focus on the general character of the activity is, indeed, suggested by the nature of the jurisdictional inquiry. Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question. Thus, in this case, we need not ascertain the precise cause of the fire to determine what "activity" Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters.[3]

Our final inquiry, then, is whether the storage and maintenance of a boat at a marina on navigable waters has a substantial relationship to a "traditional maritime activity" within the meaning of *Executive Jet* and *Foremost*.[4] Re-

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[3] In this case, all of the instrumentalities involved in the incident were engaged in a similar activity. The *Ultorian* and the other craft damaged by the fire were docked at a marina, and the marina itself provided docking and related services. The facts of *Executive Jet* and *Foremost* also reveal that all the relevant entities were engaged in a common form of activity. See *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249 (1972) (entities involved in the incident were engaged in nonmaritime activity of facilitating air travel); *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668 (1982) (entities were both engaged in navigation). Different issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely raises them.

[4] The Circuits have interpreted this aspect of the jurisdictional inquiry variously. After *Executive Jet*, but before *Foremost*, the Fifth Circuit adopted a four-factor test for deciding whether an activity is substantially related to traditional maritime activity. The factors are "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." *Kelly* v. *Smith*, 485 F. 2d 520, 525 (1973). In other Circuits, this test has continued to dominate the landscape even in the wake of *Foremost*. See, *e. g.*, *Drake* v. *Raymark Industries, Inc.*, 772 F. 2d 1007, 1015 (CA1 1985); *Guidry* v. *Durkin*, 834 F. 2d 1465, 1471 (CA9 1987); *Lewis Charters, Inc.* v. *Huckins Yacht Corp.*, 871 F. 2d 1046, 1051 (CA11 1989). The Fourth Circuit appears to follow *Kelly* as well, although how closely is unclear. Compare *Oman* v. *Johns-Manville Corp.*,

spondents would have us hold that, at least in the context of noncommercial activity, only navigation can be characterized as substantially related to traditional maritime activity. We decline to do so. In *Foremost*, we identified navigation as an example, rather than as the sole instance, of conduct that is substantially related to traditional maritime activity. See 457 U. S., at 675, n. 5. Indeed, had we intended to sug-

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764 F. 2d 224, 230, and n. 3 (CA4 1985) (en banc) (stating that "a thorough analysis of the nexus requirement should include a consideration of *at least* [the *Kelly* factors]") (emphasis added), with *Bubla* v. *Bradshaw*, 795 F. 2d 349, 351 (CA4 1986) (implicitly treating *Kelly* factors as exclusive). The precise state of the law in the Fifth Circuit after *Foremost* is also unclear. Compare *Mollett* v. *Penrod Drilling Co.*, 826 F. 2d 1419, 1426 (CA5 1987) *(Mollett I)* (applying, in addition to the *Kelly* factors, "(1) the impact of the event on maritime shipping and commerce (2) the desirability of a uniform national rule to apply to such matters and (3) the need for admiralty 'expertise' in the trial and decision of the case"), with *Mollett* v. *Penrod Drilling Co.*, 872 F. 2d 1221, 1224–1226 (CA5 1989) *(Mollett II)* (applying the *Kelly* factors without explicit mention of the extra factors identified in *Mollett I*).

Other Circuits have adopted different approaches. The Seventh Circuit in this case held that an activity must either be commercial or involve navigation to satisfy the "traditional maritime activity" standard. *In re Complaint of Sisson*, 867 F. 2d 341, 345 (1989). The Second Circuit directly applies our language requiring a substantial relationship to traditional maritime activity without applying any additional factors. See *Keene Corp.* v. *United States*, 700 F. 2d 836, 844 (1983); *Kelly* v. *United States*, 531 F. 2d 1144, 1147–1148 (1976). Finally, the Sixth Circuit has criticized the Seventh Circuit's analysis in this case as "an indefensibly narrow reading of *Foremost Insurance*," *In re Young*, 872 F. 2d 176, 178–179, n. 4 (1989), but has not set forth in concrete terms the test it would apply, cf. *Petersen* v. *Chesapeake & Ohio R. Co.*, 784 F. 2d 732, 736 (1986).

The parties and various *amici* suggest that we resolve this dispute by adopting one of the Circuits' tests (or some other test entirely). We believe that, at least in cases in which all of the relevant entities are engaged in similar types of activity (cf. n. 3, *supra*), the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts. We therefore decline the invitation to use this case to refine further the test we have developed.

gest that navigation is the only activity that is sufficient to confer jurisdiction, we could have stated the jurisdictional test much more clearly and economically by stating that maritime jurisdiction over torts is limited to torts in which the vessels are in "navigation." Moreover, a narrow focus on navigation would not serve the federal policies that underlie our jurisdictional test. The fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce," *id.*, at 674, and we have said that that interest cannot be fully vindicated unless "*all* operators of vessels on navigable waters are subject to uniform rules of conduct," *id.*, at 675. The need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial.

Clearly, the storage and maintenance of a vessel at a marina on navigable waters is substantially related to "traditional maritime activity" given the broad perspective demanded by the second aspect of the test. Docking a vessel at a marina on a navigable waterway is a common, if not indispensable, maritime activity. At such a marina, vessels are stored for an extended period, docked to obtain fuel or supplies, and moved into and out of navigation. Indeed, most maritime voyages begin and end with the docking of the craft at a marina. We therefore conclude that, just as navigation, storing and maintaining a vessel at a marina on a navigable waterway is substantially related to traditional maritime activity.

For the foregoing reasons, we conclude that the District Court has jurisdiction over Sisson's limitation claim pursuant to § 1333(1). Neither the District Court nor the Court of Appeals has addressed the merits of Sisson's claim, and we therefore intimate no view on that matter. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, with whom JUSTICE WHITE joins, concurring in the judgment.

I agree that the District Court has jurisdiction over this case under 28 U. S. C. § 1333(1),[1] but I do not agree with the test the Court applies to conclude that this is so. Prior to *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668 (1982), our clear case law extended admiralty jurisdiction to all torts involving vessels on navigable waters. *Foremost* recited as applicable to such torts the test of "significant relationship to traditional maritime activity," which had been devised 10 years earlier for torts *not* involving vessels, see *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U. S. 249, 268 (1972). In my view that test does not add any new substantive requirement for vessel-related torts, but merely explains *why all* vessel-related torts (which *ipso facto* have such a "significant relationship"), but only *some* non-vessel-related torts, come within § 1333(1). The Court's description of how one goes about determining whether a vessel-related tort meets the "significant relationship" test threatens to sow confusion in what had been, except at the margins, a settled area of the law.

In *The Plymouth*, 3 Wall. 20, 36 (1866), we stated that "[e]very species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." Despite that passage, however, we held in *Executive Jet Aviation, Inc.* v. *City of Cleveland*, *supra*, that a tort action involving the crash of a jet aircraft in Lake Erie was not a "civil case of admiralty or maritime jurisdiction" within the meaning of § 1333(1), even assuming the accident could be regarded as having "occurred" on navigable waters. We acknowledged the tradi-

[1] Like the Court, because I conclude that the claims sought to be pursued against petitioner are maritime in nature, I do not reach the question whether, if jurisdiction did not exist on that basis, there would exist an independent basis for jurisdiction under the provisions of the Limited Liability Act, 46 U. S. C. App. § 181 *et seq.* (1982 ed., Supp. V).

tional rule as set forth in *The Plymouth*, but thought it significant that this "strict locality" test "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel." 409 U. S., at 254. Whereas where vessels were involved the test tended properly to capture only those cases that had been the traditional business of the admiralty courts, in other contexts it had produced "perverse and casuistic borderline situations" in which "the invocation of admiralty jurisdiction seem[ed] almost absurd." *Id.*, at 255.

> "If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation." *Id.*, at 255–256.

We noted the general criticism of these cases, and pointed out the particular difficulties that had arisen from efforts to apply a "locality-alone" test to cases involving airplane crashes. Accordingly, we interpreted § 1333(1) to require, in the case of torts involving aircraft, not only that the *Plymouth* "locality" requirement be met, but also that "the wrong bear a significant relationship to traditional maritime activity," *Executive Jet*, 409 U. S., at 268. We concluded that wrongs in connection with "flights by land-based aircraft between points within the continental United States," *id.*, at 274, did not meet this test.

Our decision in *Executive Jet* could be understood as resting on the quite simple ground that the tort did not involve a

vessel, which had traditionally been thought required by the leading scholars in the field (notwithstanding the contrary dictum in *The Plymouth*). See E. Benedict, American Admiralty: Its Jurisdiction and Practice 173 (1850); G. Robinson, Handbook of Admiralty Law in the United States 42, 56, 88 (1939); G. Gilmore & C. Black, Law of Admiralty 23–24 (2d ed. 1975). At the very least, the opinion conveyed the strong implication that a case involving a tort occurring "in connection with a waterborne vessel," 409 U. S., at 254, would be deemed within the admiralty jurisdiction without further inquiry.

In *Foremost Ins. Co.* v. *Richardson*, *supra*, however, a case involving the collision of two pleasure boats on what we presumed to be navigable waters, we read *Executive Jet* for the broader proposition that a "significant relationship to traditional maritime activity" is required even for torts involving vessels. "Because the 'wrong' here," we said, "involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the District Court." 457 U. S., at 674. We then proceeded to consider and reject the petitioner's argument that outside the strictly commercial context "the need for uniform rules to govern conduct and liability disappears, and 'federalism' concerns dictate that these torts be litigated in the state courts." *Ibid.* To the contrary, we concluded, traditional admiralty concerns arise whenever the rules of navigation are implicated in a particular suit; a pleasure boat's failure to follow the "uniform rules of conduct" that govern navigation on navigable waters could have a "potential disruptive impact" on maritime commerce just as surely as could a similar transgression by a commercial vessel. *Id.*, at 675.

This discussion in *Foremost* has caused many lower courts to read the opinion as not only requiring a "significant relationship to traditional maritime activity" in all cases, *i. e.*, even when a vessel is involved, but as requiring more specifi-

cally a particularized showing that the activity engaged in at the time of the alleged tort, if generally engaged in to some indeterminate extent, would have an actual effect on maritime commerce. See *ante*, at 365–366, n. 4 (collecting cases). In my view the reading that imputes the latter requirement is in error. We referred to "the potential disruptive impact of a collision" merely to rebut the petitioner's argument that jurisdiction in that particular case would not further the general purposes of admiralty jurisdiction, since navigation by pleasure craft could not affect maritime commerce. It was enough in that case to answer that it could. But that response cannot reasonably be converted into a holding that *in every case* such an answer must be available—that no single instance of admiralty tort jurisdiction can exist where there is no potentially disruptive impact upon maritime commerce. No jurisdictional rule susceptible of ready and general application (and therefore no practical jurisdictional rule) can be so precise as to pass such an "overbreadth" test. One can afford, and perhaps cannot avoid, such case-by-case analysis for the few cases lying at the margins—when, for example, a plane falls into a lake—but it is folly to apply it to the generality of cases involving vessels.[2] Today's opinion, by engaging in an extended discussion of the degree to which fire (the instrumentality by which the damage in this particular case was caused) might disrupt commercial maritime activity, *ante*, at 362–364, reinforces this erroneous reading of *Foremost*.

What today's opinion achieves for admiralty torts is reminiscent of the state of the law with respect to admiralty contracts. The general test, of course, must be whether the

[2] The Court describes this point as a "demand for tidy rules." *Ante*, at 364, n. 2. I think it is rather an aversion to chaos—of the sort represented by the conflicting lower court decisions that the Court painstakingly describes, *ante*, at 365–366, n. 4, but makes no effort to alleviate. The Court's statement that "the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance," *ante*, at 366, n. 4, is neither an accurate description of the past nor a plausible prediction for the future.

contract "touch[es] rights and duties appertaining to commerce and navigation," 3 J. Story, Commentaries on the Constitution of the United States 528 (1833). But instead of adopting, for contracts as we had (until today) for torts, a general rule that matters directly related to vessels were covered, we sought to draw the line more finely, case by case. That body of law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself "maritime," has brought ridicule upon the enterprise. As one scholar noted in 1924, "[t]he rules as to building and repairing vessels"—the former having been deemed nonmaritime, see *People's Ferry Co. of Boston* v. *Beers*, 20 How. 393 (1858), and the latter maritime, see *New Bedford Dry Dock Co.* v. *Purdy*, 258 U. S. 96 (1922)—"and the results obtained therefrom, are so humorous that they deserve insertion in the laws of Gerolstein." Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, 534 (1924).[3] There is perhaps more justification for this approach with respect to contracts, since in that field the "vessel" test would not be further limited by the "locality" test, as it is for torts. And I am not suggesting an abandonment of our approach in that other field, which by now has developed some rules, however irrational they may be.[4] But there is no reason for expanding that approach to the tort field. I agree with, and apply to today's opinion, the com-

[3] Those music lovers are better than I who immediately recognize Gérolstein as the fictitious European principality that is the setting of Offenbach's once-popular operetta, La Grande-Duchesse de Gérolstein.

[4] As Professor Black has put it, in the field of maritime contracts "[t]he attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs. Fortunately, the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided." Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 264 (1950) (footnote omitted).

mentary on an earlier judicial effort to do so: "The decision . . . seems . . . unfortunate as increasing complication and uncertainty in the law without, apparently, securing any practical gain to compensate for these disadvantages." Note, Admiralty Jurisdiction Over Torts, 16 Harv. L. Rev. 210, 211 (1903), discussing *Campbell* v. *H. Hackfield & Co., Ltd.* (D. Haw., Oct 21, 1902), aff'd, 125 F. 696 (CA9 1903).

The sensible rule to be drawn from our cases, including *Executive Jet* and *Foremost*, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, as a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts. *Foremost* is very clear that the *Executive Jet* requirement that the wrong bear a "significant relationship to traditional maritime activity" applies across the board. But it is not conclusive as to what is required to *establish* such a relationship in the case of torts aboard vessels. The "wrong" in *Foremost* not only occurred on a vessel *while it was engaged in* traditional maritime activity (navigating), but also consisted precisely of conducting that activity in a tortious fashion—and the discussion emphasized the latter reality. But the holding of the case did not establish (and could not, since the facts did not present the question) that the former alone would not suffice. In the case of a vessel it traditionally had sufficed, and *Foremost* gave no indication that it was revolutionizing admiralty jurisdiction. It is noteworthy, moreover, that a later case, *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207 (1986), described the *Executive Jet* "relationship" requirement not with reference to the cause of the injury, but with reference to the activity that was being engaged in when the injury occurred: "[A]dmiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity [transporting workers to a drilling platform at sea] bearing a significant relationship to a traditional maritime activity." 477 U. S., at 218–219. I would

hold that a wrong which occurs (1) in navigable waters, (2) on a vessel, and (3) while that vessel is engaged in a traditional maritime activity, bears a significant relationship to a traditional maritime activity. A vessel engages in traditional maritime activity for these purposes when it navigates, as in *Foremost*, when it lies in dock, as in the present case, and when it does anything else (*e. g.*, dropping anchor) that vessels normally do in navigable waters. It would be more straightforward to jettison the "traditional maritime activity" analysis entirely, and to return (for vessels) to the simple locality test—which in that context, as we observed in *Executive Jet*, "worked quite satisfactorily," 409 U. S., at 254. But that would eliminate what *Foremost* evidently sought to achieve—the elegance of a general test applicable to *all* torts. That test will produce sensible results if interpreted in the manner I have suggested.

This approach might leave within admiralty jurisdiction a few unusual actions such as defamation for "a libel published and circulated exclusively on shipboard," Hough, *supra*, at 531,[5] but there seems to me little difference in principle between bringing such an issue to the federal courts and bringing a slip-and-fall case. In any event, exotic actions appear more frequently in the theoretical musings of the "thoroughbred admiralty men," *ibid.*, than in the federal reports. The time expended on such rare freakish cases will be saved many

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[5] It should not be thought that this approach will bring within admiralty jurisdiction torts occurring in navigable waters aboard any craft designed to carry people or cargo and to float. For a discussion of what constitutes a "vessel," see generally G. Robinson, Handbook of Admiralty Law in the United States § 8, pp. 42–50 (1939). The definition is not necessarily static. "The modern law of England and America rules out of the admiralty jurisdiction all vessels propelled by oars simply because they are the smallest class and beneath the dignity of the court of admiralty; but long within the historic period, and for at least seven hundred years, the triremes and quadriremes of the Greek and Roman navies were the largest and most powerful vessels afloat." *The Robert W. Parsons*, 191 U. S. 17, 32–33 (1903).

times over by a clear jurisdictional rule that makes it unnecessary to decide, in hundreds of other cases, what particular activities aboard a vessel are "traditionally maritime" in nature, and what effect a particular tort will have on maritime commerce. The latter tests produce the sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.

> "The boundary between judicial power and nullity should . . . , if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising 'questions of penumbra, of shadowy marches,' two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there." Z. Chafee, The Thomas M. Cooley Lectures, Some Problems of Equity 312 (1950) (quoting *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 426 (1916) (Holmes, J., concurring)).

For these reasons, I concur in the judgment.

GEORGIA *v.* SOUTH CAROLINA

ON EXCEPTIONS TO REPORTS OF SPECIAL MASTER

No. 74, Orig. Argued January 8, 1990—Decided June 25, 1990

This suit involves a dispute between Georgia and South Carolina over the location of their boundary along the Savannah River, downstream from the city of Savannah and at the river's mouth, and their lateral seaward boundary. In 1787, the parties agreed in the Treaty of Beaufort (hereinafter Treaty) that the boundary along the river was the river's "most northern branch or stream," "reserving all islands in [the river] to Georgia . . . ." In 1922, the Treaty was interpreted to mean, *inter alia*, that where there is no island in the river, the boundary is midway between the banks, and where there is an island, the boundary is midway between the island and the South Carolina shore. *Georgia* v. *South Carolina*, 259 U. S. 572. The Special Master has submitted two reports, making several boundary recommendations. Both States have filed exceptions.

Held:

1. The Special Master's determination that the Barnwell Islands are in South Carolina is adopted, and Georgia's exception is overruled. South Carolina has established sovereignty over the islands by prescription and acquiescence, as evidenced by its grant of the islands in 1813, and its taxation, policing, and patrolling of the property. Georgia cannot avoid this evidence's effect by contending that it had no reasonable notice of South Carolina's actions. Inaction alone may constitute acquiescence when it continues for a sufficiently long period, see *Rhode Island* v. *Massachusetts*, 15 Pet. 233, 274, and there has been more than inaction on Georgia's part. It was charged with knowing that the Treaty placed all of the Savannah River islands in Georgia, yet, despite the fact that cultivation was readily discernible, there is virtually no record of its taxation of, or other sovereign action over, these lands. A 1955 Court of Appeals decision in a condemnation proceeding by the Federal Government, which recognized Georgia's sovereignty over the islands, cannot be regarded as fixing the boundary between the States. Pp. 388–393.

2. The Special Master's determination that the islands emerging in the river after the 1787 Treaty do not affect the boundary line between the States is adopted, and Georgia's exception is overruled. Georgia's suggestion that the boundary in the vicinity of each new island runs between that island and the South Carolina shore would create a regime of continually shifting jurisdiction, by creating a new "northern branch or

stream" for even the smallest emerging island no matter how near the South Carolina shoreline, and would frustrate the purpose of the Treaty, which purports to fix the boundary "forever hereafter." Construing the Treaty to avoid sudden boundary changes would be more consistent with this language, and also comports with the simplicity and finality of the Court's 1922 reading of the Treaty and with the respect for settled expectations that generally attends the drawing of interstate boundaries, cf. *Virginia* v. *Tennessee*, 148 U. S. 503, 522–525. Pp. 394–398.

3. The Special Master's conclusion that Oyster Bed Island is in South Carolina and that the southern side of the Savannah's mouth is Tybee Island while the northern side is an underwater shoal is adopted. Georgia's exception is overruled. Customarily a boundary would be drawn to an opposing headland. However, due to the uncommon type of river mouth here, Tybee Island has no counterpart of high land on the northern side. Rather, the geographical feature taking its place is the shoal, long recognized as confining the river. To accept Georgia's proposition that the northern side should be the closest South Carolina headlands—islands that are so distant that they cannot even be said to touch the river—would result in having Georgia's waters lie directly seaward of South Carolina's coast and waters. Pp. 398–400.

4. In drawing the boundary line around islands on the South Carolina side of the river's thread, when the midline of the stream encounters an island and must move northward to become the line midway between the island bank and the South Carolina shore, the Special Master erred in invoking a right-angle principle—*i. e.*, using the line midway between the island and the shore until the island ends and the boundary reverts to the middle of the river, and then using right-angle lines to connect the island-to-bank center line with the bank-to-bank center line by the shortest distance. Georgia's exception is sustained. Georgia's approach—to use a point "triequidistant" from the South Carolina shore, the island shore, and the Georgia shore, resulting in a boundary that would pass through this point and otherwise be equidistant from the South Carolina shore and the Georgia shore, or island—is sensible, less artificial, fair to both States, and generally in line with what the Court said in 1922. Pp. 400–402.

5. The Special Master's determination that additions to Denwill Plantation and Horseshoe Shoal be awarded to Georgia is adopted, and South Carolina's exception is overruled. The rapidity of some aspects of dredging and other processes used by the Army Corps of Engineers to improve the river's navigation channel support the Master's recommendation that the changes in the Savannah River were caused primarily by avulsion rather than the natural and gradual process of erosion and accretion. Pp. 402–405.

6. Since the Special Master's Second Report clarified any confusion that may have existed with regard to how the recommended boundary line affects Bird Island, the boundary dispute as to this island has been eliminated and South Carolina's exception, initially made, is overruled. P. 405.

7. The Special Master's determination of the lateral seaward boundary between the States is adopted. His line continues down the river's mouth until it intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where it proceeds out to sea perpendicularly to that line. His recommendation gives equitable balance and recognition to the so-called equidistant principle, *Texas* v. *Louisiana*, 426 U. S. 465, and to the inland boundary between the States, and does so with the least possible offense to any claimed parallel between offshore territory and the coast itself. The States' respective exceptions are overruled. Pp. 405–408.

Exceptions of South Carolina overruled; Exception of Georgia to Special Master's use of right-angle principle sustained; Other exceptions of Georgia overruled; Special Master's recommendations, as to which no exceptions have been taken or as to which exceptions have been advanced but overruled, are adopted.

BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and VIII, and the opinion of the Court with respect to Part IV, in which BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, and SCALIA, JJ., joined; with respect to Part V, in which BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, and SCALIA, JJ., joined, and in which REHNQUIST, C. J., and KENNEDY, J., joined except for a portion thereof; with respect to Part VI, in which REHNQUIST, C. J., and BRENNAN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined; with respect to Part VII, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and O'CONNOR, JJ., joined; and with respect to Part IX, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, O'CONNOR, and KENNEDY, JJ., joined. WHITE, J., filed an opinion dissenting in part, in which MARSHALL, J., joined, *post*, p. 410. STEVENS, J., filed an opinion dissenting in part, in which SCALIA, J., joined, *post*, p. 412. SCALIA, J., filed an opinion dissenting in part, in which KENNEDY, J., joined, *post*, p. 413. KENNEDY, J., filed an opinion dissenting in part, in which REHNQUIST, C. J., joined, *post*, p. 413.

Patricia T. Barmeyer, Senior Assistant Attorney General of Georgia, argued the cause for plaintiff. With her on the briefs were *Michael J. Bowers*, Attorney General, *H. Perry Michael*, Executive Assistant Attorney General, *William B.*

Hill, Jr., Deputy Attorney General, and *Sarah Evans Lockwood*, Special Assistant Attorney General.

Thomas E. McCutchen argued the cause for defendant. With him on the briefs were *T. Travis Medlock*, Attorney General of South Carolina, *Robert D. Cook*, Deputy Attorney General, *Kenneth P. Woodington*, Senior Assistant Attorney General, and *Jeter E. Rhodes*.*

JUSTICE BLACKMUN delivered the opinion of the Court.†

This litigation was instituted in August 1977, pursuant to Art. III, § 2, cl. 2, of the United States Constitution and 28 U. S. C. § 1251(a)(1) (1976 ed.), by the presentation to this Court of a motion by the State of Georgia for leave to file a complaint against the State of South Carolina. The suit wasthe culmination of a prolonged dispute between the two States over the location of their boundary along the lower reaches of the Savannah River (that is, downstream from the city of Savannah) and at the river's mouth. The two States also are in disagreement as to their lateral seaward boundary.

We granted leave to Georgia to file its complaint. 434 U. S. 917 (1977). The Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, was appointed Special Master with the authority customarily granted in litigation of this kind. 434 U. S. 1057 (1978). South Carolina, in due course, filed its answer and counterclaims.

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*Briefs of *amici curiae* were filed for the United States by *Solicitor General Starr;* and for the State of Alaska by *Douglas B. Baily*, Attorney General, *G. Thomas Koester*, Assistant Attorney General, and *John Briscoe*.

†All Members of the Court join in Parts I, II, III, and VIII of the opinion. Part IV is joined by all except THE CHIEF JUSTICE and JUSTICE KENNEDY. Part V is joined by all, except that THE CHIEF JUSTICE and JUSTICE KENNEDY do not join a portion of that Part. Part VI is joined by all except JUSTICE WHITE and JUSTICE MARSHALL. Part VII is joined by all except JUSTICE SCALIA and JUSTICE KENNEDY. Part IX is joined by all except JUSTICE STEVENS and JUSTICE SCALIA.

The Special Master submitted his First Report (1 Rep.) to this Court eight years later on March 20, 1986. That report dealt with the issues other than the lateral seaward boundary. The Master and the parties moved that we defer action on the First Report until he had ruled on the seaward boundary. We complied with that request. The Special Master's Second and Final Report (2 Rep.) was filed April 24, 1989. The Court fixed the time for the filing of exceptions. See 490 U. S. 1033 (1989). Each State filed exceptions and each responded to the exceptions of the other. Briefs were submitted and oral argument followed.

I

Background

On June 9, 1732, nearly 260 years ago, King George II, describing himself as King of Great Britain, France, and Ireland, issued letters patent constituting the Charter of the Colony of Georgia. These letters described the boundary between that colony and the existing Colony of South Carolina as "the most northern part of a stream or river there, commonly called the Savannah." See F. Van Zandt, Boundaries of the United States and the Several States (Geological Survey Professional Paper 909) 100 (1976).

The precise location of segments of the boundary, however, proved to be a matter of continuing dispute between South Carolina and Georgia. Much of the controversy originally concerned navigation rights on the river. Shortly after the United States emerged as a Nation, commissioners appointed by each of the States met at Beaufort, S. C., and produced a Convention known as the Treaty of Beaufort of April 28, 1787 (hereinafter Treaty). See Van Zandt, *supra*, at 99; see also *Georgia* v. *South Carolina*, 257 U. S. 516, 518 (1922). The Treaty stated that the boundary was the "most northern branch or stream of the river Savannah . . . , reserving all the islands in the said rive[r] Savannah . . . to

Georgia . . . ."[1] The Treaty was ratified in due course by the legislature of each State and by the Continental Congress. See 33 Journals of the Continental Congress 467 (1936).[2]

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[1] The first two Articles of the Treaty read:

"*Article the first.*

"The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence the most northern branch or stream of the said river Tugoloo till it intersects the northern boundary line of South Carolina if the said branch or stream of Tugoloo extends so far north, reserving all the islands in the said rivers Savannah and Tugoloo to Georgia; but if the head spring or source of any branch or stream of the said river Tugoloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi, to be drawn from the head spring or source of the said branch or stream of Tugoloo river which extends to the highest northern latitude—shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia.

"*Article the second.*

"The navigation of the river Savannah at and from the bar, and mouth, along the north east side of Cockspur Island and up the direct course of the main northern channel, along the northern side of Hutchinson's Island, opposite the town of Savannah to the upper end of the said island, and from thence up the bed, or principal stream of the said river, to the confluence of the rivers Tugoloo and Keowee, and from the confluence up the channel of the most northern stream of Tugoloo river to its source and back again by the same channel to the Atlantic ocean: Is hereby declared to be henceforth equally free to the citizens of both States, and exempt from all duties, tolls, hindrance, interruption or molestation whatsoever, attempted to be enforced by one State on the citizens of the other, and all the rest of the river Savannah to the southward of the foregoing description is acknowledged to be the exclusive right of the State of Georgia." Reprinted in App. A to Ga. Exceptions.

It is to be noted that the Treaty did not state whether the boundary was the middle of the northern branch or stream of the Savannah River, or whether it was on the South Carolina bank, or whether the bed was held jointly.

[2] The 1798 Constitution of Georgia reflected the same theme. It provided:

"The limits, boundaries, jurisdictions, and authority of the State of Georgia do, and did, and of right ought to, extend from the sea or mouth of the

Past Litigation

The very existence of the present suit, of course, demonstrates that the Treaty of Beaufort did not resolve all river-

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river Savannah, along the northern branch or stream thereof, to the fork or confluence of the rivers now called Tugalo and Keowee, . . . reserving all the islands in said rivers Savannah and Tugalo to Georgia . . . ." Art. I, § 23.

See H. R. Doc. No. 357, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, 59th Cong., 2d Sess., vol. 2, p. 794 (1909).

Georgia's present Constitution of 1983, as amended, contains no provision relating to the State's boundaries. Georgia statutes, however, provide:

"The boundaries of Georgia, as deduced from the Constitution of Georgia, the Convention of Beaufort, the Articles of Cession and Agreement with the United States of America entered into on April 24, 1802, the Resolution of the General Assembly dated December 8, 1826, and the adjudications and compromises affecting Alabama and Florida, are as follows:

"From the sea, or the mouth of the River Savannah, along the stream thereof to the fork or confluence made by the Rivers Keowee and Tugalo, and thence along said River Tugalo until the fork or confluence made by said Tugalo and the River Chattooga, and up and along the same to the point where it touches the northern boundary line of South Carolina, and the southern boundary line of North Carolina, which is at a point on the thirty-fifth parallel of north latitude, reserving all the islands in said Rivers Savannah, Tugalo, and Chattooga, to Georgia . . . ." Ga. Code Ann. § 50–2–1 (1986).

"The boundary between Georgia and South Carolina shall be the line described as running from the mouth of the River Savannah, up said river and the Rivers Tugalo and Chattooga, to the point where the last-named river intersects with the thirty-fifth parallel of north latitude, conforming as much as possible to the line agreed on by the commissioners of said states at Beaufort on April 28, 1787." § 50–2–2.

Similarly, South Carolina's present Constitution of 1895, as amended, has no provision as to that State's boundaries. The State has a statute which reads:

"From the State of Georgia, this State is divided by the Savannah River, from its entrance into the ocean to the confluence of the Toogaloo and Seneca Rivers; thence up the Toogaloo River to the confluence of the Tallulah and the Chattooga Rivers; thence up the Chattooga River to the 35th parallel of north latitude, which is the boundary of North Carolina, the line

boundary questions between South Carolina and Georgia. Indeed, this is not the first, but the third, occasion that some issue concerning that boundary has come before this Court.

The first case is *South Carolina* v. *Georgia*, 93 U. S. 4 (1876). South Carolina filed a bill in equity for an injunction restraining Georgia and certain federal officials from "obstructing or interrupting" navigation on the Savannah River. This Court dismissed the bill. It ruled that the 1787 Treaty had no effect upon the power of Congress to regulate commerce among the several States. Congress' power over the river was the same as it possessed over other navigable waters. Thus, Congress could close one of the several channels in the river if, in its judgment, navigation thereby would be improved.

The second case is *Georgia* v. *South Carolina*, 257 U. S. 516, decided in 1922. There, the Treaty of Beaufort was central to the controversy. The Court held, among other things, that (1) where there is no island in the Savannah River, the boundary is midway between the banks when the water is at ordinary stage, (2) where an island is present, the boundary is midway between the island bank and the South Carolina shore, with the water at ordinary stage, (3) where a navigable or nonnavigable river is the boundary between the two States, and the navigable channel is not involved, then, in the absence of contrary agreement, each State takes to the middle of the stream, and (4) the location of the boundary under the Treaty was unaffected by the thalweg doctrine because of the Treaty's provision that each State shall have

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being midway between the banks of said respective rivers when the water is at ordinary stage. And when the rivers are broken by islands of natural formation which, under the treaty of Beaufort, are reserved to the state of Georgia, the line is midway between the island banks and the South Carolina banks when the water is at ordinary stage." S. C. Code Ann. § 1–1–10 (1986).

equal rights of navigation. The ensuing decree is set forth at 259 U. S. 572 (1922).[3]

It is to be noted that this Court did not discuss the problem of emerging islands, that navigability was not itself a factor in determining the boundary, and that no map or chart illuminated the Court's reported opinion.

Neither of these cases bears directly upon the specific issues presently before us. The 1876 case, however, illustrates the type of boundary problem the Savannah River is capable of producing, and the 1922 case reveals generally this Court's approach to the Treaty of Beaufort.

The decision in *United States* v. *450 Acres of Land, More or Less in Chatham County*, 220 F. 2d 353 (CA5), cert. denied, 350 U. S. 826 (1955), must be mentioned. This was a condemnation proceeding instituted by the Federal Government in the United States District Court for the Southern District of Georgia to acquire an easement to enter upon "Barnwell Island," one of the islands of a group discussed in Part III hereof, for the deposit of spoil excavated from Savannah Harbor. The complaint was served upon E. B. Pinckney, who claimed ownership of the island, and upon certain Beaufort County, S. C., officials. Only Pinckney made an appearance. He moved to dismiss the complaint for lack of jurisdiction on the ground that the land was in South Carolina. The motion was granted, and the Government's complaint was dismissed. Georgia then was allowed to intervene. The Court of Appeals for the Fifth Circuit reversed. It observed:

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[3] The relevant provisions of the 1922 decree read:

"1st. Where there are no islands in the boundary rivers the location of the line between the two States is on the water midway between the main banks of the river when water is at ordinary stage;

"2nd. Where there are islands, the line is midway between the island bank and the South Carolina shore when the water is at ordinary stage;

"3rd. That all islands formed by nature in the Chattooga river are reserved to Georgia as completely as are those in the Savannah and Tugaloo rivers."

"The boundary line between Georgia and South Carolina is not in dispute as between these sovereigns. . . .

"There is, there can be, no doubt that the land here involved is in the State of Georgia. Article I of the Beaufort Convention specifically reserved to Georgia all the islands in the Savannah River and the Supreme Court by its decision and decree in State of Georgia v. South Carolina, 257 U. S. 516 . . . confirmed that reservation." 220 F. 2d, at 356.

Although South Carolina did not participate in that case, it sought leave to file an original-jurisdiction complaint in this Court to confirm its claimed sovereignty over the Barnwell Islands. Leave to file was denied. *South Carolina* v. *Georgia*, 350 U. S. 812 (1955). This took place while Pinckney's petition for certiorari, noted above, in the Fifth Circuit case was pending in this Court. Later, another application by South Carolina for leave to file also was denied. *South Carolina* v. *Georgia*, 352 U. S. 1030 (1957).

II

The Special Master's Reports and the Exceptions

The Special Master's two reports concern, as he listed them, (1) a small unnamed island upstream, or west, of Pennyworth Island, (2) an unnamed island east of Pennyworth, referred to as "Tidegate," (3) the Barnwell Islands, that is, Rabbit Island, Hog Island, Long Island, and Barnwell No. 3, (4) Southeastern Denwill, (5) Jones Island, (6) Horseshoe Shoal and Oyster Bed Island, (7) the mouth of the river, and (8) the lateral seaward boundary.

The Special Master himself, "[f]or the convenience of the Court and counsel," described the "major legal issues" covered by his First Report in this way:

"1. Did the Treaty of 1787, in reserving all islands in the Savannah River to Georgia, intend to include not only the then existing islands, but also all islands thereafter emerging by natural processes on the South Caro-

lina side of the river? If the answer is in the affirmative, how can the 1922 decision of this Court be reconciled?

"2. Is the Special Master correct in determining that the right-angle principle should be invoked by the demarcator in drawing the boundary line around islands on the South Carolina side of the 'thread' of the Savannah River, because of the 'special circumstances' existing by reason of the preclusive effect of the 1922 Supreme Court decision as it interpreted the Treaty of 1787?

"3. Has the Special Master correctly ruled that Rabbit Island accreted to the State of South Carolina, and whether the 'Island Rule' is applicable?

"4. Has the Special Master correctly decided that Hog Island and Long Island have been acquired by the State of South Carolina under the doctrine of prescription and acquiescence? The Special Master notes that, even though Hog Island (in existence in 1787) was acquired by South Carolina under the doctrine of prescription and acquiescence, there remained at that time a creek separating Hog Island from the mainland and it was not until the spoilage had been dumped by avulsive processes that Hog Island became a part of the South Carolina mainland.

"5. Has the Special Master correctly ruled that the area known as Southeastern Denwill, if it presently encroaches on the southern side of the mid-point of the Savannah River as it existed in 1787, now belongs to Georgia?

"6. Has the Special Master correctly ruled that Jones Island, at all pertinent times, was in the State of South Carolina?

"7. Did the Special Master err in diverting from the doctrine of *medium filum acquae* as established by the 1922 decision of this Court, in proceeding eastwardly

after leaving the southern tip of Turtle Island?" 1 Rep. 112–113.

Georgia's exceptions to both reports are directed to the Special Master's recommendations concerning (a) the Barnwell Islands (other than Rabbit Island, as to which Georgia does not now except), (b) Oyster Bed Island and the mouth of the Savannah River, (c) the "use of a right-angle line to connect the boundary in stream around an island in the Savannah River with the boundary in the mainstream of the river," see Ga. Exceptions ii, (d) the Master's ruling that islands of natural formation emerging after the Treaty of Beaufort are not in Georgia if they emerged "on the South Carolina side of the river," *ibid.*, and (e) the Master's use of the navigation channel, rather than the geographic middle of the "mouth" of the Savannah River, as the starting point for his delineation of the lateral seaward boundary. Georgia's exceptions, so far as the First Report is concerned, thus are directed only to the first, second, fourth, and seventh of the issues listed by the Master. Some of the claims Georgia pressed before the Master, *e. g.*, the one relating to Jones Island, are not presented for review here; we treat those claims as now abandoned.

South Carolina takes exception to the Master's recommendations concerning (a) the lateral seaward boundary, (b) "two narrow strips of land well downstream from the City of Savannah," (c) the "downstream area known as Horseshoe Shoal," and (d) "the line which resulted from the placement of Horseshoe Shoal in Georgia." See S. C. Exceptions 2. So far as the First Report is concerned, these exceptions thus are directed only to the first, fifth, and seventh of the issues listed by the Master.

Before we consider these several exceptions specifically, we note that Georgia's reaction to the First Report is straightforward. It asserts that under the 1787 Treaty *all* islands in the Savannah River are in Georgia; that, despite this treaty provision, the Master would place certain islands

in South Carolina; and that his First Report "reflects his fundamental dissatisfaction with the boundary line as established by the framers of the Treaty of Beaufort and as construed by this Court in 1922." Ga. Exceptions 7. This has led the Master "to diverge, at virtually every opportunity, from the boundary which has been established since 1787, in order to place his recommended boundary in or near the mainstream or the navigation channel of the river." *Id.*, at 8. South Carolina, of course, disavows this characterization of the Special Master's decision.

We turn to the exceptions in an order we select.

III

The Barnwell Islands

These islands were four in number and were named by the Barnwell family, in downstream order, Rabbit Island, Hog Island (referred to as "Barnwell Island" on some older United States Coast Survey maps), Long Island (referred to as Barnwell Island No. 2 on some maps), and Barnwell Island No. 3 (actually the fourth island and not present when the family named the others). As has been noted, Georgia takes no exception to the Special Master's recommendation that Rabbit Island, although in the Savannah River in 1787, now be adjudged to be in South Carolina. This leaves us with Hog Island, Long Island, and Barnwell Island No. 3.

Georgia states that the Barnwell Islands remained as islands in the Savannah River and discernible as such well into the 20th century, when, because of the activity of the United States Army Corps of Engineers, they became affixed to the South Carolina shore. Ga. Exceptions 13. South Carolina opines that the Barnwell Islands area is the most valuable land in the present dispute. It consists of at least 450 acres of high ground only a short distance downstream from the city of Savannah. It is "clearly capable of future economic development." Response for South Carolina 1–2.

Georgia's argument is essentially this: Long acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes. See, *e. g.*, *Rhode Island* v. *Massachusetts*, 4 How. 591, 638–639 (1846); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53 (1906). Possession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence. *Virginia* v. *Tennessee*, 148 U. S. 503, 524 (1893). The duration of any purported dominion by South Carolina was judicially terminated by the above-cited Fifth Circuit decision in 1955. In line with that decision, and at all times since, Georgia has exercised dominion, sovereignty, and ownership of the Barnwell Islands. The Corps of Engineers has possessed and occupied Barnwell pursuant to a deed granted by Georgia for a spoilage easement. The doctrine of prescription and acquiescence may not be used aggressively to acquire territory; it may be used only to confirm the current status. In any event, proof adduced by South Carolina falls short of what is required to change the boundary solemnly accepted by the two States in 1787.

Georgia further maintains that the State asserting the claim must make a showing of acquiescence by the neighboring State. *New Jersey* v. *Delaware*, 291 U. S. 361, 376, 377 (1934). Inaction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response. Here, it is said, there is little evidence either of prescription by South Carolina or of actual or constructive notice to Georgia sufficient to imply acquiescence by Georgia. Except for the activity by the Corps of Engineers, the islands received scant attention from anyone except members of the Barnwell family. And, apart from some rice planting, there is little evidence of activity on the islands other than illegal whiskey production and the rais-

ing of hogs fed with the mash. The fact that moonshining could be carried on successfully shows how little attention was paid to the islands by Georgia authorities and the public generally. Except for the placement of a battery on the islands by Confederate forces during the War Between the States, there never was any resident on the islands and no schools, roads, or other public improvements.

Georgia acknowledges two grants by South Carolina, one in 1795 and the other in 1813. The grants and accompanying plats, however, identify the property only as "islands." These, says Georgia, were invalid because the 1787 Treaty reserved all islands in the river to Georgia. Thus, South Carolina cannot build its case on those grants. To be sure, there were 1868 deeds describing the property as in South Carolina, but these were intrafamily conveyances by the Barnwells and, in any event, provided no notice to anyone until they were recorded in 1930. There also were a marriage settlement in 1832 and a mortgage in 1871 but these, too, were intrafamily transactions. Anyway, their descriptions were insufficient to constitute notice of claim by South Carolina. The same is true of a deed in 1896 whereby the Barnwell brothers conveyed their interests in the islands and other family property to their sisters. A sheriff's deed in 1940 was insufficient to convey title, because of inadequate description of the property, and did not constitute notice to Georgia of any South Carolina claim of jurisdiction. The same is true of a 1942 deed from the Forfeited Land Commission of South Carolina to E. B. Pinckney.

There were taxes paid to Beaufort County, S. C., by the Barnwell family and later by Pinckney, but the tax records contain no information identifying the property, and even after 1930 there was no correlation between the acreage reported for taxes and the acreage conveyed by the deeds. The claim of South Carolina prescription and Georgia ac-

quiescence is contradicted "by considerable evidence" that Georgia and United States officials understood the islands to be in Georgia. Ga. Exceptions 34. There was a Georgia grant in 1760. In 1825, 1830, and 1831, taxes were paid to Chatham County, Ga. Many maps show the Barnwell Islands (other than Rabbit) to be on the Georgia side of the boundary line between the two States.

Thus, the short duration of actual possession, the limited South Carolina official Acts, and the paucity of published or recorded documents referring to the islands as in South Carolina fall far short, Georgia claims, of establishing the open and continuous possession required to confirm a boundary by prescription. This is especially so since the islands remained as islands in the river until well into the 20th century, and since South Carolina continued to recognize officially the Treaty of Beaufort with its provision that all islands in the river are in Georgia. This is not a situation where Georgia can be held to have acquiesced.

South Carolina, in its turn, first takes the position that the 1955 Fifth Circuit case has no effect whatsoever, directly or indirectly, on the present litigation. South Carolina was not a party in that case, and the case did not fix the boundary between the States. It further argues that Georgia asserted no act of dominion or control over the Barnwell Islands from 1787 until the 1950's, and acquiesced in South Carolina's jurisdiction through long inaction in the face of the latter's continuing and obvious exercise of dominion since 1795.

With all this before us, and recognizing that each side advances some facts favorable to its position, we decide this issue in favor of South Carolina. We agree that the 1955 case in the Fifth Circuit cannot be regarded as fixing the boundary between the States. Although some South Carolinians were served with process, they were local officials and a person whose name appeared in the chain of title. South

Carolina itself was never served and made no appearance. See *Martin* v. *Wilks*, 490 U. S. 755, 761–762 (1989). In any event, this Court, not a Court of Appeals, is the place where an interstate boundary dispute usually is to be resolved. See *Durfee* v. *Duke*, 375 U. S. 106, 115–116 (1963). The judgment in the 1955 case, therefore, does not control the issue of South Carolina's sovereignty. Nor do the incidental effects of that case transform the judgment into one that binds South Carolina. This conclusion needs no additional fortification, but, if it did, we would note that South Carolina twice, in 1955 and again in 1957, asked this Court to have the Barnwell area boundary question resolved. Georgia opposed those applications, and leave to file was denied each time by this Court. South Carolina attempted to get the issue here, but until the present litigation was instituted and allowed to proceed, this aspect of the boundary issue was not before this Court.[4]

We need not here repeat in detail the extensive record evidence and the tax and conveyancing documents relied upon by the Special Master in reaching his conclusion. It suffices to say that the entire area in the late 18th and early 19th centuries was low marshy ground. The islands were separated from Georgia by the wide and deep waters of the Savannah River, but were separated from South Carolina only by streams so shallow that they were described as "sometimes dry." Record, S. C. Exh. B–8. See *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 381 (1820). The South Carolina grant in 1813, the almost-uniform taxation of the property, the South Carolina seizure and subsequent sale for unpaid taxes, policing and prosecutorial activities by South Carolina au-

[4] It also seems to us, for what it may be worth, that there is no qualitative difference in the type of proof offered by South Carolina for Rabbit Island and the rest of the Barnwell cluster. The islands were granted together, often conveyed together, and taxed in the same manner. Rabbit and Hog were both diked and cultivated for rice. Yet Georgia has not pursued its claim to Rabbit Island.

thorities, patrolling by South Carolina wildlife officers, and other factors, all support the Special Master's conclusion that, in any event, South Carolina established sovereignty by prescription and acquiescence.

Georgia seeks to avoid the effect of this evidence on the ground that it had no reasonable notice of South Carolina's actions and therefore cannot be said to have acquiesced in them. But inaction alone may constitute acquiescence when it continues for a sufficiently long period. See *Rhode Island* v. *Massachusetts*, 15 Pet. 233, 274 (1841); *Vermont* v. *New Hampshire*, 289 U. S. 593, 616 (1933). And there is more than mere inaction on the part of Georgia. The record contains substantial evidence of events that put Georgia on notice of South Carolina's exercise of sovereignty. Parts of the islands were cultivated, as the Master found, for more than 30 years prior to 1880. This was readily discernible, for rice cultivation requires dikes, and the presence of dikes on the islands appeared on maps of the area as early as 1855. Ga. Exh. 156, App. B to 1 Rep. Georgia was chargeable with knowledge that the Treaty of Beaufort placed all the Savannah River islands in Georgia. Yet Georgia authorities could have discovered there was no record of taxation or other sovereign action over these lands by Georgia except, possibly, for three isolated instances in the early part of the 19th century. Some documents recorded in Georgia, because they also involved Georgia property, describe the islands as in South Carolina. There is evidence, too, that Savannah residents were aware of cultivation on the islands. "It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held . . . . And in the United States we deem it to be equally settled." *Landes* v. *Brant*, 10 How. 348, 375 (1851).

South Carolina must prevail as to the Barnwell Islands issue, and we overrule Georgia's exception with respect thereto.

IV

Islands Emerging After the Treaty of Beaufort

The unnamed island west of Pennyworth, the island east of Pennyworth called "Tidegate," and Oyster Bed Island all emerged after the Treaty of Beaufort was signed in 1787.[5] Georgia claims these islands and argues that, by the terms of the Treaty, the boundary in the vicinity of each island runs between that island and the South Carolina shore. The first Article of the Treaty, see n. 1, *supra*, provides:

> "The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, . . . reserving all the islands in the said rivers Savannah and Tugoloo to Georgia . . . shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia."

This Court considered this provision in 1922 in *Georgia* v. *South Carolina*, 257 U. S. 516. Both States agreed that the presence of an island on the South Carolina side of the river altered the boundary so as to bring the island within the jurisdiction of Georgia. In its decision on the merits, the Court resolved two contested issues relevant here.

First it held, ruling in Georgia's favor, that "where, in any of the boundary rivers here involved, there are no islands the location of the boundary line between the two States is the thread of the river—the middle line of the stream—regardless of the channel of navigation . . . ." *Id.*, at 521. It rejected South Carolina's alternative position, which would have placed the boundary at the low water mark on the Georgia side of the river: "The express reservation of the islands to Georgia and the placing of the boundary line in the most northerly branch of the Savannah and then of the Tugaloo

[5] Some of the Barnwell Islands also may have emerged after the Treaty, but our conclusion that they belong to South Carolina by prescription, see Part III, *supra*, makes the time of their emergence immaterial.

river up to the 'northern boundary of South Carolina,' makes it clear that where there are islands in the river the line must be between them and the South Carolina shore, for otherwise the Georgia islands would be within the State of South Carolina." *Id.*, at 520–521. Because the "northern branch or stream" clause by definition would bring the boundary north of the low water mark on the Georgia side, the Court thought it unlikely that the parties intended the low water mark to be the benchmark where no islands were present. The more logical reading of the Treaty was that each State would take to "the middle of the stream." *Id.*, at 521.

Second, the Court held that, where there was an island in the river, the boundary would be midway between the island and the South Carolina shore. This conclusion followed from the determination that the "northern branch or stream" of the river, where an island was present in the northern half of the river, would be the "branch or stream" that ran between the island and the northern shore, and from the Court's first holding that the midpoint of the relevant body of water was the appropriate place to draw the boundary.

Two principles established by the 1922 decision are pertinent here. First, although it is by no means self-evident on the face of the Treaty that the "northern branch or stream" refers to the "stream" that each island—however small and however close to the northern shore—creates between itself and the shore to the north of it, that was the construction of the Treaty agreed upon by the parties in 1922 and adopted by this Court. Apparently it was thought that a contrary rule, whereby the "northern branch or stream" referred only to a "branch or stream" that made a major departure from the main body of the river, would create an unmanageable boundary, because then the Treaty's additional reservation of the islands to Georgia would create pockets of Georgia territory within South Carolina wherever islands existed on the South Carolina side of the "northern branch or stream" defined in this larger sense. Second, under the principle that

each island in the river created a new "northern branch or stream," each island was not only reserved to Georgia under the reservation clause of Article I, but also formed a point of reference, by which the boundary would be drawn.

The Court, in its 1922 decision, did not expressly determine the treatment to be given islands that emerged after the Treaty of Beaufort was signed, so that decision is not controlling on this issue. The Special Master found, and South Carolina agrees, that the better reading of the Treaty in light of the 1922 decision is that the clause "reserving all islands . . . to Georgia" refers only to islands in existence in 1787 and that the "most northern branch or stream," as applied to a "branch or stream" going to the north of an island, similarly refers only to islands in existence when the Treaty was signed. The Treaty's establishment of the boundary "forever hereafter" would thus be unaffected by after-emerging islands. Georgia argues that the provision of Article I "reserving all islands . . . to Georgia" includes such after-emerging islands and that, accordingly, the reference in the Treaty to the "most northern branch or stream of the river Savannah" means the stream flowing to the north of any island currently in the river. We think South Carolina and the Special Master have the better argument.

Georgia's solution, whereby each emerging island not only is newly "reserv[ed] . . . to Georgia" but also creates a new "northern branch or stream" by which the boundary between the States must be drawn, would create a regime of continually shifting jurisdiction. Even the smallest emerging island, no matter how near the South Carolina shore, would cause the entire boundary between the States to shift northward, depriving South Carolina not only of the land that constitutes the island but also any riverbed between the island and the center line that previously formed the boundary. We doubt that the parties, in drafting the Treaty, meant to create a boundary that shifted so radically each time a new island emerged in the river. To the contrary, Article I of the

Treaty purports to fix the boundary "forever hereafter," a goal that would be frustrated were the boundary to jump northward each time a new island appeared on the South Carolina side of the river. A construction of the Treaty that avoids sudden changes in the boundary would be more consistent with this language, and also comports with the principles of simplicity and finality that animated the Court's reading of the Treaty in 1922, and with the respect for settled expectations that generally attends the drawing of interstate boundaries. Cf. *Virginia* v. *Tennessee*, 148 U. S. 503, 522–525 (1893).

We recognize, of course, that the normal rules relating to accretion and erosion may cause the boundary line between the States to shift over time, so that the line will not necessarily be fixed as of any particular point. But it is one thing to say that the parties meant that gradual shifts in the path of the river would shift the boundary gradually, to the extent of the accretion; this rule is consistent with settled expectations and with the parties' interest in maintaining their riparian rights. See *Nebraska* v. *Iowa*, 143 U. S. 359 (1892). It is quite another thing to infer that the parties meant that each new island, however formed, would alter the boundary line to a degree that could be dramatically out of proportion to the physical change brought about by the formation of the island itself.

Finally, Georgia points to the statement in the 1922 decree that all islands "formed by nature" in the Chattooga River, like the islands in the Savannah and the Tugaloo, were reserved by the Treaty to Georgia. *Georgia* v. *South Carolina*, 259 U. S., at 572. This reference, Georgia contends, necessarily implies that the reservation clause in the Treaty includes after-emerging islands, since man-made islands did not exist in the river in 1787. There is no indication, however, that the Court knew of this fact in 1922. No issue of after-emerging islands was even before the Court, and the decree simply described the river as it then was.

In light of the foregoing, we agree with the Special Master that islands that emerged after 1787 do not affect the boundary line between the two States. Georgia's exception with respect to that issue is overruled.

V

Oyster Bed Island and the Mouth of the River

Oyster Bed Island, which was not in existence in 1787 and which emerged in the 1870's or 1880's, is one of the most easterly or downstream islands in the Savannah River. It lies north of Cockspur Island and southeast of Turtle Island. Both Turtle Island and its westerly neighbor, Jones Island, are now conceded by the parties to be in South Carolina. Georgia accepts the Special Master's location of the boundary between the two States immediately upstream and west of Oyster Bed as midway between Jones Island and certain Georgia islands in the river. Ga. Exceptions 38–39.

Georgia complains, however, that west of Oyster Bed, opposite the southern point of Turtle Island, the Special Master's recommended boundary departs from the middle of the stream and, going east, makes an "abrupt jog [to the southeast] to reach the navigation channel of the river." *Id.*, at 38. The result is that Oyster Bed Island is placed in South Carolina, a consequence, Georgia says, that is contrary to this Court's 1922 ruling in *Georgia* v. *South Carolina*, *supra*.

Georgia fortifies this argument by asserting that in the 1870's a major navigation channel of the river flowed north of Oyster Bed, but that the Corps of Engineers blocked this northern channel by a training wall and later by deposit of hydraulic fill in order to force the water into the channel south of Oyster Bed. It stresses that only Georgia has exercised dominion and control over Oyster Bed and, indeed, ceded it to the United States in 1820.

It seems to us that this portion of the controversy between the two States centers on the determination of the "mouth" of

the Savannah River and encounters no inconsistency with what this Court said in *Georgia* v. *South Carolina*. The Savannah River's "mouth" was not defined in the Treaty of Beaufort. Georgia argues that the mouth, as referred to in the Treaty, must be located in the vicinity of Tybee Island, rather than somewhat upstream. Tybee lies south and east of Cockspur. We accept that submission and regard Tybee as forming the south side of the river's mouth. Usually, there are two opposing "headlands" marking and constituting the mouth of a river. See *Knight* v. *United States Land Assn.*, 142 U. S. 161, 207 (1891) (Field, J., concurring). This is the "headland-to-headland" principle used in defining the limits of bays and rivers. 2 A. Shalowitz, Shore and Sea Boundaries § 141, p. 367 (1964). It is not always that simple, however. Sometimes the mouth of a river is difficult to delineate. See S. Jones, Boundary-Making: A Handbook 130 (1945). Because of the absence of a reasonably close headland to the north, Georgia is driven to argue that the boundary at the mouth of the Savannah River must be the geographical middle between Tybee and the closest points of land in South Carolina, that is, Daufuskie Island, lying north and northeastward of Turtle Island, and Hilton Head Island, almost six miles north of Tybee.

We conclude that this is not a realistic determination of the Savannah River's mouth, and we agree with the Special Master in rejecting the argument.

The difficulty lies in the fact that Tybee Island, the most seaward point of land on the southern side of the river, has no counterpart of high land on the northern side. The geographical feature taking the place of the customarily present opposing headland is, instead, a shoal, long recognized as confining the river. It is true, of course, that the Corps of Engineers affected the flow by its training wall and hydraulic fill. But the shoal which directed that flow has been recognized for many years. Furthermore, Hilton Head Island and

Daufuskie Island are so far distant that it is impossible to say that they even touch the Savannah River.

Given this somewhat uncommon type of river mouth, the Special Master's conclusion that the northern side of the Savannah's mouth is the underwater shoal is not unreasonable. To accept Georgia's proposition here would result in having Georgia waters lie directly seaward of South Carolina's coast and waters.

Georgia's exception with respect to Oyster Bed Island and the mouth of the Savannah River is overruled.

VI

The "Right-Angle" Principle

This Court in its 1922 decision in *Georgia* v. *South Carolina* ruled that (1) at any point where there is no island in the Savannah River, the boundary "is on the water midway between the main banks of the river when the water is at ordinary stage," and (2) where there is an island the boundary "is midway between the island bank and the South Carolina shore when the water is at ordinary stage." 257 U. S., at 523. This seemingly simple and routine resolution, however, results in a problem, not decided in the 1922 case, when the midline of the stream encounters an island and must move northward to qualify as the line midway between the island bank and the South Carolina shore. Where and how does this boundary movement to the north take place? Is it when the midline touches the island, if it does touch it at all, and does it then move at right angles until it reaches a point midway between the island bank and the South Carolina shore? Does it then proceed accordingly until the island is bypassed and the midline of the stream is to be met and followed, and is a right angle to be applied there as well?

A line midway between the banks of a river, known as the *medium filum acquae*, Shalowitz, *supra*, at 374, is easily es-

tablished, for every point of the midline is equidistant from the nearest points on the opposite shores. See *New Hampshire* v. *Maine*, 426 U. S. 363, 371 (1976) (WHITE, J., dissenting). But, as noted, the ease of ascertainment disappears when an island and the Treaty of Beaufort are encountered. Such is the case here, particularly with respect to the Special Master's treatment of the line around Pennyworth Island north of the city of Savannah.

This issue clearly was not determined, and perhaps was not even contemplated, by the framers of the Treaty. What the Special Master did in the absence of authority—and we have found none—was to use the line midway between an island and the South Carolina shore (as the parties agree is proper) until the island ended and ceased to lie opposite the shore. There the boundary was to revert to the middle of the river. The Master then used a right-angle line connecting the island-to-bank center line with the bank-to-bank center line by the shortest distance. South Carolina urges that this is the most reasonable approach to this unique problem and that the Master's recommended device should be adopted.

Georgia's position, also apparently unsupported by decisional authority, but see S. Boggs, International Boundaries: A Study of Boundary Functions and Problems 183 (1966), is that the use of the right angle is simply wrong. Instead, Georgia argues, that, with an island's presence, the boundary is to be marked by the use of a point which is "tri-equidistant" from the South Carolina shore, the island shore, and the Georgia shore. The boundary then would pass through this point and otherwise be equidistant from the South Carolina shore and the Georgia shore, or island, as the case may be. See Ga. Exceptions 50–51.

We think that Georgia has the better of this argument. Its submission, it seems to us, is sensible, is less artificial than other lines, is fair to both States, and is generally in line with what was said in *Georgia* v. *South Carolina*.

Georgia's exception to the right-angle principle used by the Special Master is therefore sustained, and Georgia's approach, not that of the right angle, is to be utilized wherever this fact situation is encountered in the stretch of the Savannah River under consideration.

VII

Southeastern Denwill and Horseshoe Shoal

Elba Island is downstream from the city of Savannah and upstream from Jones and Oyster Bed Islands. Denwill is a plantation on the South Carolina side of the river; it is opposite Elba but extends eastward beyond that island. Horseshoe Shoal is slightly downstream from there. See App. D of 2 Rep.

Prior to the performance of work in the area by the Army Corps of Engineers, the navigation channel north of Elba was a broad expanse which, in the Corps' estimation, was excessively wide. In the 1880's, the Corps undertook to improve the navigation channel by restricting the river's width. This was effected by the construction of a training wall north of Elba Island during 1891–1895, by sedimentation that took place, and by deposits of dredge material behind the wall. Land in the area of southeastern Denwill formed initially as marsh islands adjacent to the wall and then grew to be connected to the South Carolina shore.

Similar changes took place at Horseshoe Shoal, an area that now connects Jones Island and Oyster Bed Island.

The Special Master recommended that the additions to Denwill and Horseshoe Shoal be awarded to Georgia. South Carolina takes exception to this. Referring to App. D of 2 Rep., South Carolina asserts: "Approximately 1 mile of riverfront land on the South Carolina side of the river would be placed in Georgia." S. C. Exceptions 6. It emphasizes that the additions to Denwill took more than 40 years to form, that is, between the time the first diversion wing-dam

structures were built, and 1924 when the old bed appeared above water. *Id.*, at 7. The training wall, two miles long, was permeable, and permitted sedimentation behind it before the dredging and filling occurred. South Carolina observes that the Special Master nowhere specifically states that the process in fact was avulsive, but it asserts, pointing to several references by the Master to avulsive procedures, that "it is clear that he considered the process to be avulsive." *Id.*, at 9. South Carolina also notes that all those activities worked to the benefit of the city of Savannah, and that "Georgia's port was the only beneficiary of the dredging." Brief in Rebuttal for South Carolina 5.

Georgia, in its turn, notes the Corps' relocation of the northern bank of the river at southeastern Denwill over a half mile south of its original location. See App. C of 1 Rep. It asserts that the land in dispute did not form as gradual accretion from the South Carolina shore toward the river but, instead, rose in the river immediately behind the training wall and was the result of the construction of the wall and the deposit of dredge spoil behind it.

South Carolina's exception as to Horseshoe Shoal is like its Denwill exception. It asserts that, as was the case with Denwill, training works and dredging by the Corps led to sedimentation and filling. As a result, the Shoal is now a long isthmus of high ground connecting Jones Island and Oyster Bed Island. It was formed "in the same way, and over a comparable period, as the additional land on Denwill." S. C. Exceptions 13–14. The major training work in this area, too, was between 1890 and 1894. Wing dams were placed and then hydraulic fill. But "even before large-scale dredging and filling began, the area was close to becoming a dry elevation solely as a result of the 30 years of sedimentation caused by training works." *Id.*, at 14–15.

General rules concerning the formation of riparian land are well developed and are simply expressed and well accepted.

When the bed is changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. But if the stream leaves its old bed and forms a new one by the process known as avulsion, the result works no change of boundary. *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918). Sometimes, the problem is to distinguish between the two.

Here we have a situation where interference in the river's flow was not caused by either of the adjoining States, but by the United States Army Corps of Engineers. It is generally held, of course, that one cannot extend one's own property into the water by landfilling or purposefully causing accretion. See, *e. g.*, *Seacoast Real Estate Co.* v. *American Timber Co.*, 92 N. J. Eq. 219, 221, 113 A. 489, 490 (1920).

We conclude, not without some difficulty, that Georgia has the better of the argument as to these two areas. It is true, of course, that avulsive action ordinarily calls to mind something somewhat sudden or, at least, of short duration, whereas accretion has as its essence the gradual deposit of material over a period by action of water flow. This is so even though it may have been caused partly or wholly by placed obstructions. See *County of St. Clair* v. *Lovingston*, 23 Wall. 46 (1874).

Some of the changes here were caused gradually by the deposit of sediment by river waters. Others were caused by the deposit of fill through the use of a hydraulic-pipeline dredge employed by the Corps pursuant to the paramount right of the United States Government to improve navigation. See *South Carolina* v. *Georgia*, 93 U. S. 4 (1876). The rapidity of some aspects of the dredging and other processes led the Special Master to conclude that the changes in the Savannah River were primarily avulsive in nature. Although the question is close, on balance, we think this particular record as to this particular river supports the recommendation made by the Master. We therefore overrule

South Carolina's exceptions as to southeastern Denwill and Horseshoe Shoal.

VIII

Addition to Bird Island

Bird Island, as described by South Carolina, "is now part of an elongated island several miles long, in the middle of the river across from Jones Island." S. C. Exceptions 16. It has merged with Long Island. See Apps. C and D of 2 Rep. South Carolina initially took exception to the Special Master's conclusion that a sliver of land on Bird Island was in Georgia rather than in South Carolina. The latter State's position was that, in line with its accretion argument with respect to Denwill and Horseshoe Shoal, the boundary for like reasons should run through part of Bird Island. S. C. Exceptions 17.

The Special Master's Second Report, on Georgia's motion, clarified any confusion that may have existed with respect to Bird Island. His recommended boundary line is now carefully described as passing north of the island, so that Bird Island in its entirety would be in Georgia. See App. D of 2 Rep., modifying App. F of 1 Rep. And South Carolina "responded by essentially agreeing." 2 Rep. 19. This serves to eliminate the dispute over the island, and South Carolina's exception, initially made, is overruled.

IX

The Lateral Seaward Boundary

Each side has noted an exception to the Special Master's recommendation concerning the lateral seaward boundary between the States. What the Master has done here begins with his resolution of the issue concerning the river's mouth, a recommendation we have approved in Part V hereof. He accepted, as do we, that Tybee Island is to be regarded as the "headland" for the south side of the mouth of the Savannah River, and that the long-existing shoal forms the north side of the mouth.

A seemingly complicating factor is that the Georgia coast and the South Carolina coast, where they meet at the river, do not run at exactly the same angle from due north. While each extends southwest-northeast, Georgia's coast is roughly 20 degrees from north-south and South Carolina's roughly 47 degrees. Thus, lines drawn perpendicularly from each coast overlap off the coast, and overlap more as the distance from the shoreline increases. This wedge-shaped overlap is the primary focus of the two States' respective exceptions.

The Master's recommended line continues down the river's mouth until it intersects a line, from Tybee Island's most northern point to Hilton Head Island's most southern point, where it then proceeds out to sea perpendicularly to that line.

South Carolina claims that the described overlap is the only area reasonably in dispute, but that the Master's line runs at an angle about six degrees north of the most favorable line Georgia could expect to receive, *i. e.*, a line perpendicular to Georgia's coast. Thus, says South Carolina, the Master's line is wholly outside the area of overlap. South Carolina urges that the area of overlap be split "more or less equally." S. C. Exceptions 22.

Georgia's exception relates "only to the starting point of the proposed lateral seaward boundary." Reply Brief for Georgia 17. It submits that "the geographic middle of the mouth of the Savannah River should be used as the starting point of the maritime boundary," *ibid.*, but that if this argument fails, the boundary as recommended by the Master should be upheld.

The Master observed that neither Georgia's Charter of 1732 nor the 1787 Treaty of Beaufort made any reference to the lateral seaward boundary between the States. 2 Rep. 1. He noted that in 1969 the States reached a tentative agreement upon a boundary projecting due east from the mouth of the river, but that this agreement was not ratified by Congress and never was effective. *Id.*, at 2. The two States have entered into a stipulation, approved by the Solicitor

General of the United States, whereby they agree that no interest of the United States is affected by this Court's ultimate determination as to the location of the lateral seaward boundary between the States. The Master accordingly concluded that the Federal Government was not a necessary party. *Id.*, at 3. He then proceeded to apply principles of international law, citing *Wisconsin* v. *Michigan*, 295 U. S. 455 (1935), and *Texas* v. *Louisiana*, 426 U. S. 465 (1976).

The Master reviewed the States' respective contentions. He noted that Georgia cited the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964] 15 U. S. T. 1607, T. I. A. S. No. 5639, and particularly the first paragraph of Article 12 thereof, *id.*, at 1610, which recites that neither of two adjacent States is entitled "to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines." The Baseline Committee, operating in the 1970s', drew its line between Hilton Head Island and Tybee Island. The Master noted that he had determined the mouth of the river to be only approximately a mile north of the southern end of the baseline at Tybee Island. Nevertheless, in drawing the lateral seaward boundary the Master felt controlled by international law. "[T]herefore, it does not follow that the starting point of the lateral seaward boundary must merely be an extension of the land boundary between the states, although such a factor must be considered as highly persuasive." 2 Rep. 5. Georgia's claimed starting point for the lateral seaward boundary was at a point halfway between Hilton Head Island and Tybee Island, and thus about two miles north of where the land boundary met the baseline.

The Special Master noted that South Carolina contended that the boundary line must start at the point where the inland boundary, if extended, intersected the baseline. This would result in the boundary's being delimited seaward in a southeasterly direction running substantially parallel to the channel providing the entrance to the river. The Master

then turned to the "equidistant principle" referred to in *Texas* v. *Louisiana*, *supra*. He observed, however, that while the equidistant principle "may be a slightly preferred method of delimitation, it does not reach the stature of a rule of law." 2 Rep. 16. Instead, "it is the principles of equity which should guide the conclusion in each particular case." *Ibid.*

The Special Master recommended that the lateral seaward boundary between the two States be along a line drawn at right angles to the baseline beginning at a point marked "X" on App. A to 2 Rep. until that line reached the outer limit of the territorial sea as that outer limit existed on December 27, 1988.[6] He felt that this was a proper utilization of equitable principles. 2 Rep. 18. He further recommended that Georgia and South Carolina "be required to suitably mark the lateral seaward boundary in the water area at the joint expense of the two states." *Ibid.*

We adopt the recommendation of the Special Master as to the lateral seaward boundary between South Carolina and Georgia. We conclude that it gives equitable balance and recognition to the so-called equidistant principle and to the inland boundary between the two States, and does so with the least possible offense to any claimed parallel between offshore territory and the coast itself. The States' respective exceptions as to the lateral seaward boundary are overruled.

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[6] This date is utilized because on December 27, 1988, the President issued a Proclamation that the territorial sea of the United States thenceforth extended to 12 nautical miles. See Proclamation 5928, 54 Fed. Reg. 777 (filed Jan. 6, 1989). The Special Master specifically concluded his determination of the lateral seaward boundary at the outer limit of the theretofore existing 3-mile territorial sea. He felt that there were legal problems confronting the coastal States with respect to the extended portion of the territorial sea and, further, that consideration of an extended boundary line would exceed this Court's reference to him. 2 Rep. 27–28.

X

In summary:

1. Each exception advanced by South Carolina is overruled.

2. Georgia's exception to the Special Master's use of the right-angle principle, discussed in Part VI hereof, is sustained.

3. Each other exception advanced by Georgia is overruled.

4. Each recommendation made by the Special Master in his two reports, and as to which no exception has been taken, is adopted (subject to the reservation expressed in n. 7, *infra*).

5. Each recommendation made by the Special Master, and as to which an exception has been advanced but overruled, is adopted.[7]

The parties are directed promptly to prepare an appropriate proposed decree in line with these conclusions. Because the Special Master has been discharged, see 493 U. S. 1053 (1990), the proposed decree shall be submitted directly to this Court for its review and consideration. The Court assumes that the parties will be able to agree upon the form

[7] One might suggest, perhaps, that the Special Master in his Second Report *assumed* that the United States had utilized "straight baselines" in constructing the coast near the mouth of the Savannah River. See 2 Rep. 12–14. Such baseline use would have been authorized by Article 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 [1964] 15 U. S. T. 1606, 1608 T. I. A. S. No. 5639. Article 4, however, provides this only as an option. We are not aware of any instance where that provision has been employed in the determination of the United States coastline. See, *e. g.*, *United States* v. *California*, 381 U. S. 139, 167–169 (1965); *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U. S. 11, 68–73 (1969); *United States* v. *Louisiana (Alabama and Mississippi Boundary Case)*, 470 U. S. 93, 99 (1985). If the Special Master in fact made the assumption, we refrain from adopting that portion of his discussion. The assumption is not necessary for a decision in the present litigation, and we leave the question of its propriety for another day.

of the decree. If they are unable to agree, each State shall submit to the Court its own formulation with any supportive comment deemed necessary. The Court will then draft the decree and enter it.

No costs are allowed.

The Court retains jurisdiction to entertain such further proceedings as from time to time may be necessary or advisable to effectuate the forthcoming decree and the rights of the respective parties.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting in part.

I join all but Part VI of the Court's opinion. In that Part, the Court sustains Georgia's exception to the Special Master's use of the "right-angle" principle to delimit the boundary between the two States where there is an island in the river belonging to Georgia. Where this is the case, the boundary line is not a line equidistant from the mainland shores of the two States as it otherwise would be, but a line equidistant from the island bank and the South Carolina shore. In particular dispute is Pennyworth Island, an island belonging to Georgia just north of the city of Savannah and in existence when the Treaty of Beaufort was signed. The Special Master recommends that the boundary at Pennyworth be the island-South Carolina shore center line only so long as some part of Pennyworth is opposite the shore, but when that is not the case, the boundary reverts, at right angles to the shore-to-shore center line.

This is an eminently reasonable approach, it seems to me. Furthermore, it is faithful to the Court's decision in 1922. There the Court ruled as follows: "(1) Where there are no islands in the boundary rivers the location of the line between the two States is on the water midway between the main banks of the river when the water is at ordinary stage; (2) Where there are islands the line is midway between the island bank and the South Carolina shore when the water is at ordi-

nary stage . . . ." *Georgia* v. *South Carolina*, 257 U. S. 516, 523. Thus the boundary line at any point is determined by reference to just two banks, either the two main banks or the island and South Carolina banks. This cannot be carried out by any method other than the Master's right-angle approach.

Georgia's approach, which the Court adopts, would deviate from the main bank-to-bank center line far short of where any part of the island is opposite the South Carolina shore. This point, it is said, is a point "tri-equidistant" from the South Carolina shore, the island shore, and the Georgia shore—thus referring to three banks rather than two. It is true that from that point onward the boundary line as it circumscribes the island would at any point be equidistant from the island and South Carolina banks, but the point at which the shore-to-shore center line ceases to be the boundary at either end of the island requires reference to the two mainlands and the island. Using Georgia's approach, the boundary is no longer exclusively determined by either the two mainlands or the island and the South Carolina banks.

Georgia complains that the Master had no authority for his position but he did his best to follow the 1922 decision, noting that in that case Georgia pressed the position that it now urges—that when the island-South Carolina bank center line passes the ends of the island it "deflects" and continues until at some point it meets the center line between the two main banks. The Court, as the Master noted, did not endorse this position, for it made no mention of "deflection." Rather, as I have said, it defined the boundary everywhere with reference either to the two main banks or the island-South Carolina banks.

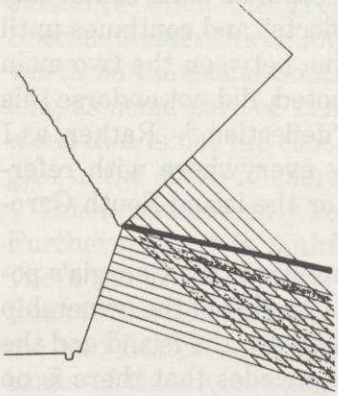
Furthermore, the Master was convinced that Georgia's position would unfairly deprive South Carolina of the ownership of some riverbed that does not lie between the island and the South Carolina shore. The Court concedes that there is no precedent for Georgia's position, fails to give any deference to the Master's view of what is a "fair" resolution of the issue,

and, as I see it, misreads *Georgia* v. *South Carolina*, *supra*. With all due respect, I dissent.

JUSTICE STEVENS, with whom JUSTICE SCALIA joins, dissenting in part.

With respect to Part IX of the Court's opinion, I would sustain South Carolina's exception to the Special Master's determination of the angle of the lateral seaward boundary. I am persuaded that a boundary drawn in reference to the full coastlines of the respective States, rather than one drawn perpendicular to the line connecting Hilton Head and Tybee Islands, is more equitable and consistent with the equidistant principle of *Texas* v. *Louisiana*, 426 U. S. 465 (1976).* The

*South Carolina's coast runs northeast to southwest at approximately a 47° angle, and Georgia's at a 20° angle. *Ante*, at 406. Lines perpendicular to these coastal fronts, at approximately 137° and 110°, respectively, define the overlapping area in the illustrations on the next page. The Hilton Head-to-Tybee closing line lies at a 14° angle. S. C. Rebuttal Brief 8. The Special Master and the Court set the boundary east of this closing line at an angle perpendicular to it, at the azimuth 104°, completely outside of the overlap of the States' coastal fronts:



S. C. Exceptions 21.

I would extend the boundary eastward from the same starting point, but at an angle perpendicular to the average angle of the States' coastal

difference between this boundary and that recommended by the Special Master becomes particularly clear if one assumes that the boundary line would not change angles when it crosses the outer limits of the 3-mile and 12-mile territorial seas.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, dissenting in part.

I would sustain South Carolina's exceptions with respect to southeastern Denwill and Horseshoe Shoal, and I accordingly dissent from Part VII of the Court's opinion. The Court does not purport to alter settled principles of law regarding accretion and avulsion but, applying those principles to the specifics of this record and acknowledging the question to be close, approves the determination of the Master. In my view, the facts do not support the Court's holding.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting in part.

Georgia's fourth exception concerns the islands in the Savannah River that came into existence after the States signed the Treaty of Beaufort in 1787. Agreeing with the Special Master, the Court finds these islands in South Carolina if they emerged on a portion of the riverbed belonging to

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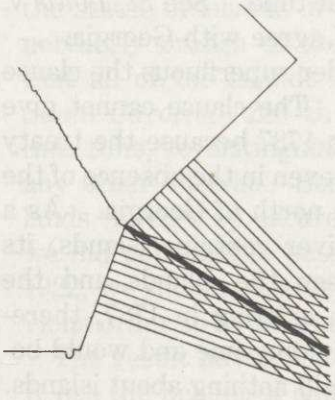
fronts. Assuming that the above-reported measures of the coastal fronts are correct, the azimuth of this boundary would be approximately 123½°:



S. C. Exceptions 22.

South Carolina. Georgia contends that all islands formed by natural processes lie within its territory unless South Carolina has acquired them through prescription. I would sustain Georgia's fourth exception and I therefore dissent from Part IV of the Court's opinion and that portion of Part V concerning Oyster Bed Island.

The Treaty of Beaufort, in pertinent part, provides:

> "'The most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers now called Tugoloo and Keowee, and from thence the most northern branch or stream of the said river Tugoloo till it intersects the northern boundary line of South Carolina . . . *reserving all the islands in the said rivers Savannah and Tugoloo to Georgia* . . . shall forever hereafter form the separation limit and boundary between the States of South Carolina and Georgia.'" *Ante*, at 381, n. 1 (emphasis added).

Georgia reasons that the clause reserving all islands to Georgia gives it sovereignty over all islands regardless of when or where they emerged. South Carolina maintains that the treaty placed the islands existing in 1787 in Georgia and then vested the rights of the two States with respect to the riverbeds. It contends that, under ordinary principles of property law, it has jurisdiction over any island that arose from its portion of the riverbed after that time. See *St. Louis* v. *Rutz*, 138 U. S. 226, 247 (1891). I agree with Georgia.

South Carolina's view would render superfluous the clause "reserving all islands" to Georgia. The clause cannot give Georgia only the islands existing in 1787 because the treaty would give these islands to Georgia even in the absence of the clause. South Carolina lies to the north of Georgia. As a result, wherever the Savannah River contains islands, its northernmost streams flow between the islands and the South Carolina shore. All islands existing in 1787, therefore, lay on Georgia's side of the dividing line and would belong to Georgia even if the treaty said nothing about islands.

This is the principle of our decision in *Georgia* v. *South Carolina*, 257 U. S. 516 (1922). We ruled there that "the location of the boundary line 'where the most northern branch or stream' flows between an island or islands and the South Carolina shore" is midway "between the island bank on the one side and the South Carolina bank on the other." *Id.*, at 521–522. Consistent with this earlier holding, by interpreting the island reservation clause to address all islands regardless of when or where they arose, Georgia's view gives effect to the language of the treaty.

Georgia's rule also seems in keeping with what I think that the parties to such a treaty must have intended. When two States define their boundary according to a river, they may expect natural processes such as erosion and accretion to alter their borders. *Louisiana* v. *Mississippi*, 466 U. S. 96, 100 (1984); *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918). South Carolina takes the position that, although the boundary between the States moves when accretion and erosion change the river banks, the boundary does not change when these processes produce or alter an island within the river. Because the treaty defines the dividing line according to the most northern stream of the river, I do not think that those who signed it contemplated this uneven result.

Georgia's position, in addition, comports better with our 1922 interpretation of the Treaty of Beaufort. In ruling on the status of islands in the Chattooga River (*i. e.*, the most northerly branch of the Tugaloo River), our decree states that all of the islands belong to Georgia. See *Georgia* v. *South Carolina*, 259 U. S. 572 (1922). We saw no need, at that time, to distinguish islands that arose after 1787 from any other islands. See *ibid.* (distinguishing only those islands "formed by nature" from other islands). Even though we did not need to pass on the specific issue in this case in 1922, we should give some weight to the language of our previous order to avoid upsetting settled expectations.

The result advocated by Georgia seems quite reasonable. It has the benefit of simplicity because, so long as all islands

belong to Georgia, one may discern the boundaries between the two States without knowing when the islands arose, how much they have eroded, or where the middle point of the river lay at the time of their emergence. Although the rule will favor Georgia in some instances, at other times it may work to the benefit of South Carolina. As Georgia explains in its brief:

> "Either state stands to lose river bed as a result of natural changes in the river; likewise, each state has the potential of acquiring additional river bed as a result of accretion and erosion. For example, if an island existed in 1787 but was subsequently eliminated by gradual erosion, the boundary would be moved to the advantage of South Carolina, and river bed previously owned by Georgia would then be owned by South Carolina." Ga. Exceptions 56 (footnote omitted).

For these reasons, I would sustain Georgia's fourth exception.

Several consequences follow from my view. First, Oyster Bed Island would lie within Georgia's territory, and the boundary would run north of the location adopted by the Court at this point in the river. See First Report of Special Master 88, n. 68 (noting that, if the treaty does place all islands in Georgia, "then the boundary line would definitely be north of Oyster Bed Island, and the Special Master is in error"). This conclusion prevents me from joining Part V of the Court's opinion on this question.

Second, the small unnamed islands upstream and downstream from Pennyworth Island would belong to Georgia. My conclusion with respect to these islands prevents me from joining Part IV of the Court's opinion.

Third, my interpretation of the treaty also implies that the Barnwell Islands which emerged after 1787 at one time belonged to Georgia. I agree with the Court, however, that Georgia lost these islands to South Carolina by prescription. I thus dissent in part.

HODGSON ET AL. *v.* MINNESOTA ET AL.

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

No. 88–1125. Argued November 29, 1989—Decided June 25, 1990*

Subdivision 2 of Minn. Stat. § 144.343 provides that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. The two-parent notice requirement is mandatory unless, *inter alia*, the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. Subdivision 6 provides that, if a court enjoins the enforcement of subdivision 2, the same two-parent notice requirement is effective unless a court of competent jurisdiction orders the abortion to proceed without notice upon proof by the minor that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would be in her best interest. Two days before the statute's effective date, a group consisting of doctors, clinics, pregnant minors, and the mother of a pregnant minor filed suit in the District Court, alleging that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The court declared the statute unconstitutional in its entirety and enjoined its enforcement. The Court of Appeals, sitting en banc, reversed. Although it rejected the State's submission that subdivision 2's two-parent notice requirement was constitutional without any bypass procedure, the court held that subdivision 6 was valid and that its bypass procedure saved the statute as a whole. The court also rejected the argument that the 48-hour waiting period imposed a significant burden on the minor's abortion right.

HHHeld: The judgment is affirmed.

853 F. 2d 1452, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, IV, and VII, concluding that subdivision 2 of § 144.343 violates the Constitution insofar as it requires two-parent notification. Pp. 436–444, 450–455.

(a) Since none of this Court's abortion decisions dealing with parental consent or notification statutes focused on the possible significance of making the consent or notice applicable to both parents instead of just

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*Together with No. 88–1309, *Minnesota et al.* v. *Hodgson et al.*, also on certiorari to the same court.

one, the District Court's extensive and unchallenged findings on the question are significant. On the basis of extensive trial testimony, the District Court found, *inter alia*, that the two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated, especially in the context of an abusive or dysfunctional family; that the requirement also had adverse effects in families in which the minor lives with both parents, particularly where family violence is a serious problem; that the requirement actually impairs family communication in many instances, since minors who otherwise would inform one parent were unwilling to do so when such notification would involve going to court for a bypass in any event; that few minors can take advantage of the abuse exception because of the obligation to report the information to the authorities and the attendant loss of privacy; and that the two-parent requirement did not further the State's interests in protecting pregnant minors or assuring family integrity. The court also found that, in many cases, the statutory 48-hour waiting period was extended to a week or more by scheduling considerations, thereby increasing the risk associated with the abortion to a statistically significant degree. Pp. 436–444.

(b) The requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. Any such interest in supporting the authority of a parent, who is presumed to act in the minor's best interest, to assure that the abortion decision is knowing, intelligent, and deliberate, would be fully served by a one-parent notification requirement as to functioning families, where notice to either parent would normally constitute notice to both. As to the many families in which the parent notified would not notify the other parent, the State has no legitimate interest in questioning the first parent's judgment or in presuming him or her incompetent to make decisions regarding the child's health and welfare. Moreover, as the record demonstrates, the two-parent requirement actually disserves the state interest in protecting and assisting the minor with respect to the thousands of dysfunctional families affected by the statute, where the requirement proved positively harmful. There is no merit to the argument that the two-parent requirement is justified because, in the ideal family, the minor should make her decision only after consultation with both parents, who should naturally be concerned with her welfare. The State has no legitimate interest in conforming family life to a state-designed ideal by requiring family members to talk together. Nor can the State's interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court. The combined force of the sepa-

rate interest of one parent and the minor's privacy interest outweighs the separate interest of the second parent, and the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child. The fact that the two-parent requirement is virtually an oddity among state and federal consent provisions governing childrens' health, welfare, and education further demonstrates its unreasonableness and the ease with which the State can adopt less burdensome means to protect the minor's welfare. Pp. 450–455.

JUSTICE STEVENS, joined by JUSTICE O'CONNOR, concluded in Parts V and VI that:

1. Three separate but related interests are relevant to the constitutionality of the 48-hour waiting period and the two-parent notification requirement. First, the State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. That interest justifies a state-imposed requirement that the minor notify and consult with a parent before terminating her pregnancy. See, *e. g.*, *Ohio* v. *Akron Center for Reproductive Health*, *post*, at 510–511. Second, parents have an interest in controlling their children's education and upbringing, and a natural parent's stake in the relationship with a child may rise to the level of a protected liberty interest if the parent has demonstrated his or her commitment by assuming personal, financial, or custodial responsibility for the child. Third, the family has a privacy interest in its children's upbringing and education which is constitutionally protected against undue state interference. When government intrudes on the family's choices, the governmental interests advanced and the extent to which they are served by the challenged regulation must be carefully examined. Pp. 444–448.

2. To the extent that subdivision 2 of the state statute requires that a minor wait 48 hours after notifying a single parent of her intention to obtain an abortion, it reasonably furthers the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. The State may properly enact laws designed to aid a parent who has assumed "primary responsibility" for a minor's well-being in discharging that responsibility, and the 48-hour delay provides the parent the opportunity to consult with his or her spouse and a family physician, to inquire into the competency of the abortion doctor, and to discuss the decision's religious and moral implications with the minor and provide needed guidance and counsel as to how the decision will affect her future. The delay imposes only a minimal burden on the minor's rights. The statute does not impose any period of delay if the parents or a court, acting *in loco parentis*, provide consent to the procedure. Moreover, the record reveals that

the waiting period may run concurrently with the time necessary to make an appointment for the abortion. Pp. 448–449.

JUSTICE O'CONNOR concluded that subdivision 6 of the state statute—two-parent notification plus judicial bypass—passes constitutional muster because the interference with the family's internal operation required by subdivision 2's two-parent notice requirement simply does not exist where the minor can avoid notifying one or both parents by using the bypass procedure. See, *e. g.*, *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 90–91. P. 461.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded:

1. The state statute's 48-hour waiting period is necessary to enable notified parents to consult with their daughter or her physician, if they so wish, results in little or no delay, and is therefore constitutional. Pp. 496–497.

2. Subdivision 6 of the statute—which requires two-parent notification unless the pregnant minor obtains a judicial bypass—is constitutional. By creating a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which parental notification is not in her best interest, subdivision 6 precisely addresses the concern underlying the Court's invalidation of subdivision 2: the possibility that, in some cases, two-parent notification would not work to the benefit of minors or their parents. In providing for the bypass, moreover, Minnesota has simply attempted to fit its legislation into the framework supplied by this Court's previous cases, particularly *Bellotti* v. *Baird*, 443 U. S. 622, which stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative. See *id.*, at 643 (opinion of Powell, J.); *id.*, at 656–657 (WHITE, J., dissenting). The conclusion that subdivision 6 must be sustained is compelled not only by *Bellotti*, but also by *H. L.* v. *Matheson*, 450 U. S. 398, in which the Court held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interests would be served by notice. If that is the case, but if such a law is not constitutional as applied to minors who are mature or whose best interest are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not. Pp. 497–501.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, IV, and VII, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, an opinion with respect to Part III, in which BRENNAN, J., joined, an opinion with

respect to Parts V and VI, in which O'CONNOR, J., joined, and a dissenting opinion with respect to Part VIII. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 458. MARSHALL, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 461. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 479. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, *post*, p. 480.

Janet Benshoof argued the cause for petitioners in No. 88–1125 and respondents in No. 88–1309. With her on the briefs were *Rachel N. Pine*, *Lynn M. Paltrow*, *Kathryn Kolbert*, *John A. Powell*, *William Z. Pentelovitch*, and *Rebecca A. Palmer*.

John R. Tunheim, Chief Deputy Attorney General of Minnesota, argued the cause for respondents in No. 88–1125 and petitioners in No. 88–1309. With him on the briefs were *Hubert H. Humphrey III*, Attorney General, *Catharine F. Haukedahl*, Solicitor General, *Kenneth E. Raschke, Jr.*, Assistant Attorney General, and *John B. Galus*, Special Assistant Attorney General.†

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†Briefs of *amici curiae* urging reversal were filed for the American Psychological Association et al. by *Donald N. Bersoff* and *Mark D. Schneider;* and for the Anti-Defamation League of B'Nai B'rith et al. by *Kenneth J. Bialkin*, *Peggy L. Kerr*, *Meyer Eisenberg*, *Justin J. Finger*, *Jeffrey P. Sinensky*, *Steven M. Freeman*, *Jill L. Kahn*, and *Livia D. Thompson*.

Clarke D. Forsythe and *Kent Masterson Brown* filed a brief for the Association of American Physicians and Surgeons as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the United States by *Solicitor General Starr*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Merrill*, *Paul J. Larkin, Jr.*, *Stephen J. Marzen*, and *Steven R. Valentine;* for the State of Louisiana et al. by *William J. Guste, Jr.*, Attorney General of Louisiana, *Jenifer Schaye* and *Meredith H. Lieux*, Assistant Attorneys General, *Jo Ann P. Levert*, *Thomas A. Rayner*, *Robert K. Corbin*, Attorney General of Arizona, *William L. Webster*, Attorney General of Missouri, and *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania; for 274 Organizations in Support of *Roe v. Wade* by *Kathleen*

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, IV, and VII, an opinion with respect to Part III in which JUSTICE BRENNAN joins, an opinion with respect to Parts V and VI in which JUSTICE O'CONNOR joins, and a dissenting opinion with respect to Part VIII.

A Minnesota statute, Minn. Stat. §§ 144.343(2)–(7) (1988), provides, with certain exceptions, that no abortion shall be performed on a woman under 18 years of age until at least 48 hours after both of her parents have been notified. In subdivisions 2–4 of the statute the notice is mandatory unless (1) the attending physician certifies that an immediate abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; (2) both of her parents have consented in writing; or (3) the woman declares that she is a victim of parental abuse or neglect, in which event notice of her declaration must be given to the proper authorities. The United States Court of Appeals for the

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M. Sullivan, Susan R. Estrich, Barbara Jordan, and *Estelle H. Rogers;* for the American Academy of Medical Ethics by *Joseph W. Dellapenna;* for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips, Elizabeth H. Esty, Ann E. Allen, Stephan E. Lawton, Laurie R. Rockett,* and *Joel I. Klein;* for the American Family Association, Inc., by *Peggy M. Coleman;* for the Catholic League for Religious and Civil Rights et al. by *Nancy J. Gannon* and *Thomas W. Strahan;* for the Center for Population Options et al. by *John H. Henn;* for the Elliot Institute for Social Sciences Research et al. by *Stephen R. Kaufmann;* for Focus on the Family et al. by *H. Robert Showers;* for the Knights of Columbus by *Brendan V. Sullivan, Jr., Kevin J. Hasson,* and *Carl A. Anderson;* for the Luthern Church-Missouri Synod by *Philip E. Draheim;* for the National Right to Life Committee, Inc., by *James Bopp, Jr.;* for the United States Catholic Conference by *Mark E. Chopko;* for Representative Christopher H. Smith et al. by *Mr. Bopp;* for Members of the General Assembly of the Commonwealth of Pennsylvania by *Maura K. Quinlin* and *Philip J. Murren;* for 13 Individual Members of the Panel on Adolescent Pregnancy and Childbearing or the Committee on Child Development Research and Public Policy by *Hannah E. M. Lieberman* and *Pamela H. Anderson;* and for James Joseph Lynch, Jr., *pro se.*

Eighth Circuit, sitting en banc, unanimously held these provisions unconstitutional. In No. 88–1309, we granted the State's petition to review that holding. Subdivision 6 of the same statute provides that if a court enjoins the enforcement of subdivision 2, the same notice requirement shall be effective unless the pregnant woman obtains a court order permitting the abortion to proceed. By a vote of 7 to 3, the Court of Appeals upheld the constitutionality of subdivision 6. In No. 88–1125, we granted the plaintiffs' petition to review that holding.

For reasons that follow, we now conclude that the requirement of notice to both of the pregnant minor's parents is not reasonably related to legitimate state interests and that subdivision 2 is unconstitutional. A different majority of the Court, for reasons stated in separate opinions, concludes that subdivision 6 is constitutional. Accordingly, the judgment of the Court of Appeals in its entirety is affirmed.

I

The parental notice statute was enacted in 1981 as an amendment to the Minors' Consent to Health Services Act. The earlier statute, which remains in effect as subdivision 1 of § 144.343 and as § 144.346, had modified the common-law requirement of parental consent for any medical procedure performed on minors. It authorized "[a]ny minor" to give effective consent without any parental involvement for the treatment of "pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse."[1]

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[1] Subdivision 1 of § 144.343 presently provides:

"Any minor may give effective consent for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse, and the consent of no other person is required."

The statute permits the health professional treating the minor to notify parents only when a failure to do so would jeopardize the minor's health. Minn. Stat. § 144.346 (1988).

The statute, unlike others of its age,[2] applied to abortion services.

The 1981 amendment qualified the authority of an "unemancipated minor"[3] to give effective consent to an abortion by requiring that either her physician or an agent notify "the parent" personally or by certified mail at least 48 hours before the procedure is performed.[4] The term "parent" is defined in subdivision 3 to mean "both parents of the pregnant woman if they are both living." No exception is made for

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[2] See Haw. Rev. Stat. § 577A–2 (1976); Mo. Rev. Stat. § 431.062 (Supp. 1971). See generally Pilpel & Zuckerman, Abortion and the Rights of Minors, in Abortion, Society and the Law 275, 279–280 (D. Walbert & J. Butler eds. 1973).

[3] Although there is no statutory definition of emancipation in Minnesota, see *Streitz* v. *Streitz*, 363 N. W. 2d 135, 137 (Minn. App. 1985), we have no reason to question the State's representation that Minn. Stat. §§ 144.341 and 144.342 (1988) apply to the minor's decision to terminate her pregnancy. Brief for Respondents in No. 88–1125, p. 2, n. 2. Those sections provide that a minor who is living separate and apart from her parents or who is either married or has borne a child may give effective consent to medical services without the consent of any other person.

The notification statute also applies to a woman for whom a guardian or conservator has been appointed because of a finding of incompetency. § 144.343(2). This portion of the statute is not challenged in this case.

[4] Subdivision 2 provides:

"Notwithstanding the provisions of section 13.02, subdivision 8, no abortion operation shall be performed upon an unemancipated minor . . . . until at least 48 hours after written notice of the pending operation has been delivered in the manner specified in subdivisions 2 to 4.

"(a) The notice shall be addressed to the parent at the usual place of abode of the parent and delivered personally to the parent by the physician or an agent.

"(b) In lieu of the delivery required by clause (a), notice shall be made by certified mail addressed to the parent at the usual place of abode of the parent with return receipt requested and restricted delivery to the addressee which means postal employee can only deliver the mail to the authorized addressee. Time of delivery shall be deemed to occur at 12 o'clock noon on the next day on which regular mail delivery takes place, subsequent to mailing."

a divorced parent, a noncustodial parent, or a biological parent who never married or lived with the pregnant woman's mother.[5] The statute does provide, however, that if only one parent is living, or "if the second one cannot be located through reasonably diligent effort," notice to one parent is

[5] The Minnesota statute is the most intrusive in the Nation. Of the 38 States that require parental participation in the minor's decision to terminate her pregnancy, 27 make express that the participation of only one parent is required. An additional three States, Idaho, Tennessee, and Utah, require an unmarried minor to notify "the parents or guardian" but do not specify whether "parents" refers to either member of the parental unit or whether notice to one parent constitutes constructive notice to both. See Idaho Code § 18–609(6) (1987); Tenn. Code Ann. § 39–15–202(f) (Supp. 1989); Utah Code Ann. § 76–7–304(2) (1990). In contrast, Arkansas does require an unmarried minor to notify both parents but provides exceptions where the second parent "cannot be located through reasonably diligent effort," or a parent's "whereabouts are unknown," the parent has not been in contact with the minor's custodial parent or the minor for at least one year, or the parent is guilty of sexual abuse. Ark. Code Ann. §§ 20–16–802, 20–16–808 (Supp. 1989). Delaware requires the consent only of parents who are residing in the same household; if the minor is not living with both of her parents, the consent of one parent is sufficient. Del. Code. Ann., Tit. 24, § 1790(b)(3) (1987). Illinois law does not require the consent of a parent who has deserted the family or is not available. Ill. Rev. Stat., ch. 38, ¶ 81–54(3) (1989). Kentucky requires an unmarried minor to obtain the consent of a legal guardian or "both parents, if available," but provides that if both parents are not available, the consent of the available parent shall suffice. Ky. Rev. Stat. Ann. §§ 311.732(2)(a), (b) (Michie 1990). Under Massachusetts law, an unmarried minor need obtain the consent of only one parent if the other parent "is unavailable to the physician within a reasonable time and in a reasonable manner," or if the parents are divorced and the other parent does not have custody. Mass. Gen. Laws § 112:12S (1988). Mississippi law requires only the consent of the parent with primary custody, care, and control of the minor if the parents are divorced or unmarried and living apart and, in all other cases, the consent of only one parent if the other parent is not available in a reasonable time or manner. Miss. Code Ann. § 41–41–53(2) (Supp. 1989). Finally, North Dakota requires only the consent of the custodial parent if the parents are separated and divorced, or the legal guardian if the minor is subject to guardianship. N. D. Cent. Code § 14–02.1–03.1 (1981).

sufficient.[6] It also makes exceptions for cases in which emergency treatment prior to notice "is necessary to prevent the woman's death," both parents have already given their consent in writing, or the proper authorities are advised that the minor is a victim of sexual or physical abuse.[7] The statute subjects a person performing an abortion in violation of its terms to criminal sanctions and to civil liability in an action brought by any person "wrongfully denied notification."[8]

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[6] Subdivision 3 provides, in part:

"For purposes of this section, 'parent' means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one."

[7] Subdivision 4 provides:

"No notice shall be required under this section if:

"(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

"(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

"(c) The pregnant minor woman declares that she is a victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3."

Under Minn. Stat. § 626.556 (1988), if the minor declares that she is the victim of abuse, the notified physician or physician's agent must report the abuse to the local welfare or law enforcement agency within 24 hours, §§ 626.556(3)(a), (3)(e), whereupon the welfare agency "shall immediately conduct an assessment and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible." § 626.556(10)(a). If the agency interviews the victim, it must notify the parent of the fact of the interview at the conclusion of the investigation unless it obtains a court order. § 626.556(10)(c). Individuals who are subjects of the investigation have a right of access to the record of the investigation. § 626.556(11).

[8] Subdivision 5 provides:

"Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully de-

Subdivision 6 authorizes a judicial bypass of the two-parent notice requirement if subdivision 2 is ever "temporarily or permanently" enjoined by judicial order. If the pregnant minor can convince "any judge of a court of competent jurisdiction" that she is "mature and capable of giving informed consent to the proposed abortion," or that an abortion without notice to both parents would be in her best interest, the court can authorize the physician to proceed without notice. The statute provides that the bypass procedure shall be confidential, that it shall be expedited, that the minor has a right to court-appointed counsel, and that she shall be afforded free access to the court "24 hours a day, seven days a week." An order denying an abortion can be appealed on an expedited basis, but an order authorizing an abortion without notification is not subject to appeal.[9]

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nied notification. A person shall not be held liable under this section if the person establishes by written evidence that the person relied upon evidence sufficient to convince a careful and prudent person that the representations of the pregnant woman regarding information necessary to comply with this section are bona fide and true, or if the person has attempted with reasonable diligence to deliver notice, but has been unable to do so."

[9] Subdivision 6 provides:

"If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition to the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

"(c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant women is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of

The statute contains a severability provision, but it does not include a statement of its purposes. The Minnesota Attorney General has advised us that those purposes are apparent from the statutory text and that they "include the recognition and fostering of parent-child relationships, promoting counsel to a child in a difficult and traumatic choice, and providing for notice to those who are naturally most concerned for the child's welfare."[10] The District Court found that the primary purpose of the legislation was to protect the well-being of minors by encouraging them to discuss with their parents the decision whether to terminate their pregnancies.[11] It also found that the legislature was motivated by a

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an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

"(ii) Such a pregnant woman may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel.

"(iii) Proceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions.

"(iv) An expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant woman at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant woman 24 hours a day, seven days a week."

[10] Brief for Petitioner in No. 88-1309, p. 4 (hereinafter Minn. Br.); see also *id.*, at 8-9.

[11] "The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to pro-

desire to deter and dissuade minors from choosing to terminate their pregnancies.[12] The Attorney General, however, disclaims any reliance on this purpose.[13]

II

This litigation was commenced on July 30, 1981, two days before the effective date of the parental notification statute. The plaintiffs include two Minnesota doctors who specialize in obstetrics and gynecology, four clinics providing abortion and contraceptive services in metropolitan areas in Minnesota, six pregnant minors representing a class of pregnant minors, and the mother of a pregnant minor. Plaintiffs alleged that the statute violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment and various provisions of the Minnesota Constitution.

Based on the allegations in their verified complaint, the District Court entered a temporary restraining order enjoin-

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tect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure." 648 F. Supp. 756, 765–766 (Minn. 1986).

[12] The District Court's finding 59 reads as follows:

"The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it 'would save lives' by influencing minors to carry their pregnancies to term rather than aborting." *Id.*, at 766.

[13] "The court also found that a desire to dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Finding 59, Hodgson Appendix 25a. This finding was based on no more than the testimony before a legislative committee of some supporters of the act who hoped it 'would save lives.' There is no direct evidence, however, that this was the motive of any legislator." Minn. Br. 4, n. 2.

ing the enforcement of subdivision 2 of the statute. After a hearing, the court entered a preliminary injunction which still remains in effect. App. 31. The District Court refused, however, to rule on the validity of the judicial bypass procedure in advance of trial.[14]

In 1986, after a 5-week trial, the District Court concluded that both the two-parent notification requirement and the 48-hour waiting period were invalid. It further concluded that the definition of the term "parent," which is carried over into the notification requirement, was not severable from the remainder of the statute. The court declared the entire statute unconstitutional and enjoined the defendants from enforcing it.

A three-judge panel of the Court of Appeals affirmed. The court first held that a compulsory notification requirement is invalid if it does not provide the pregnant minor with the option of an alternative court procedure in which she can demonstrate either her maturity or that performance of an abortion without notification would be in her best interests. App. to Pet. for Cert. in No. 88–1125, p. 62a. Second, relying heavily on the findings of the District Court concerning the impact of a two-parent notice requirement on families in which the parents are divorced, separated, or unmarried, the panel also concluded that the unconstitutional notification requirement could not be saved by the judicial bypass. The court reasoned that a mature minor and her custodial parent are in a better position than a court to determine whether notifying the noncustodial parent would be in the child's best interests and that they should not be forced to submit to a "Hobson's choice" between an unconstitutional notice requirement and a burdensome court bypass.[15] The panel fur-

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[14] On January 23, 1985, the court granted partial summary judgment in favor of defendants on several of the plaintiffs' claims, but reserved ruling on the constitutionality of subdivision 6 as applied until after trial.

[15] "Where the underlying notification provision is unconstitutional because with respect to children of broken families it fails to further the

ther held that the two-parent notice requirement was not severable.[16]

The panel opinion was vacated, and the Court of Appeals reheard the case en banc. 853 F. 2d 1452 (CA8 1988). The court unanimously and summarily rejected the State's submission that the two-parent notice requirement was constitutional without any bypass procedure. *Id.*, at 1456–1457. The majority concluded, however, that subdivision 6 of the statute was valid. It agreed with the District Court that the development of a full factual record may demonstrate that a facially valid statute is "unconstitutional in operation," *id.*, at 1459, and that "the . . . detailed factual findings concerning the general difficulties of obtaining an abortion in Minnesota and the trauma of the bypass procedure, compared to its effectiveness, raise considerable questions about the practi-

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state's significant interests, however, a mature minor or minor whose best interests are contrary to notifying the non-custodial parent is forced to either suffer the unconstitutional requirement or submit to the burdensome court bypass procedure. Such a Hobson's choice fails to further any significant interest. Just as there must be a constitutional judicial alternative to a notice requirement, so there must be a constitutional notice or consent alternative to the court bypass.

"The second reason for our conclusion that the court bypass procedure does not save the two-parent notification requirement is that where the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests. In situations where the minor has a good relationship with the non-custodial parent but the custodial parent does not, there is nothing to prevent the minor from consulting with the non-custodial parent if she so desires. The minor and custodial parent, however, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given." App. to Pet. for Cert. in No. 88–1125, pp. 68a–69a (citations omitted).

[16] The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period. A concurring judge agreed with the panel that a requirement that a pregnant minor seeking an abortion notify a noncustodial parent could not withstand constitutional scrutiny and was not saved by a court bypass procedure. *Id.*, at 72a.

cal wisdom of this statute." *Ibid.* In the majority's opinion, however, those questions were for the legislature to consider because the statute served valid state interests: the interest in "'encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child,'"[17] as well as the independent interest of the parents in the upbringing of their children.[18]

After noting that the State did not challenge the District Court's findings, *id.*, at 1462, the court concluded that these findings placed undue emphasis on one-parent and no-parent households. For even though the two-parent notice requirement may not further the interests of the pregnant minor in such cases, the rights of "best-interest" and mature minors were nevertheless protected by the bypass procedure. More importantly, "as applied to all pregnant minors, regardless of their family circumstances, the district court did not consider whether parental and family interests (as distinguished from the interests of the minor alone) justified the two-parent notice requirement." *Id.*, at 1463. The court wrote:

> "The district court enjoined the entire statute because of the impact of the two-parent notice requirement primarily upon one group of pregnant minors, without considering the effect of the bypass, or the parental and family interests which have been recognized by the Supreme Court. In concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature or non best-interest preg-

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[17] 853 F. 2d, at 1460, quoting from Justice Powell's opinion in *Bellotti* v. *Baird*, 443 U. S. 622, 640–641 (1979) *(Bellotti II)*.

[18] The court also suggested that the statute furthered the "state interest in providing an opportunity for parents to supply essential medical and other information to a physician," 853 F. 2d, at 1461, but the State has not argued here that that interest provides an additional basis for upholding the statute.

> nant minor, the district court gave only limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement. The district court's determination that an undue burden on the one group renders the statute unconstitutional for all is contrary to the Supreme Court's decision that a notice-consent/bypass procedure plainly serves important state interests and is narrowly drawn to protect only those interests. . . . Considering the statute as a whole and as applied to all pregnant minors, the two-parent notice requirement does not unconstitutionally burden the minor's abortion right." *Id.*, at 1464–1465 (citation omitted).

The Court of Appeals also rejected the argument that the 48-hour waiting period imposed a significant burden on the minor's abortion right, finding that the waiting period could run concurrently with the scheduling of an appointment for the procedure. Accordingly, the court reversed the judgment of the District Court without reaching the question of severability.[19]

In dissent, two members of the court criticized the majority for ignoring "the evidence amassed in a five-week trial," for relying on the judicial bypass procedure "to uphold an unconstitutional two-parent notification requirement," and for creating "a new right, apparently of constitutional dimension, for non-custodial parents to receive notice of their minor children's activities." *Id.*, at 1466. One of the dissenters joined a third dissenter in expressing the opinion that "a single-parent notification requirement would withstand constitutional challenge." *Id.*, at 1472. We granted certiorari, 492 U. S. 917 (1989).

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[19] The court also rejected the argument that the statute violated the Equal Protection Clause by singling out abortion as the only pregnancy-related medical procedure requiring notification. *Id.*, at 1466. The equal protection challenge is not renewed here.

III

There is a natural difference between men and women: Only women have the capacity to bear children. A woman's decision to conceive or to bear a child is a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution. See *Harris* v. *McRae*, 448 U. S. 297, 316–318 (1980); *Carey* v. *Population Services International*, 431 U. S. 678, 685, 687 (1977); *Cleveland Bd. of Education* v. *LaFleur*, 414 U. S. 632, 639–640 (1974); *Roe* v. *Wade*, 410 U. S. 113, 152–153 (1973); *id.*, at 168–170 (Stewart, J., concurring); *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479, 502–503 (1965) (WHITE, J., concurring in judgment). That Clause, as interpreted in those cases, protects the woman's right to make such decisions independently and privately, see *Whalen* v. *Roe*, 429 U. S. 589, 598–600, and n. 23 (1977), free of unwarranted governmental intrusion.

> "Moreover, the potentially severe detriment facing a pregnant woman, see *Roe* v. *Wade*, 410 U. S., at 153, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Bellotti* v. *Baird*, 443 U. S. 622, 642 (1979) *(Bellotti II)* (opinion of Powell, J.).

As we stated in *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74 (1976), the right to make this decision "do[es] not mature and come into being magically only when

one attains the state-defined age of majority." Thus, the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.

In cases involving abortion, as in cases involving the right to travel or the right to marry, the identification of the constitutionally protected interest is merely the beginning of the analysis. State regulation of travel and of marriage is obviously permissible even though a State may not categorically exclude nonresidents from its borders, *Shapiro* v. *Thompson*, 394 U. S. 618, 631 (1969), or deny prisoners the right to marry, *Turner* v. *Safley*, 482 U. S. 78, 94–99 (1987). But the regulation of constitutionally protected decisions, such as where a person shall reside or whom he or she shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made. Cf. *Turner* v. *Safley*, *supra*; *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967). In the abortion area, a State may have no obligation to spend its own money, or use its own facilities, to subsidize nontherapeutic abortions for minors or adults. See, *e. g.*, *Maher* v. *Roe*, 432 U. S. 464 (1977); cf. *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 508–511 (1989); *id.*, at 523–524 (O'CONNOR, J., concurring in part and concurring in judgment). A State's value judgment favoring childbirth over abortion may provide adequate support for decisions involving such allocation of public funds, but not for simply substituting a state decision for an individual decision that a woman has a right to make for herself. Otherwise, the interest in liberty protected by the Due Process Clause would be a nullity. A state policy favoring childbirth over abortion is not in itself a sufficient justification for overriding the woman's decision or for placing "obstacles—absolute or otherwise—in the pregnant woman's path to an abortion." *Maher*, 432 U. S., at 474; see also *Harris* v. *McRae*, 448 U. S., at 315–316.

In these cases the State of Minnesota does not rest its defense of this statute on any such value judgment. Indeed, it affirmatively disavows that state interest as a basis for upholding this law.[20] Moreover, it is clear that the state judges who have interpreted the statute in over 3,000 decisions implementing its bypass procedures have found no legislative intent to disfavor the decision to terminate a pregnancy. On the contrary, in all but a handful of cases they have approved such decisions.[21] Because the Minnesota statute unquestionably places obstacles in the pregnant minor's path to an abortion, the State has the burden of establishing its constitutionality. Under any analysis, the Minnesota statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests. Cf. *Turner* v. *Safley*, 482 U. S., at 97; *Carey* v. *Population Services International*, 431 U. S., at 704 (opinion of Powell, J.); *Doe* v. *Bolton*, 410 U. S. 179, 194–195, 199 (1973).

IV

The Court has considered the constitutionality of statutes providing for parental consent or parental notification in six abortion cases decided during the last 14 years.[22] Although the Massachusetts statute reviewed in *Bellotti* v. *Baird*, 428 U. S. 132 (1976) *(Bellotti I)*, and *Bellotti II* required the consent of both parents, and the Utah statute reviewed in *H. L.*

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[20] See n. 14, *supra*.

[21] The District Court found:

"During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted." Finding No. 55, 648 F. Supp., at 765.

[22] *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 72–75 (1976); *Bellotti* v. *Baird*, 428 U. S. 132 (1976) *(Bellotti I)*; *Bellotti II*, 443 U. S. 622 (1979); *H. L.* v. *Matheson*, 450 U. S. 398 (1981); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 439–442 (1983); and *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 490–493 (1983); *id.*, at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part).

v. *Matheson*, 450 U. S. 398 (1981), required notice to "the parents,"[23] none of the opinions in any of those cases focused on the possible significance of making the consent or the notice requirement applicable to both parents instead of just one. In contrast, the arguments in these cases, as well as the extensive findings of the District Court, are directed primarily at that distinction. It is therefore appropriate to summarize these findings before addressing the constitutionality of the 48-hour waiting period or the two-parent notification requirement, particularly since none of the findings has been challenged in either this Court or the Court of Appeals.

Approximately one out of every two marriages ends in divorce. 648 F. Supp. 756, 768 (Minn. 1986). Unrebutted evidence indicates that only 50% of minors in the State of Minnesota reside with both biological parents. *Ibid.*; App. 125–126. This conclusion is substantially corroborated by a study indicating that 9% of the minors in Minnesota live with neither parent and 33% live with only one parent. 648 F. Supp., at 768.[24]

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[23] The Utah statute reviewed in *Matheson* required the physician to "[n]otify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed." Utah Code Ann. § 76–7–304(2) (1990). Unlike the Minnesota statute under review today, the Utah statute did not define the term "parents." The statute is ambiguous as to whether the term refers to each parent individually or rather to the parental unit, which could be represented by either the mother or the father, and neither the argument nor the discussion in *Matheson* indicated that notice to both parents was required. State law, to the extent it addresses the issue, is to the contrary: Although Utah law provides that a noncustodial parent retains the right to consent to marriage, enlistment, and the performance of major medical or surgical treatment, the right to notice of the minor's abortion is not among the parent's specific residual rights and duties. Utah Code Ann. § 78–3a–2(13) (Supp. 1989).

[24] The figures are not dissimilar to those throughout the Nation. See, *e. g.*, Brief for American Psychological Association et al. as *Amici Curiae* 12–13 ("It is estimated that by age 17, 70 percent of white children born in 1980 will have spent at least some time with only one parent, and 94 percent of black children will have lived in one-parent homes") (citing

The District Court found—on the basis of extensive testimony at trial—that the two-parent notification requirement had particularly harmful effects on both the minor and the custodial parent when the parents were divorced or separated. Relations between the minor and absent parent were not reestablished as a result of the forced notification, thereby often producing disappointment in the minor "when an anticipated reestablishment of her relationship with the absent parent d[id] not occur." *Id.*, at 769. Moreover, "[t]he reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustration at the intrusion of the absent parent," *ibid.*, and fear that notification will threaten the custody rights of the parent or otherwise promote intrafamily violence. Tragically, those fears were often realized:

> "Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harassment may continue well beyond the divorce, especially when children are involved.
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> ". . . Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception." *Ibid.*

The District Court further found:

> "Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents

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Hofferth, Updating Children's Life Course, 47 J. Marriage and Fam. 93 (1985)).

> are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear that notification will bring the absent parent back into the family in an intrusive and abusive way." *Ibid.*

The District Court also found that the two-parent notification requirement had adverse effects in families in which the minor lives with both parents. These effects were particularly pronounced in the distressingly large number of cases in which family violence is a serious problem. The court found that many minors in Minnesota "live in fear of violence by family members" and "are, in fact, victims of rape, incest, neglect and violence."[25] The District Court found that few minors can take advantage of the exception for a minor who declares that she is a victim of sexual or physical abuse because of the obligation to report the information to the authorities and the attendant loss of privacy. See Findings 46 and 47,

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[25] "Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on these statistics, state officials suggest that the 'battering' of women by their partners 'has come to be recognized as perhaps the most frequently committed violent crime in the state' of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported." 648 F. Supp., at 768–769.

648 F. Supp., at 764.[26] This concern about family violence helps to explain why the District Court found that in many instances the requirement that both parents be notified actually impairs family communication. Minors who otherwise would inform one parent were unwilling to do so when such notification likely would also involve the parent in the torturous ordeal of explaining to a court why the second parent should not be notified. The court found:

> "Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication." *Id.*, at 769.[27]

The great majority of bypass petitions are filed in the three metropolitan counties in Minnesota, where courts schedule bypass hearings on a regular basis and have in place procedures for hearing emergency petitions. *Id.*, at 762. Courts in the nonmetropolitan areas are acquainted with the statute and, for the most part, apply it conscientiously, but a number of counties are served by judges who are unwilling to hear bypass petitions. *Id.*, at 763. Aside from the unavoidable

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[26] "Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere." *Id.*, at 764.

[27] As one of the guardians ad litem testified: "We have had situations reported to me by my other guardians as well as teenagers that I talked to myself who have said that they will consider telling one parent, usually mom, sometimes dad, but since they would have to go to court anyway, because they are absolutely sure they don't want the other parent to know, they don't tell either one." App. 239 (Testimony of Susanne Smith).

notification of court officials, the confidentiality of minors has been maintained. *Ibid.*

During the period between August 1, 1981, and March 1, 1986, 3,573 judicial bypass petitions were filed in Minnesota courts. All but 15 were granted.[28] The judges who adjudicated over 90% of these petitions testified; none of them identified any positive effects of the law.[29] The court experience produced fear, tension, anxiety, and shame among minors,

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[28] See n. 21, *supra.*

[29] One testified that minors found the bypass procedure "'a very nerve-racking experience,'" Finding 60, 648 F. Supp., at 766; another testified that the minor's "'level of apprehension is twice what I normally see in court.'" *Ibid.* A Massachusetts judge who heard similar petitions in that State expressed the opinion that "going to court was 'absolutely' traumatic for minors . . . 'at a very, very difficult time in their lives.'" *Ibid.* One judge stated that he did not "perceive any useful public purpose to what I am doing in these cases" and that he did not "see anything that is being accomplished that is useful to anybody." Testimony of Gerald C. Martin, App. in No. 86–5423 (CA8), pp. A–488—A–489.

The public defenders and guardians ad litem gave similar testimony. See Testimony of Cynthia Daly (public defender), App. 187 (bypass "was another hoop to jump through and a very damaging and stress-producing procedure that didn't do any good"); Testimony of Susanne Smith (guardian ad litem), *id.*, at 234 ("The teenagers that we see in the guardian's office are very nervous, very scared. Some of them are terrified about court processes. They are often exhausted. . . . They are upset about and tell us that they are upset about the fact that they have to explain very intimate details of their personal lives to strangers. They talk about feeling that they don't belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in"); Testimony of Heather Sweetland (public defender), App. in No. 86–5423 (CA8), p. A–585 ("Most of the women that are my clients in these hearings are scared . . . . Some of them will relax slightly but the majority of them are very nervous").

Doctor Hodgson, one of the plaintiffs in this case, testified that when her minor patients returned from the court process, "some of them are wringing wet with perspiration. They're markedly relieved, many of them. They—they dread the court procedure often more than the actual abortion procedure. And it—it's frequently necessary to give them a sedative of some kind beforehand." App. 468.

causing some who were mature, and some whose best interests would have been served by an abortion, to "forego the bypass option and either notify their parents or carry to term." Finding 44, 648 F. Supp., at 763. Among parents who supported their daughters in the bypass proceedings, the court experience evoked similar reactions.[30]

Scheduling petitions in the Minnesota court typically required minors to wait only two or three days for hearings. The District Court found, however, that the statutory waiting period of 48 hours was frequently compounded by a number of other factors that "commonly" created a delay of 72 hours, *id.*, at 764–765, and, "in many cases" a delay of a week or more in effecting a decision to terminate a pregnancy. *Id.*, at 765. A delay of that magnitude increased the medical risk associated with the abortion procedure to "a statistically significant degree." Finding 43, 648 F. Supp., at 763. While recognizing that a mandatory delay following the notice to a minor's parent served the State's interest in protecting pregnant minors, the court found that that interest could be served by a shorter waiting period. *Id.*, at 779–780.

At least 37 witnesses testified to the issue whether the statute furthered the State's interest in protecting pregnant minors. Only two witnesses testified that a two-parent notification statute did minors more good than harm; neither of these witnesses had direct experience with the Minnesota statute. Summarizing its findings on the question whether the statute as a whole furthered the State's interests, the District Court wrote:

> "Of the remaining witnesses who spoke to the issue whether Minn. Stat. § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of

[30] According to the testimony at trial, parents who participated in the bypass procedure—many of whom had never before been in court—were "real upset" about having to appear in court, *id.*, at 167, and were "angry, they were worried about their kid and they were nervous too." *Id.*, at 186.

these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible [e]ffect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious effect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit. Thus five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. § 144.343(2)–(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." *Id.*, at 775.

Focusing specifically on the statutory requirement that both parents be notified, the District Court concluded:

"The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two-parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The anxiety attending either option tends to interfere with and burden the parent-child com-

munication the minor voluntarily initiated with the custodial parent.

". . . Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent, or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents affirmatively discourages parent-child communication." *Id.*, at 777–778.

V

Three separate but related interests—the interest in the welfare of the pregnant minor, the interest of the parents, and the interest of the family unit—are relevant to our consideration of the constitutionality of the 48-hour waiting period and the two-parent notification requirement.

The State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely. See *Bellotti II*, 443 U. S., at 634–639 (opinion of Powell, J.); *Prince* v. *Massachusetts*, 321 U. S. 158, 166–167 (1944).[31] That interest, which justifies

[31] "Properly understood . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors,

state-imposed requirements that a minor obtain his or her parent's consent before undergoing an operation, marrying, or entering military service, see *Parham* v. *J. R.*, 442 U. S. 584, 603–604 (1979); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S., at 95 (WHITE, J., concurring in part and dissenting in part); *id.*, at 102–103 (STEVENS, J., concurring in part and dissenting in part), extends also to the minor's decision to terminate her pregnancy. Although the Court has held that parents may not exercise "an absolute, and possibly arbitrary, veto" over that decision, *Danforth*, 428 U. S., at 74, it has never challenged a State's reasonable judgment that the decision should be made after notification to and consultation with a parent. See *Ohio* v. *Akron Center for Reproductive Health*, *post*, at 510–511; *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 428, n. 10, 439 (1983); *H. L.* v. *Matheson*, 450 U. S., at 409–410; *Bellotti II*, 443 U. S., at 640–641 (opinion of Powell, J.); *Danforth*, 428 U. S., at 75. As Justice Stewart, joined by Justice Powell, pointed out in his concurrence in *Danforth:*

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.*, at 91.

Parents have an interest in controlling the education and upbringing of their children but that interest is "a counterpart of the responsibilities they have assumed." *Lehr* v. *Robertson*, 463 U. S. 248, 257 (1983); see also *Parham*, 442 U. S., at 602 (citing 1 W. Blackstone, Commentaries *447;

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especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti II*, 443 U. S., at 638–639 (opinion of Powell, J.).

See also *Stanford* v. *Kentucky*, 492 U. S. 361, 394–396 (1989) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*, 487 U. S. 815, 825–826, n. 23 (1988) (plurality opinion).

2 J. Kent, Commentaries on American Law *190); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925). The fact of biological parentage generally offers a person only "an opportunity . . . to develop a relationship with his offspring." *Lehr*, 463 U. S., at 262; see also *Caban* v. *Mohammed*, 441 U. S. 380, 397 (1979) (Stewart, J., dissenting). But the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest. See *Stanley* v. *Illinois*, 405 U. S. 645, 651 (1972); *Lehr*, 463 U. S., at 261; *Michael H.* v. *Gerald D.*, 491 U. S. 110, 157–160 (1989) (WHITE, J., dissenting); cf. *Caban*, 441 U. S., at 393, n. 14. But see *Michael H.*, 491 U. S., at 123–127 (plurality opinion).

While the State has a legitimate interest in the creation and dissolution of the marriage contract, see *Sosna* v. *Iowa*, 419 U. S. 393, 404 (1975); *Maynard* v. *Hill*, 125 U. S. 190, 205 (1888), the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference. See *Wisconsin* v. *Yoder*, 406 U. S. 205, 233–234 (1972); *Griswold* v. *Connecticut*, 381 U. S., at 495–496 (Goldberg, J., concurring); *Poe* v. *Ullman*, 367 U. S. 497, 551–552 (1961) (Harlan, J., dissenting); *Gilbert* v. *Minnesota*, 254 U. S. 325, 335–336 (1920) (Brandeis, J., dissenting); see also *Michael H.*, 491 U. S., at 132 (O'CONNOR, J., concurring in part); *Roberts* v. *United States Jaycees*, 468 U. S. 609, 618–620 (1984); *Cleveland Bd. of Education* v. *LaFleur*, 414 U. S., at 639–640. The family may assign one parent to guide the children's education and the other to look after their health.[32] "The statist notion that governmental power should supersede parental authority in

[32] Under common-law principles, one parent has authority to act as agent for the other in matters of their child's upbringing and education. See E. Spencer, Law of Domestic Relations 432 (1911); T. Reeve, Law of Baron and Femme 295 (1816).

all cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U. S., at 603. We have long held that there exists a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts*, 321 U. S., at 166. Thus, when the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the "governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore* v. *East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion); *id.*, at 507, 510–511 (BRENNAN, J., concurring); see also *Meyer* v. *Nebraska*, 262 U. S. 390, 399–400 (1923).

A natural parent who has demonstrated sufficient commitment to his or her children is thereafter entitled to raise the children free from undue state interference. As JUSTICE WHITE explained in his opinion for the Court in *Stanley* v. *Illinois*, 405 U. S. 645 (1972):

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923), 'basic civil rights of man,' *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May* v. *Anderson*, 345 U. S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, *supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, *supra*, at 541, and the Ninth Amendment, *Griswold* v.

Connecticut, 381 U. S. 479, 496 (1965) (Goldberg, J., concurring)." *Id.*, at 651.[33]

VI

We think it is clear that a requirement that a minor wait 48 hours after notifying a single parent of her intention to get an abortion would reasonably further the legitimate state interest in ensuring that the minor's decision is knowing and intelligent. We have held that when a parent or another person has assumed "primary responsibility" for a minor's well-being, the State may properly enact "laws designed to aid discharge of that responsibility." *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968). To the extent that subdivision 2 of the Minnesota statute requires notification of only one parent, it does just that. The brief waiting period provides the parent the opportunity to consult with his or her spouse and a family physician, and it permits the parent to inquire into the competency of the doctor performing the abortion, discuss the religious or moral implications of the abortion decision, and provide the daughter needed guidance and counsel in

[33] "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Poe* v. *Ullman*, 367 U. S. 497, 551–552 (1961) (Harlan, J., dissenting).

Far more than contraceptives, at issue in *Poe* and *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State. See, *e. g.*, *Stein* v. *Bowman*, 13 Pet. 209, 223 (1839) ("This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence"); 2 W. Best, Principles of Law of Evidence 994–995 (1st Am. ed. 1876); 1 S. Greenleaf, Law of Evidence 286–287 (12th ed. 1866); 1 M. Phillips, Law of Evidence 69–80 (3d ed. 1849).

evaluating the impact of the decision on her future. See *Zbaraz* v. *Hartigan*, 763 F. 2d 1532, 1552 (CA7 1985) (Coffey, J., dissenting), aff'd by an equally divided Court, 484 U. S. 171 (1987).

The 48-hour delay imposes only a minimal burden on the right of the minor to decide whether or not to terminate her pregnancy. Although the District Court found that scheduling factors, weather, and the minor's school and work commitments may combine, in many cases, to create a delay of a week or longer between the initiation of notification and the abortion, 648 F. Supp., at 765, there is no evidence that the 48-hour period itself is unreasonable or longer than appropriate for adequate consultation between parent and child. The statute does not impose any period of delay once a court, acting *in loco parentis*, or the parents express their agreement that the minor is mature or that the procedure would be in her best interest. Indeed, as the Court of Appeals noted and the record reveals,[34] the 48-hour waiting period may run concurrently with the time necessary to make an appointment for the procedure, thus resulting in little or no delay.[35]

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[34] The record contains the telephone training manual of one clinic which contemplates that notification will be made on the date the patient contacts the clinic to arrange an abortion so that the appointment can be scheduled for a few days later. Since that clinic typically has a 1- to 2-day backlog, App. 146–147, the statutory waiting period creates little delay.

[35] *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S., at 449, upon which the plaintiffs rely, is not to the contrary. There we invalidated a provision that required that mature women, capable of consenting to an abortion, wait 24 hours after giving consent before undergoing an abortion. The only legitimate state interest asserted was that the "woman's decision be informed." *Id.*, at 450. We decided that "if a woman, after appropriate counseling, is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *Id.*, at 450–451. By contrast, in this case, the State asserts a legitimate interest in protecting minor women from their own immaturity. As we explain in the text, the right of the minor to make an informed decision to terminate her pregnancy is not defeated by the 48-hour waiting period. It is significant that the statute

VII

It is equally clear that the requirement that *both* parents be notified, whether or not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest. The usual justification for a parental consent or notification provision is that it supports the authority of a parent who is presumed to act in the minor's best interest and thereby assures that the minor's decision to terminate her pregnancy is knowing, intelligent, and deliberate. To the extent that such an interest is legitimate, it would be fully served by a requirement that the minor notify one parent who can then seek the counsel of his or her mate or any other party, when such advice and support is deemed necessary to help the child make a difficult decision. In the ideal family setting, of course, notice to either parent would normally constitute notice to both. A statute requiring two-parent notification would not further any state interest in those instances. In many families, however, the parent notified by the child would not notify the other parent. In those cases the State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the child.

Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony

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does not impose a waiting period if a substitute *competent* decisionmaker—a parent or court—gives affirmative consent to the abortion.

at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to a parent as well. In some cases, the parents were divorced and the second parent did not have custody or otherwise participate in the child's upbringing. App. 244–245; *id.*, at 466; *id.*, at 115. In these circumstances, the privacy of the parent and child was violated, even when they suffered no other physical or psychological harm. In other instances, however, the second parent had either deserted or abused the child, *id.*, at 462, 464, had died under tragic circumstances, *id.*, at 120–121, or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. *Id.*, at 204, 465.[36] In these circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive. The focus on notifying the second parent distracted both the parent and minor from the minor's imminent abortion decision.

The State does not rely primarily on the best interests of the minor in defending this statute. Rather, it argues that, in the ideal family, the minor should make her decision only

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[36] The most common reason for not notifying the second parent was that that parent was a child- or spouse-batterer, App. 204, and notification would have provoked further abuse. For example, Judge Allen Oleisky, whose familiarity with the Minnesota statute is based on his having heard over 1,000 petitions from minors, *id.*, at 154, testified that battering is a frequent crime in Minnesota, that parents seek an exemption from the notification requirement because they have been battered or are afraid of assault, and that notification of the father would "set the whole thing off again in some cases." *Id.*, at 166–167. See also *id.*, at 237, 245, 339. That testimony is confirmed by the uncontradicted testimony of one of plaintiffs' experts that notice of a daughter's pregnancy "would absolutely enrage [a batterer]. It would be much like showing a red cape to a bull. That kind of information just plays right into his worst fears and his most vulnerable spots. The sexual jealousy, his dislike of his daughter going out with anybody else, would make him very angry and would probably create severe abuse as well as long term communication difficulties." *Id.*, at 194 (testimony of Lenore Walker).

after consultation with both parents who should naturally be concerned with the child's welfare and that the State has an interest in protecting the independent right of the parents "to determine and strive for what they believe to be best for their children." Minn. Br. 26. Neither of these reasons can justify the two-parent notification requirement. The second parent may well have an interest in the minor's abortion decision, making full communication among all members of a family desirable in some cases, but such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together. In *Moore* v. *East Cleveland*, 431 U. S. 494 (1977), we invalidated a zoning ordinance which "slic[ed] deeply into the family itself," *id.*, at 498, permitting the city to "standardiz[e] its children—and its adults—by forcing all to live in certain narrowly defined family patterns." *Id.*, at 506. Although the ordinance was supported by state interests other than the State's interest in substituting its conception of family life for the family's own view, the ordinance's relation to those state interests was too "tenuous" to satisfy constitutional standards. By implication, a state interest in standardizing its children and adults, making the "private realm of family life" conform to some state-designed ideal, is not a legitimate state interest at all. See also *Meyer* v. *Nebraska*, 262 U. S., at 399–400 (right to establish a home and bring up children may not be interfered with by legislative action which is without "reasonable relation to some purpose within the competency of the State to effect").

Nor can any state interest in protecting a parent's interest in shaping a child's values and lifestyle overcome the liberty interests of a minor acting with the consent of a single parent or court. See *Bellotti II*, 443 U. S. 622 (1979); *Bellotti I*, 428 U. S. 132 (1976); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976). In *Danforth*, the majority identified the only state interest in requiring parental con-

sent as that in "the safeguarding of the family unit and of parental authority" and held that that state interest was insufficient to support the requirement that mature minors receive parental consent. The Court summarily concluded that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.*, at 75. It follows that the combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent.

In *Bellotti I* and *Bellotti II*, we also identified the difference between parental interests and the child's best interest. Although the District Court invalidated the Massachusetts statute there under review on the grounds that it permitted a parent or the court, acting *in loco parentis*, to refuse consent based on the parent's own interests, the state attorney general argued that the parental right consisted "'exclusively of the right to assess independently, for their minor child, what will serve that child's best interest.'" 428 U. S., at 144. Because we believed that the attorney general's interpretation "would avoid or substantially modify the federal constitutional challenge," *id.*, at 148, we ordered the District Court to certify the state-law question to the Supreme Judicial Court of Massachusetts. *Id.*, at 151–152. On review in this Court for the second time, after the Supreme Judicial Court stated unambiguously that the "good cause" standard required the judge to grant consent to an abortion found to be in the minor's best interest, 443 U. S., at 630, 644 (opinion of Powell, J.), we confirmed that such a construction satisfied "some of the concerns" about the statute's constitutionality, *id.*, at 644, and thereby avoided "much of what was objectionable in the statute successfully challenged in *Danforth*," *id.*, at 645. Indeed, the constitutional defects that Justice Powell identified in the statute—its failure to allow a minor who is found to be mature and fully competent to make the abortion

decision independently and its requirement of parental consultation even when an abortion without notification would be in the minor's best interests—are predicated on the assumption that the justification for any rule requiring parental involvement in the abortion decision rests entirely on the best interests of the child. *Id.*, at 651.[37]

Unsurprisingly, the Minnesota two-parent notification requirement is an oddity among state and federal consent provisions governing the health, welfare, and education of children. A minor desiring to enlist in the armed services or the Reserve Officers' Training Corps (ROTC) need only obtain the consent of "his parent or guardian." 10 U. S. C. §§ 505(a), 2104(b)(4), 2107(b)(4). The consent of "*a* parent or guardian" is also sufficient to obtain a passport for foreign travel from the United States Department of State, 22 CFR § 51.27 (1989) (emphasis added), and to participate as a subject in most forms of medical research, 45 CFR §§ 46.404, 46.405 (1988). In virtually every State, the consent of one parent is enough to obtain a driver's license or operator's permit. The same may be said with respect to the decision to submit to any medical or surgical procedure other than an abortion.[38] Indeed, the only other Minnesota statute that the State has identified which requires two-parent con-

[37] JUSTICE KENNEDY recognizes that parental rights are coupled with parental responsibilities, *post*, at 483, and that "a State [may] legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it," *post*, at 485. That, of course, is precisely our point. What the State may not do is legislate on the generalized assumptions that a parent in an intact family will not act in his or her child's best interests and will fail to involve the other parent in the child's upbringing when that involvement is appropriate.

[38] See, *e. g.*, Brief for American Psychological Association et al. as *Amici Curiae* 6, n. 8 (state law typically allows a minor parent—whatever her age—to consent to the health care of her child); Brief for the American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 25 ("In areas that do not deal with sexuality or substance abuse, states require, at most, a single parent's consent before performing medical procedures on a minor").

sent is that authorizing the minor to change his name. Tr. of Oral Arg. 30, 32; Reply Brief for Petitioner in No. 88–1309, p. 5 (citing Minn. Stat. § 259.10 (1988)). These statutes provide testimony to the unreasonableness of the Minnesota two-parent notification requirement and to the ease with which the State can adopt less burdensome means to protect the minor's welfare. Cf. *Clark* v. *Jeter*, 486 U. S. 456, 464 (1988); *Turner* v. *Safley*, 482 U. S., at 98. We therefore hold that this requirement violates the Constitution.

VIII

The Court holds that the constitutional objection to the two-parent notice requirement is removed by the judicial bypass option provided in subdivision 6 of the Minnesota statute. I respectfully dissent from that holding.

A majority of the Court has previously held that a statute requiring one parent's consent to a minor's abortion will be upheld if the State provides an "'alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.'" *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 491 (1983) (opinion of Powell, J.); *id.*, at 505 (opinion of O'CONNOR, J.). Indeed, in *Bellotti II*, four Members of the Court expressed the same opinion about a statute requiring the consent of both parents. See 443 U. S., at 643–644 (opinion of Powell, J.). Neither of those precedents should control our decision today.

In *Bellotti II*, eight Members of the Court joined the judgment holding the Massachusetts statute unconstitutional. Thus, the Court did not *hold* that the judicial bypass set forth in that statute was valid; it held just the opposite. Moreover, the discussion of the minimum requirements for a valid judicial bypass in Justice Powell's opinion was joined by only three other Members of the Court. Indeed, neither the arguments of the parties, nor any of the opinions in the case,

considered the significant difference between a statute requiring the involvement of *both* parents in the abortion decision and a statute that merely requires the involvement of one. Thus, the doctrine of *stare decisis* does not require that the standards articulated in Justice Powell's opinion be applied to a statute that mandates the involvement of both parents.

Unlike *Bellotti II*, the judgment in *Ashcroft* sustained the constitutionality of the statute containing a judicial bypass as an alternative to the requirement of *one* parent's consent to a minor's abortion. The distinctions between notice and consent and between notification of both parents rather than just one arguably constitute a sufficient response to an argument resting on *stare decisis*. Further analysis is necessary, however, because, at least on the surface, the consent requirement would appear to be more onerous than a requirement of mere notice.

The significance of the distinction between a statute requiring the consent of one parent and a statute requiring notice to both parents must be tested by the relationship of the respective requirements to legitimate state interests. We have concluded that the State has a strong and legitimate interest in providing a pregnant minor with the advice and support of a parent during the decisional period. A general rule requiring the minor to obtain the consent of one parent reasonably furthers that interest. An exception from the general rule is necessary to protect the minor from an arbitrary veto that is motivated by the separate concerns of the parent rather than the best interest of the child. Cf. *Parham* v. *J. R.*, 442 U. S., at 604–608. But the need for an exception does not undermine the conclusion that the general rule is perfectly reasonable—just as a rule requiring the consent of either parent for any other medical procedure would surely be reasonable if an exception were made for those emergencies in which, for example, a parent might deny lifesaving

treatment to a child on religious grounds. See *id.*, at 602–603.

For reasons already set forth at length, a rule requiring consent or notification of both parents is not reasonably related to the state interest in giving the pregnant minor the benefit of parental advice. The State has not called our attention to, nor am I aware of, any other medical situation in Minnesota or elsewhere in which the provision of treatment for a child has been conditioned on notice to, or consent by, both parents rather than just one. Indeed, the fact that one-parent consent is the virtually uniform rule for any other activity which affects the minor's health, safety, or welfare emphasizes the aberrant quality of the two-parent notice requirement.

A judicial bypass that is designed to handle exceptions from a reasonable general rule, and thereby preserve the constitutionality of that rule, is quite different from a requirement that a minor—or a minor and one of her parents—must apply to a court for permission to avoid the application of a rule that is not reasonably related to legitimate state goals. A requirement that a minor acting with the consent of *both* parents apply to a court for permission to effectuate her decision clearly would constitute an unjustified official interference with the privacy of the minor and her family. The requirement that the bypass procedure must be invoked when the minor and one parent agree that the other parent should not be notified represents an equally unjustified governmental intrusion into the family's decisional process. When the parents are living together and have joint custody over the child, the State has no legitimate interest in the communication between father and mother about the child. "[W]here the parents are divorced, the minor and/or custodial parent, and not a court, is in the best position to determine whether notifying the non-custodial parent would be in the child's best interests." App. to Pet. for Cert. in No. 88–1125, p. 69a. As the Court of Appeals panel origi-

nally concluded, the "minor and custodial parent, . . . by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given." *Ibid.* (citation omitted). I agree with that conclusion.

* * *

The judgment of the Court of Appeals in its entirety is affirmed.

It is so ordered.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment in part.

I

I join all but Parts III and VIII of JUSTICE STEVENS' opinion. While I agree with some of the central points made in Part III, I cannot join the broader discussion. I agree that the Court has characterized "[a] woman's decision to conceive or to bear a child [as] a component of her liberty that is protected by the Due Process Clause of the Fourteenth Amendment to the Constitution." *Ante*, at 434. See, *e. g.*, *Carey* v. *Population Services International*, 431 U. S. 678, 685, 687 (1977); *Griswold* v. *Connecticut*, 381 U. S. 479, 502–503 (1965) (WHITE, J., concurring in judgment). This Court extended that liberty interest to minors in *Bellotti* v. *Baird*, 443 U. S. 622, 642 (1979) *(Bellotti II)*, and *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74 (1976), albeit with some important limitations: "[P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor." *Bellotti II*, *supra*, at 640–641 (opinion of Powell, J.); see also *H. L.* v. *Matheson*, 450 U. S. 398, 423 (1981) (STEVENS, J., concurring in judgment); cf. *Thompson* v.

Oklahoma, 487 U. S. 815, 835 (1988) ("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"); *Stanford* v. *Kentucky*, 492 U. S. 361, 395 (1989) (BRENNAN, J., dissenting) ("[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience, that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life").

It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, . . . then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 453 (1983) (O'CONNOR, J., dissenting); see also *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 530 (1989) (O'CONNOR, J., concurring in part and concurring in judgment). It is with that understanding that I agree with JUSTICE STEVENS' statement that the "statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests. Cf. *Turner* v. *Safley*, 482 U. S., at 97; *Carey* v. *Population Services International*, 431 U. S., at 704 (opinion of Powell, J.); *Doe* v. *Bolton*, 410 U. S. 179, 194–195, 199 (1973)." *Ante*, at 436.

I agree with JUSTICE STEVENS that Minnesota has offered no sufficient justification for its interference with the family's decisionmaking processes created by subdivision 2 of Minn. Stat. § 144.343 (1988)—two-parent notification. Subdivision 2 is the most stringent notification statute in the country. See *ante*, at 425, n. 5. The only other State that defines the generic term "parents," see, *e. g.*, Tenn. Code Ann. § 36–1–201, Art. III (6) (Supp. 1989) (adoption statute) ("'Parents'

means either the singular or plural of the word 'parent' "); see also *ante*, at 437, n. 23, as "both parents" is Arkansas, and that statute provides for numerous exceptions to the two-parent notification requirement and permits bypassing notification where notification would not be in the best interests of the minor. See Ark. Code Ann. §§ 20–16–802, 20–16–804, 20–16–808 (Supp. 1989).

The Minnesota exception to notification for minors who are victims of neglect or abuse is, in reality, a means of notifying the parents. As JUSTICE STEVENS points out, see *ante*, at 426, n. 7, to avail herself of the neglect or abuse exception, the minor must report the abuse. A report requires the welfare agency to immediately "conduct an assessment." Minn. Stat. § 626.556(10)(a) (1988). If the agency interviews the victim, it must notify the parent of the fact of the interview; if the parent is the subject of an investigation, he has a right of access to the record of the investigation. §§ 626.556 (10)(c); 626.556(11); see also Tr. of Oral Arg. 19 ("[I]t turns out that the reporting statute in Minnesota requires that after it's reported to the welfare department, the welfare department has to do an assessment and tell the parents about the assessment. This could all be done in a time frame even before the abortion occurs"). The combination of the abused minor's reluctance to report sexual or physical abuse, see *ante*, at 440, n. 26, with the likelihood that invoking the abuse exception for the purpose of avoiding notice will result in notice, makes the abuse exception less than effectual.

Minnesota's two-parent notice requirement is all the more unreasonable when one considers that only half of the minors in the State of Minnesota reside with both biological parents. See *ante*, at 437. A third live with only one parent. *Ibid.* Given its broad sweep and its failure to serve the purposes asserted by the State in too many cases, I join the Court's striking of subdivision 2.

II

In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental consent provision so as to avoid unduly burdening the minor's limited right to obtain an abortion. See *Bellotti* v. *Baird*, 428 U. S. 132, 147–148 (1976); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti II*, 443 U. S., at 642–644 (opinion of Powell, J.). In *Danforth*, the Court stated that the

> "primary constitutional deficiency lies in [the notification statute's] imposition of an absolute limitation on the minor's right to obtain an abortion. . . . [A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." 428 U. S., at 90–91.

Subdivision 6 passes constitutional muster because the interference with the internal operation of the family required by subdivision 2 simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.

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

I concur in Parts I, II, IV, and VII of JUSTICE STEVENS' opinion for the Court in No. 88–1309.[1] Although I do

[1] I concur in Part VII on the understanding that the opinion does not dispute that a minor's liberty interest alone outweighs the interest of the

not believe that the Constitution permits a State to require a minor to notify or consult with a parent before obtaining an abortion, compare *ante*, at 445, with *infra*, at 463–472, I am in substantial agreement with the remainder of the reasoning in Part V of JUSTICE STEVENS' opinion. For the reasons stated by the Court, *ante*, at 450–455, Minnesota's two-parent notification requirement is not even reasonably related to a legitimate state interest. Therefore, that requirement surely would not pass the strict scrutiny applicable to restrictions on a woman's fundamental right to have an abortion.

I dissent from the judgment of the Court in No. 88–1125, however, that the judicial bypass option renders the parental notification and 48-hour delay requirements constitutional. See *ante*, at 461 (opinion of O'CONNOR, J.); *post*, at 497–501 (opinion of KENNEDY, J.). The bypass procedure cannot save those requirements because the bypass itself is unconstitutional both on its face and as applied. At the very least, this scheme substantially burdens a woman's right to privacy without advancing a compelling state interest. More significantly, in some instances it usurps a young woman's control over her own body by giving either a parent or a court the power effectively to veto her decision to have an abortion.

I

This Court has consistently held since *Roe* v. *Wade*, 410 U. S. 113 (1973), that the constitutional right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*, at 153. We have also repeatedly stated that "[a] woman's right to make that choice freely is fundamental." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 772 (1986). Accord, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 420, n. 1 (1983); *Roe*, *supra*, at

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second parent in shaping a child's values and lifestyles, regardless of the interest of the first parent. Cf. *ante*, at 452–453.

155. As we reiterated in *American College of Obstetricians and Gynecologists*, *supra*, "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy." *Id.*, at 772. Accordingly, we have subjected state laws limiting that right to the most exacting scrutiny, requiring a State to show that such a law is narrowly drawn to serve a compelling interest. *Roe*, *supra*, at 155; *Akron Center for Reproductive Health*, *supra*, at 427. Only such strict judicial scrutiny is sufficiently protective of a woman's right to make the intensely personal decision whether to terminate her pregnancy.

Roe remains the law of the land. See *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 521 (1989) (plurality opinion); *id.*, at 525 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 537, 560 (BLACKMUN, J., concurring in part and dissenting in part). Indeed, today's decision reaffirms the vitality of *Roe*, as five Justices have voted to strike down a state law restricting a woman's right to have an abortion. Accordingly, to be constitutional, state restrictions on abortion must meet the rigorous test set forth above.

II

I strongly disagree with the Court's conclusion that the State may constitutionally force a minor woman either to notify both parents (or in some cases only one parent[2]) and then wait 48 hours before proceeding with an abortion, or disclose her intimate affairs to a judge and ask that he grant her permission to have an abortion. See *post*, at 497–501 (opinion of KENNEDY, J.). Cf. *ante*, at 448–449 (opinion of STEVENS, J.) (finding that requiring minor to wait 48 hours after notifying *one* parent reasonably furthers legitimate state interest).

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[2] The statute provides for one-parent notification where only one parent is living or where the second parent "cannot be located through reasonably diligent effort." Minn. Stat. § 144.343(3) (1988).

First, the parental notification and delay requirements significantly restrict a young woman's right to reproductive choice. I base my conclusion not on my intuition about the needs and attitudes of young women, but on a sizable and impressive collection of empirical data documenting the effects of parental notification statutes and of delaying an abortion. Second, the burdensome restrictions are not narrowly tailored to serve any compelling state interest. Finally, for the reasons discussed in Part III, *infra*, the judicial bypass procedure does not save the notice and delay requirements.

A

Neither the scope of a woman's privacy right nor the magnitude of a law's burden is diminished because a woman is a minor. *Bellotti* v. *Baird*, 443 U. S. 622, 642 (1979) *(Bellotti II)* (opinion of Powell, J.); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 74 (1976). Rather, a woman's minority status affects only the nature of the State's interests. Although the Court considers the burdens that the two-parent notification requirement imposes on a minor woman's exercise of her right to privacy, *ante*, at 450–451, and n. 36, it fails to recognize that forced notification of only one parent also significantly burdens a young woman's right to have an abortion, see *ante*, at 459–460 (opinion of O'CONNOR, J.); *post*, at 491–497 (opinion of KENNEDY, J.). Cf. *ante*, at 448–449 (opinion of STEVENS, J.).

A substantial proportion of pregnant minors voluntarily consult with a parent regardless of the existence of a notification requirement. See, *e. g.*, Torres, Forrest, & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Family Planning Perspectives 284, 287, 288, 290 (1980) (51% of minors discussed abortion with parents in the absence of a parental consent or notification requirement). Minors 15 years old or younger are even more likely voluntarily to discuss the abortion decision with their parents. *Id.*, at 290 (69% of such minors vol-

untarily discuss abortion with parents). For these women, the notification requirement by itself does not impose a significant burden. But for those young women who would choose not to inform their parents, the burden is evident: The notification requirement destroys their right to avoid disclosure of a deeply personal matter. Cf. *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977).

A notification requirement can also have severe physical and psychological effects on a young woman. First, forced notification of one parent, like forced notification of both parents, can be extremely traumatic for a young woman, depending on the nature of her relationship with her parents. Cf. *ante*, at 450–451, and n. 36. The disclosure of a daughter's intention to have an abortion often leads to a family crisis, characterized by severe parental anger and rejection. Osofsky & Osofsky, Teenage Pregnancy: Psychosocial Considerations, 21 Clinical Obstetrics and Gynecology 1161, 1164–1165 (1978). The impact of any notification requirement is especially devastating for minors who live in fear of physical, psychological, or sexual abuse. See, *e. g.*, Clary, Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area, 72 American J. of Pub. Health 283, 284 (1982) (finding that many minors chose not to inform parents voluntarily because of fear of negative consequences such as physical punishment or other retaliation). See also Tr. 911 (testimony of Dr. Elissa Benedek) (stating that usually minors accurately predict parental reaction to news about daughters' pregnancies). Cf. *ante*, at 438–440, and n. 25. Certainly, child abuse is not limited to families with two parents.

Second, the prospect of having to notify a parent causes many young women to delay their abortions, thereby increasing the health risks of the procedure. See Cates, Schulz, & Grimes, The Risks Associated with Teenage Abortion, 309 New England J. of Medicine 621, 623 (1983) (finding that for women 19 years old and younger, the number of deaths per 100,000 abortions was 0.2 for the first 8 weeks of pregnancy,

0.6 for weeks 9 through 12, 3.4 for weeks 13 through 16, and 7.8 for week 17 and after). See also *H. L.* v. *Matheson*, 450 U. S. 398, 439 (1981) (MARSHALL, J., dissenting). The risks posed by this delay are especially significant because adolescents already delay seeking medical care until relatively late in their pregnancies, when risks are higher. See 1 National Research Council, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 114 (C. Hayes ed. 1987).

In addition, a notification requirement compels many minors seeking an abortion to travel to a State without such a requirement to avoid notifying a parent. Cartoof & Klerman, Parental Consent for Abortion: Impact of the Massachusetts Law, 76 American J. of Pub. Health 397, 399 (1986) (finding that one-third of minors seeking abortions traveled outside of State to avoid Massachusetts' parental notice requirement). Other women may resort to the horrors of self-abortion or illegal abortion rather than tell a parent. Torres, Forrest, & Eisman, *supra*, at 288 (9% of minors attending family planning clinics said they would have a self-induced or illegal abortion rather then tell a parent); *H. L.* v. *Matheson*, *supra*, at 439, and n. 26 (MARSHALL, J., dissenting). See also Greydanus & Railsback, Abortion in Adolescence, 1 Seminars in Adolescent Medicine 213, 214 (1985) (noting 100-times greater death rate for women who obtain illegal abortions than for those who obtain legal ones).[3] Still others would forgo an abortion entirely and carry the fetus to term, Torres, Forrest, & Eisman, *supra*, at 289, 291 (9% of minors in family planning clinics said they would carry fetus

[3] Dr. Jane Hodgson testified before the District Court that one 14-year-old patient, in order to keep her pregnancy private, tried to induce an abortion with the help of her friends by inserting a metallic object into her vagina, thereby tearing her body, scarring her cervix, and causing bleeding. When that attempt failed to induce an abortion, the patient, then four or five months pregnant, finally went to an abortion clinic. Because of the damage to the patient's cervix, doctors had to perform a hysterotomy, meaning that that woman must have a Cesarean section to deliver a child in the future. App. 462.

to term rather than inform parents of decision to abort), subjecting themselves to the much greater health risks of pregnancy and childbirth and to the physical, psychological, and financial hardships of unwanted motherhood. See Greydanus & Railsback, *supra*, at 214 (noting that minor's overall risk of dying from childbirth is over nine times greater than risk of dying from legal abortion); Lewis, Minors' Competence to Consent to Abortion, 42 American Psychologist 84, 87 (1987) ("[P]regnancy continuation poses far greater psychological, physical, and economic risks to the adolescent than does abortion") (citation omitted). See also *Bellotti II*, 443 U. S., at 642 (opinion of Powell, J.) ("[C]onsidering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor"). Clearly, then, requiring notification of one parent significantly burdens a young woman's right to terminate her pregnancy.

B

The 48-hour delay *after* notification further aggravates the harm caused by the *pre*-notification delay that may flow from a minor's fear of notifying a parent. Moreover, the 48-hour delay burdens the rights of all minors, including those who would voluntarily consult with one or both parents.[4] JUSTICE STEVENS' assertion that the 48-hour delay "imposes only a minimal burden," *ante*, at 449; see also *post*, at 496 (opinion of KENNEDY, J.), ignores the increased health risks and costs that this delay entails. The District Court specifically found as a matter of fact that "[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity." 648 F. Supp. 756, 765 (Minn. 1986). Even a brief delay can have a particularly detrimental impact if it pushes the abortion into the second trimester, when the operation is substantially more risky and costly. *Ibid.* See

[4] As JUSTICE STEVENS notes, *ante*, at 449, and n. 35, the 48-hour delay does not apply if a parent or court consents to the abortion.

also C. Tietze & S. Henshaw, Induced Abortion: A World Review 1986, pp. 103–104 (6th ed. 1986) (rate of major complications nearly doubles in the week following the end of the first trimester and increases significantly thereafter). Moreover, the District Court found that the 48-hour delay "frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments," often resulting in an effective delay of a week or more. 648 F. Supp., at 765.[5] The increased risk caused by a delay of that magnitude, the District Court found, is statistically significant at any point in the pregnancy. *Ibid.* Certainly no pregnant woman facing these heightened risks to her health would dismiss them as "minimal."[6]

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[5] Although these other factors would constrain a young woman's ability to schedule an abortion even in the absence of the 48-hour delay requirement, the addition of the immutable statutory delay reduces both the woman's and the clinic's scheduling flexibility and thus can exacerbate the effect of the other factors. For instance, a woman might contact a clinic on Monday and find that her schedule and the clinic's allow for only a Tuesday appointment for that week. Without the 48-hour delay requirement, the woman could be treated the next day; with the statutory delay, however, the woman would be forced to wait a week.

[6] JUSTICE STEVENS concludes that the 48-hour delay requirement actually results in "little or no delay" because the statutory period "may run concurrently with the time necessary to make an appointment for the procedure." *Ante*, at 449. See also *post*, at 496 (opinion of KENNEDY, J.) ("48-hour waiting period . . . results in little or no delay"); 853 F. 2d 1452, 1465 (CA8 1988) (en banc). JUSTICE STEVENS bases this conclusion on the testimony of the coadministrator of one abortion clinic that a 1- or 2-day scheduling backlog was typical. *Ante*, at 449, n. 34. "One or two days," however, obviously means that the backlog is not necessarily 48 hours. Furthermore, that witness also stated that if "a woman says that she must be seen on a particular day our policy is we will always see her." App. 147. But because of the mandated 48-hour delay, the clinic cannot honor a woman's request for an abortion until at least two full days have elapsed. The testimony therefore is hardly sufficient to justify ignoring the District Court's factual finding with regard to the effects of the delay requirement.

C

Because the parental notification and delay requirements burden a young woman's right freely to decide whether to terminate her pregnancy, the State must show that these requirements are justified by a compelling state interest and are closely tailored to further that interest. The main purpose of the notification requirement is to "protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies" *Id.*, at 766. The 48-hour delay, in turn, is designed to provide parents with adequate time to consult with their daughters. *Ante*, at 448–449 (opinion of STEVENS, J.); *post*, at 496 (opinion of KENNEDY, J.). AS JUSTICE STEVENS states, such consultation is intended to ensure that the minor's decision is "knowing and intelligent." *Ante*, at 448. I need not determine whether the State's interest ultimately outweighs young women's privacy interests, however, because the strictures here are not closely tailored to further the State's asserted goal.

For the many young women who would voluntarily consult with a parent before having an abortion, see *supra*, at 464–465, the notification and delay requirements are superfluous, and so do not advance the State's interest. The requirements affect only those women who would not otherwise notify a parent. But compelled notification is unlikely to result in productive consultation in families in which a daughter does not feel comfortable consulting her parents about intimate or sexual matters. See Melton, Legal Regulation of Adolescent Abortion: Unintended Effects, 42 American Psychologist 79, 81 (1987) (stating that in many families, compelled parental notification is unlikely to result in meaningful discussion about the daughter's predicament); Tr. 1357–1358 (testimony of Dr. Steven Butzer) (stating that involuntary disclosure is disruptive to family and has "almost universally negative" effects, in accord with minor's expectations).

Moreover, in those families with a history of child abuse, a pregnant minor forced to notify a parent is more likely to be greeted by physical assault or psychological harassment than open and caring conversation about her predicament. See Tr. 316 (testimony of Dr. Lenore Walker) (stating that forced notification in dysfunctional families is likely to sever communication patterns and increase the risk of violence); *H. L. v. Matheson*, 450 U. S., at 446 (MARSHALL, J., dissenting). Forced notification in such situations would amount to punishing the daughter for the lack of a stable and communicative family environment, when the blame for that situation lies principally, if not entirely, with the parents. Parental notification in the less-than-ideal family, therefore, would not lead to an informed decision by the minor.[7]

The State also claims that the statute serves the interest of protecting parents' independent right "to shape the[ir] child[ren]'s values and life style[s]" and "to determine and strive for what they believe to be best for their children." Brief for Petitioners in No. 88–1309, p. 26. If this is so, the statute is surely underinclusive, as it does not require parental notification where the minor seeks medical treatment for pregnancy, venereal disease, or alcohol and other drug abuse. See Minn. Stat. § 144.343(1) (1988). Are we to believe that

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[7] The State also asserts that the requirements permit parents to provide doctors with relevant information about their daughters' medical history and "to assist with ensuring that proper after-care procedures are followed." Brief for Petitioners in No. 88–1309, pp. 34–36. See also *ante*, at 448 (opinion of STEVENS, J.) (delay period "permits the parent to inquire into the competency of the doctor performing the abortion"). If these are actual state interests, it seems peculiar that the State does not try to facilitate similar parental involvement in minors' treatment for pregnancy and childbirth, see *infra* this page, which pose far greater risks to the minor's health than abortion, see *supra*, at 466–467. In any event, compelled notification is unlikely to result in helpful parental involvement in those families in which a parent reacts to the news of the daughter's predicament by rejecting or abusing the young woman. See *supra* this page.

Minnesota parents have no interest in their children's well-being in these other contexts?

In any event, parents' right to direct their children's upbringing is a right *against* state interference with family matters. See, *e. g.*, *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944) (noting that this Court's decisions "have respected the private realm of family life which the state cannot enter"). See also *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925). Yet, ironically, the State's requirements here affirmatively interfere in family life by trying to force families to conform to the State's archetype of the ideal family. Cf. *Moore* v. *East Cleveland*, 431 U. S. 494, 506 (1977) (plurality opinion) ("[T]he Constitution prevents [the State] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns"); *ante*, at 452. It is a strange constitutional alchemy that would transform a limitation on state power into a justification for governmental intrusion into family interactions. Moreover, as a practical matter, "state intervention is hardly likely to resurrect parental authority that the parents themselves are unable to preserve." *H. L.* v. *Matheson*, *supra*, at 448 (MARSHALL, J., dissenting). See also *Planned Parenthood of Central Mo.*, 428 U. S., at 75 (finding it unlikely that parental veto power over abortion "will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure").

Even if the State's interest is construed as merely the *facilitation* of the exercise of parental authority, the notification and delay requirements are not narrowly drawn. Parental authority is not limitless. Certainly where parental involvement threatens to harm the child, the parent's authority must yield. *Prince* v. *Massachusetts*, *supra*, at 169–170; *H. L.* v. *Matheson*, *supra*, at 449 (MARSHALL, J., dissenting). Yet the notification and delay requirements facili-

tate the exercise of parental authority even where it may physically or psychologically harm the child. See *supra*, at 470.

Furthermore, the exercise of parental authority in some instances will take the form of obstructing the minor's decision to have an abortion. A parent who objects to the abortion, once notified, can exert strong pressure on the minor—in the form of stern disapproval, withdrawal of financial support, or physical or emotional abuse—to block her from getting an abortion. See *Bellotti II*, 443 U. S., at 647 (opinion of Powell, J.) ("[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct . . . an abortion"). See also *H. L.* v. *Matheson*, 450 U. S., at 438–439 (MARSHALL, J., dissenting). In such circumstances, the notification requirement becomes, in effect, a consent requirement. As discussed below, *infra*, at 473, the State may not permit any person, including a parent, to veto a woman's decision to terminate her pregnancy. Because the notification and delay requirements effectively give parents the opportunity to exercise an unconstitutional veto in some situations, those requirements are not narrowly tailored to the State's interest in facilitating *legitimate* exercises of parental authority.

III

The parental notification and 48-hour delay requirements, then, do not satisfy the strict scrutiny applicable to laws restricting a woman's constitutional right to have an abortion. The judicial bypass procedure cannot salvage those requirements because that procedure itself is unconstitutional.

A

The State argues that the bypass procedure saves the notification and delay requirements because it provides an alternative way to obtain a legal abortion for minors who would be harmed by those requirements. This Court has upheld a

one-parent consent requirement where the State provided an alternative judicial procedure "'whereby a pregnant minor [could] demonstrate that she [was] sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests.'" *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 491 (1983) (opinion of Powell, J.) (quoting *Akron Center for Reproductive Health*, 462 U. S., at 439–440).

I continue to believe, however, that a judicial bypass procedure of this sort is itself unconstitutional because it effectively gives a judge "an absolute veto over the decision of the physician and his patient." *Planned Parenthood Assn. of Kansas City*, *supra*, at 504 (BLACKMUN, J., concurring in part and dissenting in part); see also *Bellotti II*, 443 U. S., at 655 (STEVENS, J., concurring in judgment) ("The provision of an absolute veto to a judge . . . is to me particularly troubling. . . . It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (footnote omitted); *Planned Parenthood of Central Mo.*, *supra*, at 74 ("[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent"). No person may veto *any* minor's decision, made in consultation with her physician, to terminate her pregnancy. An "immature" minor has no less right to make decisions regarding her own body than a mature adult.

Minnesota's bypass provision allows a judge to authorize an abortion if he determines either that a woman is sufficiently mature to make the decision on her own or, if she is not sufficiently mature, that an abortion without parental notification would serve her best interests. Minn. Stat. § 144.343(6) (1988). Of course, if a judge refuses to authorize

an abortion, a young woman can then reevaluate whether she wants to notify a parent. But many women will carry the fetus to term rather than notify a parent. See *supra*, at 466–467. Other women may decide to inform a parent but then confront parental pressure or abuse so severe as to obstruct the abortion. For these women, the judge's refusal to authorize an abortion effectively constitutes an absolute veto.

The constitutional defects in any provision allowing someone to veto a woman's abortion decision are exacerbated by the vagueness of the standards contained in this statute. The statute gives no guidance on how a judge is to determine whether a minor is sufficiently "mature" and "capable" to make the decision on her own. See Minn. Stat. § 144.343(6)(c)(i) (1988) (judge shall authorize abortion if he "determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion"). Cf. Lewis, 42 American Psychologist, at 84, 87 (noting the absence of a judicial standard for assessing maturity). The statute similarly is silent as to how a judge is to determine whether an abortion without parental notification would serve an immature minor's "best interests." § 144.343(6)(c)(i) (judge shall authorize abortion for immature minor without notification "if said judge concludes that the pregnant woman's best interests would be served thereby"). Is the judge expected to know more about the woman's medical needs or psychological makeup than her doctor? Should he consider the woman's financial and emotional status to determine the quality of life the woman and her future child would enjoy in this world? Neither the record nor the Court answers such questions. As JUSTICE STEVENS wrote in *Bellotti II*, the best interest standard "provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor—particularly when contrary to her own informed and reasonable decision—is fundamentally at odds with privacy interests underlying the constitutional protec-

tion afforded to her decision." 443 U. S., at 655–656 (opinion concurring in judgment). It is difficult to conceive of any reason, aside from a judge's personal opposition to abortion, that would justify a finding that an immature woman's best interests would be served by forcing her to endure pregnancy and childbirth against her will.

B

Even if I did not believe that a judicial bypass procedure was facially unconstitutional, the experience of Minnesota's procedure in operation demonstrates that the bypass provision before us cannot save the parental notification and delay requirements. This Court has addressed judicial bypass procedures only in the context of facial challenges. See *Planned Parenthood Assn. of Kansas City*, 462 U. S., at 490–493 (opinion of Powell, J.); *Akron Center for Reproductive Health*, 462 U. S., at 439–442; *Bellotti II*, 443 U. S., at 643–644 (opinion of Powell, J.). The Court has never considered the actual burdens a particular bypass provision imposes on a woman's right to choose an abortion. Such consideration establishes that, even if judges authorized every abortion sought by petitioning minors, Minnesota's judicial bypass is far too burdensome to remedy an otherwise unconstitutional statute.

The District Court found that the bypass procedure imposed significant burdens on minors. First, "scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a delay of a week or more." 648 F. Supp., at 763. As noted above, *supra*, at 467–468, a delay of only a few days can significantly increase the health risks to the minor; a week-long delay inevitably does. Furthermore, in several counties in Minnesota, no judge is willing to hear bypass petitions, forcing women in those areas to travel long distances to obtain a hearing. 648 F. Supp., at

763; Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Family Planning Perspectives 259, 264 (1983) (50% of Minnesota minors utilizing bypass were not residents of city in which court was located); Melton, 42 American Psychologist, at 80 ("In Minnesota, where judges in rural counties have often recused themselves from participation in the abortion hearings, minors sometimes have to travel a round-trip of more than 500 miles for the hearing"). The burden of such travel, often requiring an overnight stay in a distant city, is particularly heavy for poor women from rural areas. Furthermore, a young woman's absence from home, school, or work during the time required for such travel and for the hearing itself can jeopardize the woman's confidentiality. See *ibid.*

The District Court also found that the bypass procedure can be extremely traumatic for young women.

> "The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, many minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.
>
> "Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed the anxiety resulting from the by-

pass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary." 648 F. Supp., at 763–764.[8]

Yet, despite the substantial burdens imposed by these proceedings, the bypass is, in effect, a "rubber stamp," *id.*, at 766 (testimony of Hon. William Sweeney); only an extremely small number of petitions are denied, *id.*, at 765. See also Melton, *supra*, at 80 ("Available research indicates that judicial bypass proceedings are merely pro forma. Although they represent substantial intrusion on minors' privacy and take up significant amounts of court time, there is no evidence that they promote more reasoned decisionmaking or screen out adolescents who may be particularly immature or vulnerable. . . . The hearings typically last less than 15 minutes. . . . Despite the complex issues involved (maturity and the best interests of the minor), experts are rarely if ever called to testify"). The judges who have adjudicated over 90% of the bypass petitions between 1981 and 1986 could not identify any positive effects of the bypass procedure. See 648 F. Supp., at 766; *ante*, at 441–442, and n. 29. The large number of women who undergo the bypass process do not receive any sort of counseling from the court—which is not surprising, given the court's limited role and lack of expertise in that area. The bypass process itself thus cannot serve the state interest of promoting informed decisionmaking by all minors. If the State truly were concerned about ensuring

[8] Dr. Hodgson testified that some minors dread the court procedure so much that they become "wringing wet with perspiration" and frequently require a sedative beforehand. App. 468. One judge who has heard a significant number of bypass petitions testified that the court experience is "'very nervewracking'" for young women. 648 F. Supp., at 766. Another testified that pregnant minors' "'level of apprehension is twice what I normally see in court. . . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.'" *Ibid.*

that all minors consult with a knowledgeable and caring adult, it would provide for some form of counseling rather than for a judicial procedure in which a judge merely gives or withholds his consent.[9]

Thus, regardless of one's view of the facial validity of a bypass procedure, Minnesota's procedure in practice imposes an excessive burden on young women's right to choose an abortion. Cf. *Bellotti II*, 443 U. S., at 655 (STEVENS, J., concurring in judgment) ("[T]he need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent"). Furthermore, the process does not serve the State's interest of ensuring that minors' decisions are informed. Surely, then, a State could not require that *all* minor women seeking an abortion obtain judicial approval.[10] The Court's holding that the burdensome bypass procedure saves the State's burdensome notification and delay require-

[9] Maine, for example, requires that a minor obtain the consent of a parent, guardian, or adult family member; undergo a judicial bypass; *or* receive counseling from the physician or a counselor according to specified criteria. See Me. Rev. Stat. Ann., Tit. 22, § 1597–A (Supp. 1989). Wisconsin requires abortion providers to encourage parental notification unless they determine that the minor has a valid reason for not notifying her parents. Wis. Stat. § 146.78 (1987–1988). In the latter situation, the provider must encourage—but not require—the minor to notify "another family member, close family friend, school counselor, social worker or other appropriate person." § 146.78(5)(c). I express no opinion on the constitutionality or efficacy of these schemes, but raise them only as examples of alternatives that seem more closely related than a judicial bypass procedure to the goal of ensuring that the minor's decision is informed.

In any event, most abortion clinics already provide extensive counseling. See 1 National Research Council, Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing 191–192 (C. Hayes ed. 1987) (90% of abortion clinics routinely provide counseling for all first-abortion patients, and all clinics make counseling available to all patients on request).

[10] Indeed, the State conceded in oral argument before the Eighth Circuit, sitting en banc, that a judicial approval provision by itself would be unconstitutional. See 853 F. 2d, at 1469 (Lay, C. J., dissenting).

ments thus strikes me as the equivalent of saying that two wrongs make a right. I cannot accept such a novel judicial calculus.

IV

A majority of the Court today strikes down an unreasonable and vastly overbroad requirement that a pregnant minor notify both her parents of her decision to obtain an abortion. With that decision I agree. At the same time, though, a different majority holds that a State may require a young woman to notify one or even both parents and then wait 48 hours before having an abortion, as long as the State provides a judicial bypass procedure. From that decision I vehemently dissent. This scheme forces a young woman in an already dire situation to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a black-robed stranger. For such a woman, this dilemma is more likely to result in trauma and pain than in an informed and voluntary decision.

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

As I understand the various opinions today: One Justice holds that two-parent notification is unconstitutional (at least in the present circumstances) without judicial bypass, but constitutional with bypass, *ante*, at 459–461 (O'CONNOR, J., concurring in part and concurring in judgment in part); four Justices would hold that two-parent notification is constitutional with or without bypass, *post*, at 488–497 (KENNEDY, J., concurring in judgment in part and dissenting in part); four Justices would hold that two-parent notification is unconstitutional with or without bypass, though the four apply two different standards, *ante*, at 455–458 (opinion of STEVENS, J.), *ante*, at 472–479 (MARSHALL, J., concurring in part, concurring in judgment in part and dissenting in part);

six Justices hold that one-parent notification with bypass is constitutional, though for two different sets of reasons, *Ohio* v. *Akron Center for Reproductive Health*, *post*, at 510–517; *post*, at 522–524 (STEVENS, J., concurring in part and concurring in judgment); and three Justices would hold that one-parent notification with bypass is unconstitutional, *post*, at 526–527 (BLACKMUN, J., dissenting). One will search in vain the document we are supposed to be construing for text that provides the basis for the argument over these distinctions; and will find in our society's tradition regarding abortion no hint that the distinctions are constitutionally relevant, much less any indication how a constitutional argument about them ought to be resolved. The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, Term after Term, that the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have authority to do so.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join, concurring in the judgment in part and dissenting in part.

"'There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.'" *Bellotti* v. *Baird (Bellotti II)*, 443 U. S. 622, 640–641 (1979) (opinion of Powell, J.) (quoting *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 91 (1976) (Stewart, J., concurring)); see also *H. L.* v. *Matheson*, 450 U. S. 398, 409–411 (1981); *id.*, at 422–423 (STEVENS, J., concurring in judgment); *Danforth*, *supra*, at 94–95 (WHITE, J., concurring in part and dissenting in part); *id.*, at 102–103 (STEVENS, J., concurring in

part and dissenting in part). Today, the Court holds that a statute requiring a minor to notify both parents that she plans to have an abortion is not a permissible means of furthering the interest described with such specificity in *Bellotti II*. This conclusion, which no doubt will come as a surprise to most parents, is incompatible with our constitutional tradition and any acceptable notion of judicial review of legislative enactments. I dissent from the portion of the Court's judgment affirming the Court of Appeals' conclusion that the Minnesota two-parent notice statute is unconstitutional.

The Minnesota statute also provides, however, that if the two-parent notice requirement is invalidated, the same notice requirement is effective unless the pregnant minor obtains a court order permitting the abortion to proceed. Minn. Stat. § 144.343(6) (1988). The Court of Appeals sustained this portion of the statute, in effect a two-parent notice requirement with a judicial bypass. Five Members of the Court, the four who join this opinion and JUSTICE O'CONNOR, agree with the Court of Appeals' decision on this aspect of the statute. As announced by JUSTICE STEVENS, who dissents from this part of the Court's decision, the Court of Appeals' judgment on this portion of the statute is therefore affirmed.

I

The provisions of the statute before us are straightforward. In essence, the statute provides that before a physician in Minnesota may perform an abortion on an unemancipated minor, the physician or the physician's agent must notify both of the minor's parents, if each one can be located through reasonable effort, either personally or by certified mail at least 48 hours before the abortion is performed. Minn. Stat. §§ 144.343(2)–(3) (1988). Notification is not required if the abortion is necessary to prevent the minor's death; or if both parents have consented to the abortion; or if the minor declares that she is the victim of sexual abuse, neglect, or physical abuse. § 144.343(4). Failure to comply

with these requirements is a misdemeanor, and the statute authorizes a civil action against the noncomplying physician by the minor's parents. § 144.343(5).

The statute also provides that, if a court enjoins the notice requirement of subdivision 2, parental notice under the subdivision shall still be required, unless the minor obtains a court order dispensing with it. Under the statute, the court is required to authorize the physician to perform the abortion without parental notice if the court determines that the minor is "mature and capable of giving informed consent to the proposed abortion" or that "the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests." § 144.343(6).

II

The State identifies two interests served by the law. The first is the State's interest in the welfare of pregnant minors. The second is the State's interest in acknowledging and promoting the role of parents in the care and upbringing of their children. JUSTICE STEVENS, writing for two Members of the Court, acknowledges the legitimacy of the first interest, but decides that the second interest is somehow illegitimate, at least as to whichever parent a minor chooses not to notify. I cannot agree that the Constitution prevents a State from keeping both parents informed of the medical condition or medical treatment of their child under the terms and conditions of this statute.

The welfare of the child has always been the central concern of laws with regard to minors. The law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent. *Parham* v. *J. R.*, 442 U. S. 584, 621 (1979) (Stewart, J., concurring in judgment). Legislatures historically have acted on the basis of the qualitative differences in maturity between children and adults, see *Schall* v. *Martin*, 467 U. S. 253, 265–267 (1984); *Thomp-*

son v. *Oklahoma*, 487 U. S. 815, 853–854 (1988) (O'CONNOR, J., concurring in judgment) (collecting cases); *Stanford* v. *Kentucky*, 492 U. S. 361, 384 (1989) (BRENNAN, J., dissenting), and not without reason. Age is a rough but fair approximation of maturity and judgment, and a State has an interest in seeing that a child, when confronted with serious decisions such as whether or not to abort a pregnancy, has the assistance of her parents in making the choice. If anything is settled by our previous cases dealing with parental notification and consent laws, it is this point. See *Bellotti II*, 443 U. S., at 640–641 (opinion of Powell, J.); *Matheson*, 450 U. S., at 409–411; *id.*, at 422–423 (STEVENS, J., concurring in judgment).

Protection of the right of each parent to participate in the upbringing of her or his own children is a further discrete interest that the State recognizes by the statute. The common law historically has given recognition to the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf. Absent a showing of neglect or abuse, a father "possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture." J. Schouler, Law of Domestic Relations 337 (3d. ed. 1882); see also 1 W. Blackstone, Commentaries *452–*453; 2 J. Kent, Commentaries on American Law *203–*206; G. Field, Legal Relations of Infants 63–80 (1888). In this century, the common law of most States has abandoned the idea that parental rights are vested solely in fathers, with mothers being viewed merely as agents of their husbands, cf. *ante*, at 446, n. 32; it is now the case that each parent has parental rights and parental responsibilities, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts, ch. 4, § 18, p. 115 (5th ed. 1984). Limitations have emerged on the prerogatives of parents to act contrary to the best interests of the child with respect to matters such as compulsory schooling and child labor. As a general matter, however, it re-

mains "cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U. S. 158, 166 (1944). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin* v. *Yoder*, 406 U. S. 205, 232 (1972); see also *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925).

A State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relationship by giving all parents the opportunity to participate in the care and nurture of their children. We have held that parents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children. See *Santosky* v. *Kramer*, 455 U. S. 745, 753–754 (1982); *Caban* v. *Mohammed*, 441 U. S. 380 (1979); *Stanley* v. *Illinois*, 405 U. S. 645, 651–652 (1972). We have recognized, of course, that there are limits to the constitutional right of parents to have custody of, or to participate in decisions affecting, their children. If a parent has relinquished the opportunity to develop a relationship with the child, and his or her only link to the child is biological, the Constitution does not require a State to allow parental participation. See *Lehr* v. *Robertson*, 463 U. S. 248, 261–265 (1983); *Quilloin* v. *Walcott*, 434 U. S. 246, 254–256 (1978). But the fact that the Constitution does not protect the parent-child relationship in all circumstances does not mean that the State cannot attempt to foster parental participation where the Constitution does not demand that it do so. A State may seek to protect and facilitate the parent-child bond on the assumption that parents will act in their child's best interests. See *Parham* v. *J. R.*, *supra*, at 602–603; *Ginsberg* v. *New York*, 390 U. S. 629, 639 (1968). Indeed,

we have held that a State cannot terminate parental rights based upon a presumption that a class of parents is unfit without affording individual parents an opportunity to rebut the presumption. See *Stanley*, *supra*, at 654–658; *Santosky*, *supra*, at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . ."). If a State cannot legislate on the broad assumption that classes of parents are unfit and undeserving of parental rights without affording an opportunity to rebut the assumption, it is at least permissible for a State to legislate on the premise that parents, as a general rule, are interested in their children's welfare and will act in accord with it.

The Court's descriptions of the State's interests in this case are caricatures, both of the law and of our most revered institutions. The Court labels these interests as ones in "standardizing its children and adults," and in ensuring that each family, to the extent possible, "conform to some state-designed ideal." *Ante*, at 452; see also *ante*, at 471 (MARSHALL, J., concurring in part, concurring in judgment in part, and dissenting in part) (accusing Minnesota of "trying to force families to conform to the State's archetype of the ideal family"). Minnesota asserts no such purpose, by explicit statement or by any permissible inference. All that Minnesota asserts is an interest in seeing that parents know about a vital decision facing their child. That interest is a valid one without regard to whether the child is living with either one or both parents, or to the attachment between the minor's parents. How the family unit responds to such notice is, for the most part, beyond the State's control. The State would no doubt prefer that all parents, after being notified under the statute, would contact their daughters and assist them in making their decisions with the child's best interests at heart; but it has not, contrary to the Court's intimation, "decreed" communication, nor could it. What

the State can do is make the communication possible by at least informing parents of their daughter's intentions.

Minnesota has done no more than act upon the commonsense proposition that, in assisting their daughter in deciding whether to have an abortion, parents can best fulfill their roles if they have the same information about their own child's medical condition and medical choices as the child's doctor does; and that to deny parents this knowledge is to risk, or perpetuate, estrangement or alienation from the child when she is in the greatest need of parental guidance and support. The Court does the State, and our constitutional tradition, sad disservice by impugning the legitimacy of these elemental objectives.

Given the societal interest that underlies parental notice and consent laws, it comes as no surprise that most States have enacted statutes requiring that, in general, a physician must notify or obtain the consent of at least one of her parents or legal guardian before performing an abortion on a minor. See Wardle, "Time Enough": *Webster* v. *Reproductive Health Services* and the Prudent Pace of Justice, 41 Fla. L. Rev. 881, 963–965 (1989) (collecting statutes). Five States, including Minnesota, appear to require, as a general rule, the notification of both parents before a physician may perform an abortion on a minor. See Ark. Code Ann. §§ 20–16–801 through 20–16–808 (Supp. 1989); Idaho Code § 18–610 (6) (1987); Tenn. Code Ann. § 39–15–202(f) (Supp. 1989); Utah Code Ann. § 76–7–304 (1990). Another six States appear to require, with varying exceptions, the consent of both parents. See Del. Code Ann., Tit. 24, § 1790(b)(3) (1987); Ill. Rev. Stat., ch. 38, ¶ 81–54(3) (1989); Ky. Rev. Stat. Ann. § 311.732 (Michie 1990); Mass. Gen. Laws § 112:12S (1988); Miss. Code. Ann. § 41–41–53 (Supp. 1989); N. D. Cent. Code § 14–02.1–03.1 (1981). Whether these statutes are more or less restrictive than the Minnesota statute is not the issue, although I pause to note that because the Court's decision today turns upon its perception that the law's requirements,

despite its exceptions, are the most "stringent" in the country, see *ante*, at 459 (O'CONNOR, J., concurring in part and concurring in judgment), the Court's decision has no import for the validity of these other statutes. What is important is that Minnesota is not alone in acknowledging the vitality of these governmental interests and adopting laws that, in the legislature's judgment, are best suited to serving them while protecting the minor's welfare.

On a more general level, the current trend among state legislatures is to enact joint custody laws making it the norm for divorced or separated parents to share the legal responsibility and authority for making decisions concerning their children's care, education, religion, and medical treatment. See 2 H. Clark, Law of Domestic Relations in the United States § 20.5 (2d ed. 1987); Folberg, Joint Custody Law—The Second Wave, 23 J. Family L. 1, 14–55 (1984–1985) (collecting statutes). Under Minnesota law, for example, there exists a presumption in divorce proceedings that joint custody, if requested by either or both parents, is in the best interests of the child. See Minn. Stat. § 518.17(2) (Supp. 1989). Even if joint custody is not awarded, Minnesota law provides that each parent, unless the court specifically directs otherwise to protect the welfare of a parent or the child, "has the right of access to, and to receive copies of, school, medical, dental, religious training, and other important records and information about the minor children"; the responsibility to "keep the other party informed as to the name and address of the school of attendance of the minor children"; the responsibility to "notify the other party of [an accident or serious illness of a minor child], and the name of the health care provider and the place of treatment"; and "the right to reasonable access and telephone contact with the minor children." Minn. Stat. § 518.17(3) (1988). Minnesota's two-parent notification law does no more than apply these general principles to the specific case of abortion.

Federal law contains similar provisions regulating the health and welfare of children that require the notification or consent of both parents. For example, one condition for obtaining a grant under the Adolescent Family Life Act is that an applicant must provide assurances that it will "notify the parents or guardians of any unemancipated minor requesting services [relating to family planning] from the applicant and . . . will obtain the permission of such parents or guardians with respect to the provision of such services." 42 U. S. C. § 300z–5(a)(22)(A)(i) (1982 ed.); see § 300z–5(a)(22)(A)(ii) (requiring only notice to parents or guardians if the unemancipated minor is pregnant). See also 42 U. S. C. § 5671(d) (1982 ed., Supp. V) (authorizing funding for certain experimental juvenile drug and alcohol treatment programs if safeguards are established for obtaining the informed consent of the "parents or guardians" of minors); 50 U. S. C. App. § 454(c)(4) (1982 ed.) (permitting induction of a 17-year-old into the Armed Forces with the written consent of his "parents or guardian"); 45 CFR § 46.408 (1989) (requiring consent of both parents before a minor may participate in medical research posing more than a "minimal" risk of harm). With all respect, I submit the Court today errs when it states that Minnesota's two-parent notice law is an "oddity among state and federal consent provisions." *Ante*, at 454.

III

At least two Members of the Court concede, as they must, that a State has a legitimate interest in the welfare of the pregnant minor and that, in furtherance of this interest, the State may require the minor to notify, and consult with, one of her parents. See *ante*, at 444–446 (opinion of STEVENS, J.); cf. *ante*, at 469 (MARSHALL, J., concurring in part, concurring in judgment in part, and dissenting in part). The Court nonetheless holds the Minnesota statute unconstitutional because it requires the minor to notify not one parent, but both parents, a requirement that the Court says bears

no reasonable relation to the minor's welfare. See *ante*, at 450–455; cf. *ante*, at 469–472 (MARSHALL, J., concurring in part, concurring in judgment in part, and dissenting in part). The Court also concludes that Minnesota does not have a legitimate interest in facilitating the participation of both parents in the care and upbringing of their children. Given the substantial protection that minors have under Minnesota law generally, and under the statute in question, the judicial bypass provisions of the law are not necessary to its validity. The two-parent notification law enacted by Minnesota is, in my view, valid without the judicial bypass provision of subdivision 6.

A

We have been over much of this ground before. It is beyond dispute that in many families, whether the parents are living together or apart, notice to both parents serves the interests of the parents and the minor, and that the State can legislate with this fact in mind. In *H. L.* v. *Matheson*, 450 U. S. 398 (1981), we considered the constitutionality of a statute which required a physician, before performing an abortion on a minor, to "'[n]otify, if possible, the [minor's] *parents* or guardian.'" *Id.*, at 400 (quoting Utah Code Ann. § 76–7–304 (1978)) (emphasis added). We held that the statute, as applied to unmarried, dependent, and immature minors, "plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution." 450 U. S., at 413. Our holding was made with knowledge of the contentions, supported by citations to medical and sociological literature, that are proffered again today for the proposition that notification imposes burdens on minors. See *id.*, at 436–441 (MARSHALL, J., dissenting). We nonetheless rejected arguments that a requirement of parental notification was the equivalent of a requirement of parental consent, *id.*, at 411; that the statute was unconstitutional because it required notification only as to abortions, and not as to other medical

procedures, *id.*, at 412; and that the statute was unconstitutional because it might deter some minors from seeking abortions, *id.*, at 413.

Our decision was based upon the well-accepted premise that we must defer to a reasonable judgment by the state legislature when it determines what is sound public policy. JUSTICE STEVENS' opinion concurring in the Court's judgment relied upon an explicit statement of this principle. Concluding that the Utah statute requiring notification of both parents was valid as to all unmarried minors, both mature and immature, JUSTICE STEVENS reasoned that the State's interest in ensuring that a young woman considering an abortion receive appropriate consultation was "plainly sufficient to support a state legislature's determination that such appropriate consultation should include parental advice." *Id.*, at 423. The Court today departs from this rule. It now suggests that a general requirement that both parents be notified is unconstitutional because of its own conclusion that the law is unnecessary when notice produces favorable results, see *ante*, at 450, and irrational in all of the instances when it produces unfavorable results, see *ante*, at 450–451. In *Matheson*, JUSTICE STEVENS rejected these same arguments as insufficient to establish that the Utah statute was unconstitutional:

> "Of course, a conclusion that the Utah statute is invalid would not prevent young pregnant women from voluntarily seeking the advice of their parents prior to making the abortion decision. But the State may legitimately decide that such consultation should be made more probable by ensuring that parents are informed of their daughter's decision . . . .
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> . . . . . .
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> "Utah's interest in its parental-notice statute is not diminished by the fact that there can be no guarantee that meaningful parent-child communication will actually occur. Good-faith compliance with the statute's re-

quirements would tend to facilitate communication between daughters and parents regarding the abortion decision. *The possibility that some parents will not react with compassion and understanding upon being informed of their daughter's predicament or that, even if they are receptive, they will incorrectly advise her, does not undercut the legitimacy of the State's attempt to establish a procedure that will enhance the probability that a pregnant young woman exercise as wisely as possible her right to make the abortion decision.*" 450 U. S., at 423–424 (emphasis added).

JUSTICE STEVENS' reasoning was correct then, and it remains correct today.

B

In applying the standards established in our prior decisions to the cases at hand, "we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, 'the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267, 270 (1904) (Holmes, J.).' *Maher* v. *Roe*, 432 U. S. 464, 479–480 (1977) (footnote omitted)." *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 465 (1983) (O'CONNOR, J., dissenting). The Minnesota Legislature, like the legislatures of many States, has found it necessary to address the issue of parental notice in its statutory laws. In my view it has acted in a permissible manner.

All must acknowledge that it was reasonable for the legislature to conclude that in most cases notice to both parents will work to the minor's benefit. See *Bellotti II*, 443 U. S., at 640, n. 20 (opinion of Powell, J.) (parental involvement, if compassionate and supportive, is highly desirable). This is true not only in what the Court calls the "ideal family setting," where both parents and the minor live under one roof,

but also where the minor no longer lives with both parents. The Court does not deny that many absent parents maintain significant ties with their children, and seek to participate in their lives, to guide, to teach, and to care for them. It is beyond dispute that these attachments, in cases not involving mistreatment or abuse, are essential to the minor's well-being, and that parental notice is supportive of this kind of family tie. Although it may be true that notice to one parent will often result in notice to both, the State need not rely upon the decision of one parent to notify the other, particularly where both parents maintain ties with their daughter but not with each other, and when both parents share responsibilities and duties with respect to the child.

I acknowledge that in some cases notifying both parents will not produce desirable results despite the fact that no actual instance is in the record before us, as the two-parent notification requirement was enjoined before it went into effect. Cf. *ante*, at 438 (stating as a matter of historical fact that the "two-parent notification requirement *had* particularly harmful effects on both the minor and the custodial parent" and that fears that notification of an absent parent would produce harmful results "*were* often realized") (emphasis added). We need not decide today, however, whether the Constitution permits a State to require that a physician notify both biological parents before performing an abortion on any minor, for the simple reason that Minnesota has not enacted such a law.

The Minnesota statute in fact contains exceptions to ensure that the statutory notice requirement does not apply if it proves a serious threat to the minor's health or safety. First, the statute does not require notice at all costs; to comply with the law, a physician need only use "reasonably diligent effort" to locate and notify both of the minor's parents. If the second parent cannot be located, as may be the case if the parent has deserted the family or ceased to maintain contact with the minor or the other parent, the only notice required is to the first parent. Minn. Stat. § 144.343(3) (1988).

Second, even where both parents can be located, notice is not required if the physician certifies that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice, § 144.343(4)(a); if the minor's parents have authorized the abortion in writing, § 144.343(4)(b); or if the minor declares that she is the victim of sexual abuse, neglect, or physical abuse, § 144.343(4)(c). Under Minnesota law, "neglect" of a minor means the failure of a parent "to supply a child with necessary food, clothing, shelter or medical care when reasonably able to do so or failure to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so," Minn. Stat. § 626.556 (2)(c) (Supp. 1989); physical abuse is defined as "any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means," § 626.556(2)(d); and sexual abuse includes any sexual contact by a parent or other person responsible for the child's care or in a position of authority with respect to the child, § 626.556(2)(a). I cannot believe that these exceptions are too narrow to eliminate from the statute's coverage those instances in which notice would place the minor in danger of parental violence or other conduct that is a real threat to the physical or mental health of the child.

The Court challenges the efficacy of this last exception because it believes that the statutory requirement that a physician report a minor's declaration of abuse to appropriate authorities, see Minn. Stat. § 144.343(4)(c) (1988), will deter minors from using the exception. This is not a proper basis for declaring the law invalid. Laws are not declared unconstitutional because of some general reluctance to follow a statutory scheme the legislature finds necessary to accomplish a legitimate state objective. Beyond any question it is reasonable for the State to require that physicians report declarations of abuse to ensure that mistreatment is known to authorities responsible for the protection of minors. This

requirement is but a single manifestation of the broad duty in Minnesota to report suspected cases of child abuse to the proper authorities. See Minn. Stat. § 626.556(1) (1988) (declaring it to be the public policy of the State "to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse" and "to strengthen the family and make the home, school, and community safer for children by promoting responsible child care in all settings").

No one can contend that a minor who is pregnant is somehow less deserving of the State's protection. It is reasonable to provide that any minor who contends that she cannot notify her parent or parents because she is the victim of neglect or abuse must allow the State to use its power to investigate her declaration and protect her from harm. Any parent, moreover, who responds to notice by threatening or harming the minor or the other parent may be prosecuted by the State to the full extent of its laws. See Minn. Stat. § 518B.01 (1988) (Domestic Abuse Act); Minn. Stat. §§ 609.221, 609.222, 609.223, 609.224 (1988 and Supp. 1989) (assault statutes); §§ 609.341 through 609.345 (sexual abuse statutes); § 609.378 (criminal neglect statute). Just as it relies upon such laws as its first line of defense for dealing with all other instances of abuse in family situations, so too is the State entitled to rely upon them here.

Notwithstanding the exceptions and protections we have discussed, it does remain possible, of course, that in some instances notifying one or both parents will not be in the minor's best interests. Allegations of a similar possibility, based upon sociological evidence similar to that presented in these cases, was made by the appellant in *Matheson*. See Brief for Appellant in *H. L.* v. *Matheson*, O. T. 1980, No. 79–5903, pp. 10–11; Brief for Planned Parenthood Federation of America, Inc., et al., as *Amici Curiae* in *Matheson* 16–31. The Court there held that the parental notification law was valid, at least as to immature minors, for the simple reason that a

law is not invalid if it fails to further the governmental interest in every instance. This point formed the cornerstone of JUSTICE STEVENS' concurring opinion in *Matheson*, see 450 U. S., at 423–424, and it finds its most explicit statement in the Court's opinion in *Parham* v. *J. R.*, 442 U. S., at 602–603:

> "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children. . . .
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> "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this. That some parents 'may at times be acting against the best interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests."

The only cases in which a majority of the Court has deviated from this principle are those in which a State sought to condition a minor's access to abortion services upon receipt of her parent's consent to do so. In *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976), the Court invalidated a Missouri law requiring that a physician obtain the consent of one parent before performing an abortion. The Court's reasoning was unmistakable: "[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Id.*, at 74. The Court today, ignoring this statement, relies heavily upon isolated passages from *Danforth*, see *ante*, at 452–453, and other cases involving parental consent laws,

see, *e. g.*, *ante*, at 453 (citing *Bellotti II*). JUSTICE MARSHALL, on the other hand, expressly equates laws requiring parental consent with laws requiring parental notification, see *ante*, at 471–472 (MARSHALL, J., concurring in part, concurring in judgment in part, and dissenting in part).

The difference between notice and consent was apparent to us before and is apparent now. Unlike parental consent laws, a law requiring parental notice does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed. We have acknowledged this distinction as "fundamental," and as one "substantially modify[ing] the federal constitutional challenge." *Bellotti* v. *Baird (Bellotti I)*, 428 U. S. 132, 145, 148 (1976); see also *Matheson*, *supra*, at 411, n. 17. The law before us does not place an absolute obstacle before any minor seeking to obtain an abortion, and it represents a considered weighing of the competing interests of minors and their parents.

"It cannot be doubted that as long as a state statute is within 'the bounds of reason and [does not] assum[e] the character of a merely arbitrary fiat . . . [then] [t]he State . . . must decide upon measures that are needful for the protection of its people . . . .'" *Akron*, 462 U. S., at 459 (O'CONNOR, J., dissenting) (quoting *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204–205 (1912)). Like all laws of general application, the Minnesota statute cannot produce perfect results in every situation to which it applies; but the State is under no obligation to enact perfect laws. The statute before us, including the 48-hour waiting period, which is necessary to enable notified parents to consult with their daughter or their daughter's physician, if they so wish, and results in little or no delay, represents a permissible, reasoned attempt to preserve the parents' role in a minor's decision to have an abortion without placing any absolute obstacles before a minor who is determined to elect an abortion for her own interest as she sees it. Section 144.343, without the

judicial bypass provision of subdivision 6, is constitutional. I would reverse the contrary judgment of the Court of Appeals.

IV

Because a majority of the Court holds that the two-parent notice requirement contained in subdivision 2 is unconstitutional, it is necessary for the Court to consider whether the same notice requirement is constitutional if the minor has the option of obtaining a court order permitting the abortion to proceed in lieu of the required notice. Minn. Stat. § 144.343 (6) (1988). Assuming, as I am bound to do for this part of the analysis, that the notice provisions standing alone are invalid, I conclude that the two-parent notice requirement with the judicial bypass alternative is constitutional.

The Court concludes that Minnesota's two-parent notice law without a judicial bypass is unconstitutional because of the possibility that, in some cases, the rule would not work to the benefit of minors or their parents. If one were to attempt to design a statute that would address the Court's concerns, one would do precisely what Minnesota has done in § 144.343(6): create a judicial mechanism to identify, and exempt from the strictures of the law, those cases in which the minor is mature or in which notification of the minor's parents is not in the minor's best interests. The bypass procedure comports in all respects with our precedents. See *Bellotti II*, 443 U. S., at 643–644 (opinion of Powell, J.); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 491 (1983) (opinion of Powell, J.); *id.*, at 505 (O'CONNOR, J., concurring in judgment in part and dissenting in part); *Ohio* v. *Akron Center for Reproductive Health*, *post*, p. 502.

In providing for the bypass, Minnesota has done nothing other than attempt to fit its legislation into the framework that we have supplied in our previous cases. The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent law is constitutional if it provides

for a sufficient judicial bypass alternative, and it requires us to sustain the statute before us here. In *Bellotti II*, the Court considered the constitutionality of a statute which required a physician to obtain, in most circumstances, the consent of both of a minor's parents before performing an abortion on the minor. See 443 U. S., at 625–626 (opinion of Powell, J.) (citing Mass. Gen. Laws. Ann., ch. 112, § 12S (West Supp. 1979)). Although eight Members of the Court concluded that the statute was unconstitutional, five indicated that they would uphold a two-parent consent statute with an adequate judicial bypass.

For four of the eight Justices forming the majority in *Bellotti II*, the failure of the statute lay in its inadequate bypass procedure, not its requirement that both of the minor's parents consent to the abortion. See 443 U. S., at 643 (opinion of Powell, J.). Justice Powell's opinion specifically stated that "if the State decides to require a pregnant minor to obtain *one or both* parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained," *ibid.* (emphasis added; footnote omitted), and then stated the minimum requirements for such a procedure. In response to the dissent's contention that his opinion was advisory, Justice Powell stated that the four Members of the Court thought it necessary

> "to provide some guidance as to how a State constitutionally may provide for adult involvement—either by parents or a state official such as a judge—in the abortion decision of minors. In view of the importance of the issue raised, and the protracted litigation to which these parties already have been subjected, we think it would be irresponsible simply to invalidate [the Massachusetts law] without stating our views as to the controlling principles." *Id.*, at 652, n. 32.

See also *id.*, at 651–652 (REHNQUIST, J., concurring) (joining Justice Powell's opinion because "unless and until [the Court is willing to overrule *Danforth*], literally thousands of judges

cannot be left with nothing more than the guidance offered by a truly fragmented holding of this Court").

JUSTICE WHITE dissented from the Court's judgment that the Massachusetts statute was unconstitutional. In his view no bypass was necessary, so it must follow that a two-parent consent statute with an adequate bypass procedure would have been valid. See *id.*, at 656–657. In sum, five Members of the Court in *Bellotti II* found, either by express statement or by implication, that it was permissible under the Constitution for a State to require the consent of two parents, as long as it provides a consent substitute in the form of an adequate judicial bypass procedure.

I cannot accept JUSTICE STEVENS' suggestion today that Justice Powell, in announcing these rules, did not "conside[r]" the fact that he was doing so in the context of a two-parent consent requirement, see *ante*, at 455–456. The statute was explicit in its command that both parents consent to the abortion. See 443 U. S., at 625–626. Justice Powell indicated that he was aware of this fact, see *id.*, at 630, and n. 10, and the dissent drew a specific contrast between the two-parent consent requirement then before the Court and the one-parent consent requirement before the Court in *Danforth*, see 443 U. S., at 656–657 (opinion of WHITE, J.); see also *id.*, at 653 (STEVENS, J., concurring in judgment). Aware of all of these circumstances, Justice Powell stated the controlling principles with specific reference to laws requiring the consent of "one or both" parents. *Id.*, at 643. Justice Powell's considered reasoning, coupled with the dissenting views of JUSTICE WHITE, was intended to set forth the dispositive principles of law for deciding the constitutionality of parental consent laws. The Court has relied upon these principles in deciding the constitutionality of laws requiring notice or the consent of one parent, see *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S., at 439–442 (consent); *Ohio* v. *Akron Center for Reproductive Health*, *post*, at 511–514 (notice). As *Bellotti II* dealt with the far more de-

manding requirement of two-parent consent, and approved of such a requirement when coupled with a judicial bypass alternative, I must conclude that these same principles validate a two-parent notice requirement when coupled with a judicial bypass alternative.

A second precedent that compels the conclusion that a two-parent notice law with a judicial bypass alternative is constitutional is our decision in *Matheson*. There we held that a two-parent notice statute without a bypass was constitutional as applied to immature minors whose best interests would be served by notice. Like the statute before the Court in *Matheson*, the Minnesota statute, as amended by subdivision 6, requires a physician to notify the parents of those immature minors whose best interest will be served by the communication.

If a two-parent notification law may be constitutional as applied to immature minors whose best interests are served by the law, but not as applied to minors who are mature or whose best interests are not so served, a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not. JUSTICE STEVENS' characterization of the judicial bypass procedure discussed in our past cases as a necessary "exception" to a "reasonable general rule," such as a one-parent consent requirement, see *ante*, at 456, 457, is far off the mark. If a judicial bypass is mandated by the Constitution at all, it must be because a general consent rule is unreasonable in at least some of its applications, and the bypass is necessary to save the statute. See, *e. g.*, *Bellotti II*, *supra*, at 643 (opinion of Powell, J.); *Matheson*, 450 U. S., at 420 (Powell, J., concurring). No reason can be given for refusing to apply a similar analysis to the less demanding case of a notice statute. It follows that a similar result should obtain: A law that requires notice to one or both parents is constitutional with a bypass. I thus concur in that portion of the judgment announced, but not agreed with, by JUSTICE STE-

VENS which affirms the Court of Appeals' conclusion that § 144.343(6) is constitutional.

V

In this case, the Court rejects a legislature's judgment that parents should at least be aware of their daughter's intention to seek an abortion, even if the State does not empower the parents to control the child's decision. That judgment is rejected although it rests upon a tradition of a parental role in the care and upbringing of children that is as old as civilization itself. Our precedents do not permit this result.

It is true that for all too many young women the prospect of two parents, perhaps even one parent, sustaining her with support that is compassionate and committed is an illusion. Statistics on drug and alcohol abuse by parents and documentations of child neglect and mistreatment are but fragments of the evidence showing the tragic reality that becomes day-to-day life for thousands of minors. But the Court errs in serious degree when it commands its own solution to the cruel consequences of individual misconduct, parental failure, and social ills. The legislative authority is entitled to attempt to meet these wrongs by taking reasonable measures to recognize and promote the primacy of the family tie, a concept which this Court now seems intent on declaring a constitutional irrelevance.

OHIO *v.* AKRON CENTER FOR REPRODUCTIVE HEALTH ET AL.

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

No. 88–805. Argued November 29, 1989—Decided June 25, 1990

As enacted, Ohio's Amended Substitute House Bill 319 (H. B. 319) makes it a crime for a physician or other person to perform an abortion on an unmarried, unemancipated, minor woman, unless, *inter alia*, the physician provides timely notice to one of the minor's parents or a juvenile court issues an order authorizing the minor to consent. To obtain a judicial bypass of the notice requirement, the minor must present clear and convincing proof that she has sufficient maturity and information to make the abortion decision herself, that one of her parents has engaged in a pattern of physical, emotional, or sexual abuse against her, or that notice is not in her best interests. Among other things, H. B. 319 also allows the physician to give constructive notice if actual notice to the parent proves impossible "after a reasonable effort"; requires the minor to file a bypass complaint in the juvenile court on prescribed forms; requires that court to appoint a guardian ad litem and an attorney for the minor if she has not retained counsel; mandates expedited bypass hearings and decisions in that court and expedited review by a court of appeals; provides constructive authorization for the minor to consent to the abortion if either court fails to act in a timely fashion; and specifies that both courts must maintain the minor's anonymity and the confidentiality of all papers. Shortly before H. B. 319's effective date, appellees—an abortion facility, one of its doctors, and an unmarried, unemancipated, minor woman seeking an abortion there—and others filed a facial challenge to the statute's constitutionality in the Federal District Court, which ultimately issued an injunction preventing H. B. 319's enforcement. The Court of Appeals affirmed, concluding that various of the statute's provisions were constitutionally defective.

Held: The judgment is reversed.

854 F. 2d 852, reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II, III, and IV, concluding that, on its face, H. B. 319 does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion. Pp. 510–519.

1. House Bill 319 accords with this Court's cases addressing the constitutionality of parental notice or consent statutes in the abortion con-

text. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52; *Bellotti* v. *Baird*, 443 U. S. 622; *H. L.* v. *Matheson*, 450 U. S. 398; *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476; *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416. Pp. 510–517.

(a) Whether or not the Fourteenth Amendment requires parental notice statutes, as opposed to parental consent statutes, to contain judicial bypass procedures, H. B. 319's bypass procedure is sufficient because it meets the requirements identified in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron* for the more intrusive consent statutes, particularly the four criteria set forth by the principal opinion in *Bellotti*, *supra*, at 643–644 (opinion of Powell, J.). First, the statute satisfies the requirement that the minor be allowed to show the maturity to make her abortion decision without regard to her parents' wishes. Second, by requiring the juvenile court to authorize her consent upon determining that the abortion is in her best interests and in cases where she has shown a pattern of abuse, H. B. 319 satisfies the requirement that she be allowed to show that, even if she cannot make the decision by herself, the abortion would be in her best interests. Third, the requirement that a bypass procedure ensure the minor's anonymity is satisfied, since H. B. 319 prohibits the juvenile court from notifying the parents that the complainant is pregnant and wants an abortion and requires both state courts to preserve her anonymity and the confidentiality of court papers, and since state law makes it a crime for any state employee to disclose documents not designated as public records. Neither the mere possibility of unauthorized, illegal disclosure by state employees nor the fact that the H. B. 319 complaint forms require the minor to provide identifying information for administrative purposes is dispositive. Complete anonymity is not critical under this Court's decisions, and H. B. 319 takes reasonable steps to prevent the public from learning of the minor's identity. Fourth, H. B. 319's time limits on judicial action satisfy the requirement that a bypass procedure be conducted with expedition. Even if, as appellees contend, the bypass procedure could take up to 22 calendar days, including weekends and legal holidays, that possibility does not suffice to invalidate the statute on its face. See, *e. g.*, *Ashcroft*, *supra*, at 477, n. 4, 491, n. 16. Pp. 510–514.

(b) The *Bellotti* criteria need not be extended by imposing appellees' suggested additional requirements on bypass procedures. First, H. B. 319 is not rendered unconstitutional by the fact that its constructive authorization provisions do not require an affirmative order authorizing the physician to act in the event that either state court fails to act within the prescribed time limits. Absent a showing that those limits will be ignored, the State may expect that its judges will follow

mandated procedural requirements. Moreover, *Ashcroft*, *supra*, at 479–480, n. 4, does not require constructive authorization provisions, which were added by Ohio out of an abundance of caution and concern for the minor's interests. Second, a bypass procedure such as Ohio's does not violate due process by placing the burden of proof on the issues of maturity or best interests on the minor or by requiring a heightened, clear and convincing evidence standard of proof. Justice Powell in *Bellotti*, *supra*, at 634, indicated that a State may require the minor to bear the burden of proof on these issues. Moreover, a State may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony and she is assisted by an attorney and a guardian ad litem. Third, H. B. 319's statutory scheme and the bypass complaint forms do not deny an unwary and unrepresented minor the opportunity to prove her case by requiring her to choose among three forms, the first of which relates only to maturity, the second to best interests, and the third to both. Even assuming some initial confusion, it is unlikely that the Ohio courts will treat a minor's choice of forms without due care and understanding for her unrepresented status. Moreover, she does not make a binding election by her initial form choice, since H. B. 319 provides her with appointed counsel after filing the complaint and allows her to move to amend the pleadings. Pp. 514–517.

2. Even assuming that H. B. 319 gives a minor a substantive, state-law liberty or property right "to avoid unnecessary or hostile parental involvement" upon proof of maturity or best interests, the statute does not deprive her of this right without due process, since its confidentiality provisions, expedited procedures, pleading form requirements, clear and convincing evidence standard, and constructive authorization provisions are valid on their face. Pp. 517–518.

3. House Bill 319 is not facially invalid simply because it requires parental notice to be given by the physician rather than by some other qualified person. Since the physician has a superior ability to garner and use important medical and psychological data supplied by a parent upon receiving notice, a State may require the physician himself to take reasonable steps to notify the parent. See *Matheson*, *supra*, at 400, 411. In addition, the conversation with an experienced and detached physician may assist the parent in approaching the problem in a mature and balanced way and thereby enable him to provide better advice to the minor than would a conversation with a less experienced person. Any imposition on the physician's schedule is diminished by provisions allowing him to give notice by mail if he cannot reach the parent "after a reasonable effort" and to forgo notice in the event of certain emergencies,

which provisions constitute an adequate recognition of his professional status. *Akron*, *supra*, at 446–449, distinguished. Pp. 518–519.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded in Part V that H. B. 319 constitutes a rational way to further legitimate ends. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronting a woman considering an abortion, which decision will affect her own destiny and dignity and the origins of the other human life within the embryo. It is both rational and fair for the State to conclude that, in most instances, the beginnings of that understanding will be within the family, which will strive to give a lonely or even terrified minor advice that is both compassionate and mature. Pp. 519–520.

JUSTICE STEVENS, agreeing that H. B. 319 is not unconstitutional on its face, concluded that, in some of its applications, the one-parent notice requirement will not reasonably further the State's legitimate interest in protecting the welfare of its minor citizens. The question whether the judicial bypass is so obviously inadequate for such exceptional situations that the entire statute should be invalidated must await the statute's implementation and the evaluation of the significance of its restrictions in light of its administration. The State must provide an adequate mechanism for avoiding parental notification for cases in which the minor is mature or notice would not be in her best interests. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 441, n. 31. Pp. 521–523.

KENNEDY, J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, and SCALIA, JJ., joined, and an opinion with respect to Part V, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 520. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 521. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 524.

Rita S. Eppler, Assistant Attorney General of Ohio, argued the cause for appellant. With her on the briefs were *Anthony J. Celebrezze, Jr.*, Attorney General, and *Thomas J. O'Connell* and *Suzanne E. Mohr*, Assistant Attorneys General.

Linda R. Sogg argued the cause for appellees. With her on the brief were *Dara Klassel*, *Roger Evans*, *Barbara E. Otten*, and *Eve W. Paul.**

JUSTICE KENNEDY announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV,† and an opinion with respect to Part V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA join.

The Court of Appeals held invalid an Ohio statute that, with certain exceptions, prohibits any person from performing an abortion on an unmarried, unemancipated, minor woman absent notice to one of the woman's parents or a court order of approval. We reverse, for we determine that the statute accords with our precedents on parental notice and

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*Briefs of *amici curiae* urging reversal were filed for American Family Association, Inc., by *Peggy M. Coleman;* for the Association of American Physicians and Surgeons by *Ann-Louise Lohr*, *Paige Comstock Cunningham*, and *Kent Masterson Brown;* for Concerned Women for America by *Jordan W. Lorence*, *Cimron Campbell*, and *Wendell R. Bird;* for the Knights of Columbus by *Brendan V. Sullivan, Jr.*, *Kevin J. Hasson*, and *Carl A. Anderson;* for the United States Catholic Conference by *Mark E. Chopko;* and for Representative Jerome S. Luebbers et al. by *Patrick J. Perotti.*

Briefs of *amici curiae* urging affirmance were filed for 274 Organizations in Support of *Roe* v. *Wade* by *Kathleen M. Sullivan*, *Susan R. Estrich*, *Barbara Jordan*, and *Estelle H. Rogers;* for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips*, *Elizabeth H. Esty*, *Ann E. Allen*, *Stephan E. Lawton*, *Laurie R. Rockett*, and *Joel I. Klein;* and for the American Psychological Association et al. by *Donald N. Bersoff.*

Briefs of *amici curiae* were filed for the American Indian Health Care Association et al. by *Rhonda Copelon* and *Nadine Taub;* for Focus on the Family et al. by *H. Robert Showers;* for Save America's Youth, Inc., by *Lynn D. Wardle;* and for 13 Individual Members of the Panel on Adolescent Pregnancy and Childbearing or the Committee on Child Development Research and Public Policy by *Hannah E. M. Lieberman* and *Pamela H. Anderson.*

†JUSTICE STEVENS and JUSTICE O'CONNOR join only Parts I, II, III, and IV of the opinion.

consent in the abortion context and does not violate the Fourteenth Amendment.

I

A

The Ohio Legislature, in November 1985, enacted Amended Substitute House Bill 319 (H. B. 319), which amended Ohio Rev. Code Ann. § 2919.12 (1987), and created Ohio Rev. Code Ann. §§ 2151.85 and 2505.073 (Supp. 1988). Section 2919.12(B), the cornerstone of this legislation, makes it a criminal offense, except in four specified circumstances, for a physician or other person to perform an abortion on an unmarried and unemancipated woman under 18 years of age. See § 2919.12(D) (making the first offense a misdemeanor and subsequent offenses felonies); § 2919.12(E) (imposing civil liability).

The first and second circumstances in which a physician may perform an abortion relate to parental notice and consent. First, a physician may perform an abortion if he provides "at least twenty-four hours actual notice, in person or by telephone," to one of the woman's parents (or her guardian or custodian) of his intention to perform the abortion. § 2919.12(B)(1)(a)(i). The physician, as an alternative, may notify a minor's adult brother, sister, stepparent, or grandparent, if the minor and the other relative each file an affidavit in the juvenile court stating that the minor fears physical, sexual, or severe emotional abuse from one of her parents. See §§ 2919.12(B)(1)(a)(i), 2919.12(B)(1)(b), 2919.12(B)(1)(c). If the physician cannot give the notice "after a reasonable effort," he may perform the abortion after "at least forty-eight hours constructive notice" by both ordinary and certified mail. § 2919.12(B)(2). Second, a physician may perform an abortion on the minor if one of her parents (or her guardian or custodian) has consented to the abortion in writing. See § 2919.12(B)(1)(a)(ii).

The third and fourth circumstances depend on a judicial procedure that allows a minor to bypass the notice and con-

sent provisions just described. The statute allows a physician to perform an abortion without notifying one of the minor's parents or receiving the parent's consent if a juvenile court issues an order authorizing the minor to consent, § 2919.12(B)(1)(a)(iii), or if a juvenile court or court of appeals, by its inaction, provides constructive authorization for the minor to consent, § 2919.12(B)(1)(a)(iv).

The bypass procedure requires the minor to file a complaint in the juvenile court, stating (1) that she is pregnant; (2) that she is unmarried, under 18 years of age, and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; (4) that she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, *or* that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her, *or* that notice is not in her best interests; and (5) that she has or has not retained an attorney. §§ 2151.85(A)(1)–(5). The Ohio Supreme Court, as discussed below, has prescribed pleading forms for the minor to use. See App. 6–14.

The juvenile court must hold a hearing at the earliest possible time, but not later than the fifth business day after the minor files the complaint. § 2151.85(B)(1). The court must render its decision immediately after the conclusion of the hearing. *Ibid.* Failure to hold the hearing within this time results in constructive authorization for the minor to consent to the abortion. *Ibid.* At the hearing the court must appoint a guardian ad litem and an attorney to represent the minor if she has not retained her own counsel. § 2151.85(B)(2). The minor must prove her allegation of maturity, pattern of abuse, or best interests by clear and convincing evidence, § 2151.85(C), and the juvenile court must conduct the hearing to preserve the anonymity of the complainant, keeping all papers confidential. §§ 2151.85(D), (F).

The minor has the right to expedited review. The statute provides that, within four days after the minor files a

notice of appeal, the clerk of the juvenile court shall deliver the notice of appeal and record to the state court of appeals. § 2505.073(A). The clerk of the court of appeals dockets the appeal upon receipt of these items. *Ibid.* The minor must file her brief within four days after the docketing. *Ibid.* If she desires an oral argument, the court of appeals must hold one within five days after the docketing and must issue a decision immediately after oral argument. *Ibid.* If she waives the right to an oral argument, the court of appeals must issue a decision within five days after the docketing. *Ibid.* If the court of appeals does not comply with these time limits, a constructive order results authorizing the minor to consent to the abortion. *Ibid.*

B

Appellees in this action include the Akron Center for Reproductive Health, a facility that provides abortions; Max Pierre Gaujean, M. D., a physician who performs abortions at the Akron Center; and Rachael Roe, an unmarried, unemancipated, minor woman, who sought an abortion at the facility. In March 1986, days before the effective date of H. B. 319, appellees and others brought a facial challenge to the constitutionality of the statute in the United States District Court for the Northern District of Ohio. The District Court, after various proceedings, issued a preliminary injunction and later a permanent injunction preventing the State of Ohio from enforcing the statute. *Akron Center for Reproductive Health* v. *Rosen*, 633 F. Supp. 1123 (1986).

The Court of Appeals for the Sixth Circuit affirmed, concluding that H. B. 319 had six constitutional defects. These points, discussed below, related to the sufficiency of the expedited procedures, the guarantee of anonymity, the constructive authorization provisions, the clear and convincing evidence standard, the pleading requirements, and the physician's personal obligation to give notice to one of the minor's

parents. *Akron Center for Reproductive Health* v. *Slaby*, 854 F. 2d 852 (1988). The State of Ohio, on appeal under 28 U. S. C. § 1254(2) (1982 ed.), prob. juris. noted, 492 U. S. 916 (1989), challenges the Court of Appeals' decision in its entirety. Appellees seek affirmance on the grounds adopted by the Court of Appeals and on other grounds.

II

We have decided five cases addressing the constitutionality of parental notice or parental consent statutes in the abortion context. See *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52 (1976); *Bellotti* v. *Baird*, 443 U. S. 622 (1979); *H. L.* v. *Matheson*, 450 U. S. 398 (1981); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983); *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983). We do not need to determine whether a statute that does not accord with these cases would violate the Constitution, for we conclude that H. B. 319 is consistent with them.

A

This dispute turns, to a large extent, on the adequacy of H. B. 319's judicial bypass procedure. In analyzing this aspect of the dispute, we note that, although our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. See *Matheson*, *supra*, at 413, and n. 25 (upholding a notice statute without a bypass procedure as applied to immature, dependent minors). We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, H. B. 319's bypass procedure meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*. *Danforth* established that, in order to prevent another person from having an absolute veto power over a minor's decision to have an abortion, a State must provide some sort of bypass procedure if it elects to require pa-

rental consent. See 428 U. S., at 74. As we hold today in *Hodgson* v. *Minnesota*, *ante*, p. 417, it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute. See also *Matheson*, *supra*, at 411, n. 17 (notice statutes are not equivalent to consent statutes because they do not give anyone a veto power of over a minor's abortion decision).

The principal opinion in *Bellotti* stated four criteria that a bypass procedure in a consent statute must satisfy. Appellees contend that the bypass procedure does not satisfy these criteria. We disagree. First, the *Bellotti* principal opinion indicated that the procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. See 443 U. S., at 643 (opinion of Powell, J.). The Court reaffirmed this requirement in *Akron* by holding that a State cannot presume the immaturity of girls under the age of 15. 462 U. S., at 440. In the case now before us, we have no difficulty concluding that H. B. 319 allows a minor to show maturity in conformity with the principal opinion in *Bellotti*. The statute permits the minor to show that she "is sufficiently mature and well enough informed to decide intelligently whether to have an abortion." Ohio Rev. Code Ann. §2151.85(C)(1) (Supp. 1988).

Second, the *Bellotti* principal opinion indicated that the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, "the desired abortion would be in her best interests." 443 U. S., at 644. We believe that H. B. 319 satisfies the *Bellotti* language as quoted. The statute requires the juvenile court to authorize the minor's consent where the court determines that the abortion is in the minor's best interest and in cases where the minor has shown a pattern of physical, sexual, or emotional abuse. See §2151.85(C)(2).

Third, the *Bellotti* principal opinion indicated that the procedure must insure the minor's anonymity. See 443 U. S., at 644. H. B. 319 satisfies this standard. Section 2151.85 (D) provides that "[t]he [juvenile] court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion." Section 2151.85(F) further states:

> "Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records."

Section 2505.073(B), in a similar fashion, requires the court of appeals to preserve the minor's anonymity and confidentiality of all papers on appeal. The State, in addition, makes it a criminal offense for an employee to disclose documents not designated as public records. See §§ 102.03(B), 102.99(B).

Appellees argue that the complaint forms prescribed by the Ohio Supreme Court will require the minor to disclose her identity. Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places. See App. 6–14 (pleading forms). Appellees would prefer protections similar to those included in the statutes that we reviewed in *Bellotti* and *Ashcroft*. The statute in *Bellotti* protected anonymity by permitting use of a pseudonym, see *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F. 2d 1006, 1025 (CA1 1981), and the statute in *Ashcroft* allowed the minor to sign the petition with her initials, see 462 U. S., at 491, n. 16. Appellees also maintain that the Ohio laws requiring court employees not to disclose public documents are irrelevant because the right to anonymity is broader than the right not to have officials reveal one's identity to the public at large.

Confidentiality differs from anonymity, but we do not believe that the distinction has constitutional significance in the present context. The distinction has not played a part in our previous decisions, and, even if the *Bellotti* principal opinion is taken as setting the standard, we do not find complete anonymity critical. H. B. 319, like the statutes in *Bellotti* and *Ashcroft*, takes reasonable steps to prevent the public from learning of the minor's identity. We refuse to base a decision on the facial validity of a statute on the mere possibility of unauthorized, illegal disclosure by state employees. H. B. 319, like many sophisticated judicial procedures, requires participants to provide identifying information for administrative purposes, not for public disclosure.

Fourth, the *Bellotti* principal opinion indicated that courts must conduct a bypass procedure with expedition to allow the minor an effective opportunity to obtain the abortion. See 443 U. S., at 644. H. B. 319, as noted above, requires the trial court to make its decision within five "business day[s]" after the minor files her complaint, § 2151.85(B)(1); requires the court of appeals to docket an appeal within four "days" after the minor files a notice of appeal, § 2505.073(A); and requires the court of appeals to render a decision within five "days" after docketing the appeal, *ibid.*

The District Court and the Court of Appeals assumed that all of the references to days in §§ 2151.85(B)(1) and 2505.073(A) meant business days as opposed to calendar days. Cf. Ohio Rule App. Proc. 14(A) (excluding nonbusiness days from computations of less than seven days). They calculated, as a result, that the procedure could take up to 22 calendar days because the minor could file at a time during the year in which the 14 business days needed for the bypass procedure would encompass 3 Saturdays, 3 Sundays, and 2 legal holidays. Appellees maintain, on the basis of an affidavit included in the record, that a 3-week delay could increase by a substantial measure both the costs and the medical risks of an abortion. See App. 18. They conclude, as did those

courts, that H. B. 319 does not satisfy the *Bellotti* principal opinion's expedition requirement.

As a preliminary matter, the 22-day calculation conflicts with two well-known rules of construction discussed in our abortion cases and elsewhere. "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." *Ashcroft*, 462 U. S., at 493 (opinion of Powell, J.). Although we recognize that the other federal courts "'are better schooled in and more able to interpret the laws of their respective States'" than are we, *Frisby* v. *Schultz*, 487 U. S. 474, 482 (1988), the Court of Appeals' decision strikes us as dubious. Interpreting the term "days" in § 2505.073(A) to mean business days instead of calendar days seems inappropriate and unnecessary because of the express and contrasting use of "business day[s]" in § 2151.85(B)(1). In addition, because appellees are making a facial challenge to a statute, they must show that "no set of circumstances exists under which the Act would be valid." *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 524 (1989) (O'CONNOR, J., concurring). The Court of Appeals should not have invalidated the Ohio statute on a facial challenge based upon a worst-case analysis that may never occur. Cf. Ohio Rev. Code Ann. § 2505.073(A) (Supp. 1988) (allowing the court of appeals, upon the minor's motion, to shorten or extend the time periods). Moreover, under our precedents, the mere possibility that the procedure may require up to 22 days in a rare case is plainly insufficient to invalidate the statute on its face. *Ashcroft*, for example, upheld a Missouri statute that contained a bypass procedure that could require 17 calendar days plus a sufficient time for deliberation and decisionmaking at both the trial and appellate levels. See 462 U. S., at 477, n. 4, 491, n. 16.

B

Appellees ask us, in effect, to extend the criteria used by some Members of the Court in *Bellotti* and the cases following it by imposing three additional requirements on bypass

procedures. First, they challenge the constructive authorization provisions in H. B. 319, which enable a minor to obtain an abortion without notifying one of her parents if either the juvenile court or the court of appeals fails to act within the prescribed time limits. See Ohio Rev. Code Ann. §§ 2151.85 (B)(1), 2505.073(A), and 2919.12(B)(1)(a)(iv) (1987 and Supp. 1988). They speculate that the absence of an affirmative order when a court fails to process the minor's complaint will deter the physician from acting.

We discern no constitutional defect in the statute. Absent a demonstrated pattern of abuse or defiance, a State may expect that its judges will follow mandated procedural requirements. There is no showing that the time limitations imposed by H. B. 319 will be ignored. With an abundance of caution, and concern for the minor's interests, Ohio added the constructive authorization provisions in H. B. 319 to ensure expedition of the bypass procedures even if these time limits are not met. The State represents that a physician can obtain certified documentation from the juvenile or appellate court that constructive authorization has occurred. Brief for Appellant 36. We did not require a similar safety net in the bypass procedures in *Ashcroft*, *supra*, at 479–480, n. 4, and find no defect in the procedures that Ohio has provided.

Second, appellees ask us to rule that a bypass procedure cannot require a minor to prove maturity or best interests by a standard of clear and convincing evidence. They maintain that, when a State seeks to deprive an individual of liberty interests, it must take upon itself the risk of error. See *Santosky* v. *Kramer*, 455 U. S. 745, 755 (1982). House Bill 319 violates this standard, in their opinion, not only by placing the burden of proof upon the minor, but also by imposing a heightened standard of proof.

This contention lacks merit. A State does not have to bear the burden of proof on the issues of maturity or best interests. The principal opinion in *Bellotti* indicates that a State may require the minor to prove these facts in a bypass

procedure. See 443 U. S., at 643 (opinion of Powell, J.). A State, moreover, may require a heightened standard of proof when, as here, the bypass procedure contemplates an *ex parte* proceeding at which no one opposes the minor's testimony. We find the clear and convincing standard used in H. B. 319 acceptable. The Ohio Supreme Court has stated:

> "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross* v. *Ledford*, 161 Ohio St. 469, 477, 120 N. E. 2d 118, 123 (1954) (emphasis deleted).

Our precedents do not require the State to set a lower standard. Given that the minor is assisted in the courtroom by an attorney as well as a guardian ad litem, this aspect of H. B. 319 is not infirm under the Constitution.

Third, appellees contend that the pleading requirements in H. B. 319 create a trap for the unwary. The minor, under the statutory scheme and the requirements prescribed by the Ohio Supreme Court, must choose among three pleading forms. See Ohio Rev. Code Ann. § 2151.85(C) (Supp. 1988); App. 6–14. The first alleges only maturity and the second alleges only best interests. She may not attempt to prove both maturity and best interests unless she chooses the third form, which alleges both of these facts. Appellees contend that the complications imposed by this scheme deny a minor the opportunity, required by the principal opinion in *Bellotti*, to prove either maturity or best interests or both. See 443 U. S., at 643–644.

Even on the assumption that the pleading scheme could produce some initial confusion because few minors would have counsel when pleading, the simple and straightforward procedure does not deprive the minor of an opportunity to

prove her case. It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status. In addition, we note that the minor does not make a binding election by the initial choice of pleading form. The minor, under H. B. 319, receives appointed counsel after filing the complaint and may move for leave to amend the pleadings. See § 2151.85(B)(2); Ohio Rule Juvenile Proc. 22(B); see also *Hambleton* v. *R. G. Barry Corp.*, 12 Ohio St. 3d 179, 183–184, 465 N. E. 2d 1298, 1302 (1984) (finding a liberal amendment policy in the state civil rules). Regardless of whether Ohio could have written a simpler statute, H. B. 319 survives a facial challenge.

III

Appellees contend our inquiry does not end even if we decide that H. B. 319 conforms to *Danforth*, *Bellotti*, *Matheson*, *Ashcroft*, and *Akron*. They maintain that H. B. 319 gives a minor a state-law substantive right "to avoid unnecessary or hostile parental involvement" if she can demonstrate that her maturity or best interests favor abortion without notifying one of her parents. They argue that H. B. 319 deprives the minor of this right without due process because the pleading requirements, the alleged lack of expedition and anonymity, and the clear and convincing evidence standard make the bypass procedure unfair. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). We find no merit in this argument.

The confidentiality provisions, the expedited procedures, and the pleading form requirements, on their face, satisfy the dictates of minimal due process. We see little risk of erroneous deprivation under these provisions and no need to require additional procedural safeguards. The clear and convincing evidence standard, for reasons we have described, does not place an unconstitutional burden on the types of proof to be presented. The minor is assisted by an attorney and a guardian ad litem and the proceeding is *ex parte*. The

standard ensures that the judge will take special care in deciding whether the minor's consent to an abortion should proceed without parental notification. As a final matter, given that the statute provides definite and reasonable deadlines, Ohio Rev. Code Ann. § 2505.073(A) (Supp. 1988), the constructive authorization provision, § 2151.85(B)(1), also comports with due process on its face.

IV

Appellees, as a final matter, contend that we should invalidate H. B. 319 in its entirety because the statute requires the parental notice to be given by the physician who is to perform the abortion. In *Akron*, the Court found unconstitutional a requirement that the attending physician provide the information and counseling relevant to informed consent. See 462 U. S., at 446–449. Although the Court did not disapprove of informing a woman of the health risks of an abortion, it explained that "[t]he State's interest is in ensuring that the woman's consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Id.*, at 448. Appellees maintain, in a similar fashion, that Ohio has no reason for requiring the minor's physician, rather than some other qualified person, to notify one of the minor's parents.

Appellees, however, have failed to consider our precedent on this matter. We upheld, in *Matheson*, a statute that required a physician to notify the minor's parents. See 450 U. S., at 400. The distinction between notifying a minor's parents and informing a woman of the routine risks of an abortion has ample justification; although counselors may provide information about general risks as in *Akron*, appellees do not contest the superior ability of a physician to garner and use information supplied by a minor's parents upon receiving notice. We continue to believe that a State may require the physician himself or herself to take reasonable

steps to notify a minor's parent because the parent often will provide important medical data to the physician. As we explained in *Matheson:*

> "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data." 450 U. S., at 411 (footnote omitted).

The conversation with the physician, in addition, may enable a parent to provide better advice to the minor. The parent who must respond to an event with complex philosophical and emotional dimensions is given some access to an experienced and, in an ideal case, detached physician who can assist the parent in approaching the problem in a mature and balanced way. This access may benefit both the parent and child in a manner not possible through notice by less qualified persons.

Any imposition on a physician's schedule, by requiring him or her to give notice when the minor does not have consent from one of her parents or court authorization, must be evaluated in light of the complete statutory scheme. The statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort," Ohio Rev. Code Ann. § 2919.12(B)(2) (1987), and also allows him or her to forgo notice in the event of certain emergencies, see § 2919.12(C)(2). These provisions are an adequate recognition of the physician's professional status. On this facial challenge, we find the physician notification requirement unobjectionable.

V

The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an

abortion. We believe, in addition, that the legislature acted in a rational manner in enacting H. B. 319. A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society's most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statute in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent. We uphold H. B. 319 on its face and reverse the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the opinion of the Court, because I agree that the Ohio statute neither deprives minors of procedural due process nor contradicts our holdings regarding the constitutional right to abortion. I continue to believe, however, as I said in my separate concurrence last Term in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), that the Constitution contains no right to abortion. It is not to be found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution—not, that is, without volunteering a judicial answer to the nonjusticiable question of when human life begins. Leaving this matter to the political process is not only legally correct, it is pragmatically so. That alone—and not lawyerly dissection of federal judi-

cial precedents—can produce compromises satisfying a sufficient mass of the electorate that this deeply felt issue will cease distorting the remainder of our democratic process. The Court should end its disruptive intrusion into this field as soon as possible.

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

As the Court emphasizes, appellees have challenged the Ohio statute only on its face. The State may presume that, in most of its applications, the statute will reasonably further its legitimate interest in protecting the welfare of its minor citizens. See *H. L.* v. *Matheson*, 450 U. S. 398, 422–423 (1981) (STEVENS, J., concurring in judgment). In some of its applications, however, the one-parent notice requirement will not reasonably further that interest. There will be exceptional situations in which notice will cause a realistic risk of physical harm to the pregnant woman, will cause trauma to an ill parent, or will enable the parent to prevent the abortion for reasons that are unrelated to the best interests of the minor. The Ohio statute recognizes that possibility by providing a judicial bypass. The question in this case is whether that statutory protection for the exceptional case is so obviously inadequate that the entire statute should be invalidated. I am not willing to reach that conclusion before the statute has been implemented and the significance of its restrictions evaluated in the light of its administration. I therefore agree that the Court of Appeals' judgment must be reversed, and I join Parts I–IV of the Court's opinion.[1]

[1] It is perhaps trite for a judge to reiterate the familiar proposition that an opinion about the facial constitutionality of a statute says nothing about the judge's views concerning the wisdom or unwisdom of the measure. I have made this observation before, see *National League of Cities* v. *Usery*, 426 U. S. 833, 881 (1976) (dissenting opinion), and am moved by JUSTICE BLACKMUN's eloquent dissent to do so again. It would indeed be difficult to contend that each of the challenged provisions of the Ohio statute—or the entire mosaic—represents wise legislation.

The Court correctly states that we have not decided the specific question whether a judicial bypass procedure is necessary in order to save the constitutionality of a one-parent notice statute. See *ante*, at 510. We have, however, squarely held that a requirement of preabortion parental notice in all cases involving pregnant minors is unconstitutional. Although it need not take the form of a judicial bypass, the State must provide an adequate mechanism for cases in which the minor is mature or notice would not be in her best interests.

In *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), the city argued that the constitutionality of its ordinance requiring parental consent was saved by the minor's opportunity to invoke the State's juvenile court procedures. We held the same day in *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 493 (1983) (opinion of Powell, J.), that a similar provision which did not require parental notification avoided any constitutional infirmities in such a statute. We rejected the argument in *Akron*, however, because the procedures in that case required that the parent be given notice when the minor's petition was filed. Writing for six Justices, including the author of the Court's opinion in *H. L.* v. *Matheson*, *supra*, Justice Powell explained:

> "Even assuming that the Ohio courts would construe these provisions as permitting a minor to obtain judicial approval for the 'proper or necessary . . . medical or surgical care' of an abortion, where her parents had refused to provide that care, the statute makes no provision for a mature or emancipated minor completely to avoid hostile parental involvement by demonstrating to the satisfaction of the court that she is capable of exercising her constitutional right to choose an abortion. On the contrary, the statute requires that the minor's parents be notified once a petition has been filed, [Ohio Rev. Code Ann.] § 2151.28 [(Supp. 1982)], a requirement that in the case

> of a mature minor seeking an abortion would be unconstitutional. See *H. L.* v. *Matheson*, 450 U. S., at 420 (POWELL, J., concurring); *id.*, at 428, n. 3 (MARSHALL, J., dissenting)." 462 U. S., at 441, n. 31.

Thus, while a judicial bypass may not be necessary to take care of the cases in which the minor is mature or parental notice would not be in her best interests—and, indeed, may not be the preferable mechanism—the Court has held that some provision must be made for such cases.

The Ohio statute, on its face, provides a sufficient procedure for those cases. The pleading requirements and the constructive authorization and confidentiality provisions of the Act satisfy the standards established in *Ashcroft*, *supra*, for a judicial bypass. As the Court states, the minor is not bound by her initial choice of pleading form, *ante*, at 517, the constructive authorization provision functions as an additional "safety net" when the statutory deadlines are not met, *ante*, at 515, and the State has taken reasonable steps to ensure confidentiality, *ante*, at 512–513. The requirement that the minor prove maturity or best interests by clear and convincing evidence is supported by the presumption that notification to a parent will in most circumstances be in the minor's best interests: It is not unreasonable to require the minor, *when assisted by counsel and a guardian ad litem*, *ante*, at 517–518, to overcome that presumption by clear and convincing evidence. Cf. *Parham* v. *J. R.*, 442 U. S. 584, 610 (1979) ("[P]resumption that parents act in the best interests of their child" is relevant in determining what process is due in commitment proceeding).[2] I have more concern

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[2] The standard of proof for the minor's abortion decision is no more onerous than that for any medical procedure of which the parents may disapprove. Under Ohio law, a determination that a child is neglected or dependent, which is necessary before a court or guardian ad litem may authorize proper or necessary medical or surgical care, must be made by clear and convincing evidence. See Ohio Rev. Code Ann. § 2151.35 (Supp. 1988); see also *In re Willmann*, 24 Ohio App. 3d 191, 198–199, 493 N. E. 2d

about the possible delay in the bypass procedure, but the statute permits the Ohio courts to expedite the procedure upon a showing of good cause, see *ante*, at 515 (citing Ohio Rev. Code Ann. § 2505.073(A) (Supp. 1988)), and sensitive administration of the deadlines may demonstrate that my concern is unwarranted.

There is some tension between the statutory requirement that the treating physician notify the minor's parent and our decision in *Akron*, 462 U. S., at 446–449, that a State may not require the attending physician to personally counsel an abortion patient. One cannot overlook the possibility that this provision was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see *Maher* v. *Roe*, 432 U. S. 464, 474 (1977), than by a genuine interest in fostering informed decisionmaking. I agree with the Court, however, that the Ohio statute requires only that the physician take "reasonable steps" to notify a minor's parent and that such notification may contribute to the decisionmaking process. *Ante*, at 518–519. Accordingly, I am unable to conclude that this provision is unconstitutional on its face.

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

I

The constitutional right to "control the quintessentially intimate, personal, and life-directing decision whether to carry a fetus to term," *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 538 (1989) (opinion concurring in part and dissenting in part), does "not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of*

1380, 1389 (1986); *In re Bibb*, 70 Ohio App. 2d 117, 120, 435 N. E. 2d 96, 99 (1980).

Central Mo. v. *Danforth*, 428 U. S. 52, 74 (1976); *Hodgson* v. *Minnesota*, *ante*, at 435 ("[T]he constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women"). Although the Court "has recognized that the State has somewhat broader authority to regulate the activities of children than of adults," in doing so, the State nevertheless must demonstrate that there is a "*significant state interest* in conditioning an abortion . . . that is not present in the case of an adult." *Danforth*, 428 U. S., at 74–75 (emphasis added). "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.*, at 75.

"The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with *particular sensitivity* when it legislates to foster parental involvement in this matter." *Bellotti* v. *Baird*, 443 U. S. 622, 642 (1979) (opinion of Powell, J.) (emphasis added) *(Bellotti II)*. "[P]articular sensitivity" is mandated because "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Ibid.* It should be obvious that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor." *Ibid.*

The State of Ohio has acted with particular *in*sensitivity in enacting the statute the Court today upholds. Rather than create a judicial-bypass system that reflects the sensitivity necessary when dealing with a minor making this deeply intimate decision, Ohio has created a tortuous maze. Moreover, the State has failed utterly to show that it has any significant

state interest in deliberately placing its pattern of obstacles in the path of the pregnant minor seeking to exercise her constitutional right to terminate a pregnancy. The challenged provisions of the Ohio statute are merely "poorly disguised elements of discouragement for the abortion decision." *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 763 (1986).

II

The majority does not decide whether the Ohio parental-notice statute must contain a judicial-bypass procedure because the majority concludes that the bypass procedure in the statute "meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*." *Ante*, at 510. I conclude, however, that, because of the minor's emotional vulnerability and financial dependency on her parents, and because of the "unique nature of the abortion decision," *Bellotti II*, 443 U. S., at 642, and its consequences, a parental-notice statute is tantamount to a parental-consent statute. As a practical matter, a notification requirement will have the same deterrent effect on a pregnant minor seeking to exercise her constitutional right as does a consent statute. See *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 441, n. 31 (1983); *H. L.* v. *Matheson*, 450 U. S. 398, 420, n. 9 (1981) (concurring opinion). Thus a notice statute, like a consent statute, must contain a bypass procedure that comports with the standards set forth in *Bellotti II*. Because I disagree with the Court's conclusion that the Ohio bypass procedure complies with the dictates of *Bellotti II* and its progeny, I would strike down Ohio Amended Substitute House Bill 319.

The *Bellotti II* principal opinion stated: "A pregnant minor is entitled in such a [judicial-bypass] proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2)

that even if she is not able to make this decision independently, the desired abortion would be in her best interests." 443 U. S., at 643–644 (opinion of Powell, J.) (footnote omitted). The language of the Ohio statute purports to follow the standards for a bypass procedure that are set forth in *Bellotti II*, but at each stage along the way, the statute deliberately places "substantial state-created obstacles in the pregnant [minor's] path to an abortion," *Maher* v. *Roe*, 432 U. S. 464, 477, n. 10 (1977), in the legislative hope that she will stumble, perhaps fall, and at least ensuring that she "conquer a multi-faceted obstacle course" before she is able to exercise her constitutional right to an abortion. Dellinger & Sperling, Abortion and the Supreme Court: Retreat from *Roe v. Wade*, 138 U. Pa. L. Rev. 83, 100 (1989). The majority considers each provision in a piecemeal fashion, never acknowledging or assessing the "degree of burden that the entire regime of abortion regulations places" on the minor. *Ibid.*

A

The obstacle course begins when the minor first enters the courthouse to fill out the complaint forms. The "'procedural trap,'" as it appropriately was described by the Court of Appeals, *Akron Center for Reproductive Health* v. *Slaby*, 854 F. 2d 852, 863 (CA6 1988), requires the minor to choose among three forms. The first alleges *only* maturity; the second alleges *only* that the abortion is in her best interest. App. 6–11. Only if the minor chooses the third form, which alleges both, *id.*, at 12–13, may the minor attempt to prove both maturity *and* best interest as is her right under *Bellotti II*. See Ohio Rev. Code Ann. § 2151.85(C)(3) (Supp. 1988). The majority makes light of what it acknowledges might be "some initial confusion" of the unsophisticated minor who is trying to deal with an unfamiliar and mystifying court system on an intensely intimate matter. *Ante*, at 516–517. The Court points out that the minor, with counsel appointed after she filed the complaint, "may move for leave to amend the

pleadings" and avers that it "seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care." *Ante*, at 517. I would take the Ohio Legislature's word, however, that its pleading requirement was intended to be meaningful. The constitutionality of a procedural provision cannot be analyzed on the basis that it may have no effect. If the pleading requirement prevents some minors from showing either that they are mature or that an abortion would be in their best interests, it plainly is unconstitutional.

The majority fails to elucidate *any* state interest in setting up this barricade for the young pregnant woman—a barricade that will "serve only to confuse . . . her and to heighten her anxiety." *Thornburgh*, 476 U. S., at 762. The justification the State put forward before the Court of Appeals was the "absurd contention that '[a]ny minor claiming to be mature and well enough informed to independently make such an important decision as an abortion should also be mature enough to file her complaint under [the appropriate subsection].'" See 854 F. 2d, at 863, quoting Brief for State of Ohio in No. 86–3664, (CA6), p. 43. This proffered "justification" is even more harsh than the Court of Appeals noted. It excludes the mature minor who may not have the intellectual capacity to understand these tangled forms, and it spurns the immature minor who is abused or who contends for some other reason that an abortion without parental involvement would be in her best interest. Surely, the goal of the court proceeding is to assist, not to entrap, the young pregnant woman.

The State's interest in "streamlining" the claims, belatedly asserted for the first time before this Court, is no less absurd. It is ludicrous to confound the pregnant minor, forced to go to court at this time of crisis in her life, with alternative complaint forms that must later be rescinded by appointed counsel and replaced by the only form that is constitutionally valid. Moreover, this ridiculous pleading scheme leaves to the judge's discretion whether the minor may amend her

pleading and attempt to prove both her maturity and best interest. To allow the resolution of this vital issue to turn on a judge's discretion does not comport with *Bellotti II*'s declaration that the minor who "fails to satisfy the court that she is competent to make this decision independently . . . *must* be permitted to show that an abortion nevertheless would be in her best interests." 443 U. S., at 647–648 (opinion of Powell, J.) (emphasis added).

B

As the pregnant minor attempts to find her way through the labyrinth set up by the State of Ohio, she encounters yet another obstruction even before she has completed the complaint form. In *Bellotti II*, the principal opinion insisted that the judicial-bypass procedure "must assure that a resolution of the issue, and any appeals that may follow, will be completed with *anonymity* . . . ." *Id.*, at 644 (emphasis added). That statement was not some idle procedural requirement, but stems from the proposition that the Due Process Clause protects the woman's right to make her decision "independently and privately." *Hodgson*, *ante*, at 434. The zone of privacy long has been held to encompass an "individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977). The Ohio statute does not safeguard that right. Far from keeping the identity of the minor anonymous, the statute requires the minor to sign her full name and the name of one of her parents on the complaint form. See App. 6–14 (pleading forms). See *ante*, at 512 ("Unless the minor has counsel, she must sign a complaint form to initiate the bypass procedure and, even if she has counsel, she must supply the name of one of her parents at four different places"). Acknowledging that "[c]onfidentiality differs from anonymity," the majority simply asserts that "complete anonymity" is not "critical." *Ante*, at 513. That easy conclusion is irreconcilable with *Bellotti*'s anonymity requirement. The definition of "anonymous" is "not named or identified."

Webster's Ninth New Collegiate Dictionary 88 (1983). Complete anonymity, then, appears to be the only kind of anonymity that a person could possibly have. The majority admits that case law regarding the anonymity requirement has permitted no less. See *ante*, at 512, citing *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F. 2d 1006, 1025 (CA1 1981) (pseudonym); *Planned Parenthood Assn. of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476, 491, n. 16 (1983) (initials). See also *Thornburgh*, 476 U. S., at 766 ("[T]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity").

The majority points to Ohio laws requiring court employees not to disclose public documents, blithely assuming that the "mere possibility of unauthorized, illegal disclosure by state employees" is insufficient to establish that the confidentiality of the proceeding is not protected. *Ante*, at 513. In fact, the provisions regarding the duty of court employees not to disclose public documents amount to no more than "generally stated principles of . . . confidentiality." *American College of Obstetricians and Gynecologists* v. *Thornburgh*, 737 F. 2d 283, 297 (CA3 1984), aff'd on other grounds, 476 U. S. 747 (1986). As the District Court pointed out, there are no indications of how a clerk's office, large or small, is to ensure that the records of abortion cases will be distinguished from the records of all other cases that are available to the public. *Akron Center for Reproductive Health* v. *Rosen*, 633 F. Supp. 1123, 1143–1144 (ND Ohio 1986). Cf. *Planned Parenthood League of Massachusetts* v. *Bellotti*, 641 F. 2d, at 1025 (minor proceeds under pseudonym and affidavit containing her identity is kept in separate, sealed file). Nor are there measures for sealing the record after the case is closed to prevent its public availability; *Planned Parenthood Assn. of the Atlanta Area, Inc.* v. *Harris*, 670 F. Supp. 971, 991 (ND Ga. 1987) (noting with disapproval that Georgia statute made no provision for court documents to be sealed).

This Court is well aware that, unless special care is taken, court documents of an intimate nature will find their way to the press and public. See *The Florida Star* v. *B. J. F.*, 491 U. S. 524 (1989) (reporter in police room copied police report and published article with rape victim's full name). The State has offered no justification for its failure to provide specific guidelines to be followed by the juvenile court to ensure anonymity for the pregnant minor—even though it has in place a procedure to assure the anonymity of juveniles who have been adjudicated delinquent or unruly. See Ohio Rev. Code Ann. §2151.358 (1976) (detailed provision for sealing record and for expungement of record).

"A woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly." *Thornburgh*, 476 U. S., at 766. A minor, whose very purpose in going through a judicial-bypass proceeding is to avoid notifying a hostile or abusive parent, would be most alarmed at signing her name and the name of her parent on the complaint form. Generalized statements concerning the confidentiality of records would be of small comfort, even if she were aware of them. True anonymity is essential to an effective, meaningful bypass. In the face of the forms that the minor must actually deal with, the State's assurances that the minor's privacy will be protected ring very hollow. I would not permit the State of Ohio to force a minor to forgo her anonymity in order to obtain a waiver of the parental-notification requirement.

C

Because a "pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy," this Court has required that the State "must assure" that the "resolution of the issue, and any appeals that may follow, will be completed with . . . sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti II*, 443

U. S., at 642, 644 (opinion of Powell, J.); see also *H. L.* v. *Matheson*, 450 U. S., at 412 (time is of the essence in an abortion decision). Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy. I would join the Sixth Circuit, the District Court, and the other federal courts that have held that a time span of this length fails to guarantee a sufficiently expedited procedure. See 854 F. 2d, at 868; 633 F. Supp., at 1143. See also, *e. g.*, *American College of Obstetricians and Gynecologists* v. *Thornburgh*, 656 F. Supp. 879, 887–888 (ED Pa. 1987) (statutory scheme allowing 23 days for judicial proceeding is unconstitutional); *Glick* v. *McKay*, 616 F. Supp. 322, 326–327 (Nev. 1985).

The majority is unconcerned that "the procedure may require up to 22 days in a rare case." *Ante*, at 514. I doubt the "rarity" of such cases. In any event, the Court of Appeals appropriately pointed out that, because a minor often does not learn of her pregnancy until a late stage in the first trimester, time lost during that trimester is especially critical. 854 F. 2d, at 867–868. The Court ignores the fact that the medical risks surrounding abortion increase as pregnancy advances and that such delay may push a woman into her second trimester, where the medical risks, economic costs, and state regulation increase dramatically. See *Roe* v. *Wade*, 410 U. S. 113, 150, 163 (1973); *H. L.* v. *Matheson*, 450 U. S., at 439, and n. 25 (dissenting opinion). Minors, who are more likely to seek later abortions than adult women,[1] and who usually are not financially independent, will suffer acutely from any delay. See *Ashcroft*, 462 U. S., at 497–498 (opinion concurring in part and dissenting in part) (an increased cost factor "may seem insignificant from the Court's comfortable perspective," but is not "equally insignificant" to "the unemployed teenager" for whom this additional cost may well put an abortion beyond reach). Because a delay of up to 22

[1] Indeed, the threat of parental notice itself may cause a minor to delay requesting assistance with her pregnancy. See *H. L.* v. *Matheson*, 450 U. S. 398, 439, and n. 25 (1981) (dissenting opinion).

days may limit significantly a woman's ability to obtain an abortion, I agree with the conclusions of the District Court and the Court of Appeals that the statute violates this Court's command that a judicial-bypass proceeding be conducted with sufficient speed to maintain "an effective opportunity for an abortion to be obtained." *Bellotti II*, 443 U. S., at 644 (opinion of Powell, J.).[2]

D

The Ohio statute provides that if the juvenile or appellate courts fail to act within the statutory time frame, an abortion without parental notification is "constructively" authorized. Although Ohio's Legislature may have intended this provision to expedite the bypass procedure, the confusion that will result from the constructive-authorization provision will add further delay to the judicial-bypass proceeding, and is yet one more obstruction in the path of the pregnant minor. The physician risks civil damages, criminal penalties, including imprisonment, as well as revocation of his license for disobeying the statute's commands, but the statute provides for no formal court order or other relief to safeguard the physician from these penalties. See §§ 2151.85(B)(1), 2919.12(D), 2919.12(E), 4731.22(B)(23). The State argues that a combination of a date-stamped copy of the minor's complaint and

[2] The majority finds comfort in *Planned Parenthood of Kansas City, Mo., Inc.* v. *Ashcroft*, 462 U. S. 476 (1983), and insists that this Court upheld a Missouri statute that contained a bypass procedure "that could require 17 calendar days plus a sufficient time for deliberation and decision-making at both the trial and appellate levels." *Ante*, at 514. The majority disregards the limited nature of the *Ashcroft* holding. The Court there looked only at the Missouri appellate procedure and determined that the 24-hour deadline for docketing the appeal and the 5-day deadline for completing the record and perfecting the appeal, together with the requirement that the Missouri Supreme Court provide for expedited appeal by court rule, provided a constitutionally sufficient "framework" for complying with *Bellotti*'s mandate for expedited appeals. See 462 U. S., at 491, n. 16. The Court made no ruling as to whether the Missouri law provided constitutionally sufficient expedition at the initial stages of the bypass.

a "docket sheet showing no entry" would inform the physician that the abortion could proceed. Brief for Appellant 36. Yet, the mere absence of an entry on a court's docket sheet hardly would be reassuring to a physician facing such dire consequences, and the State offers no reason why a formal order or some kind of actual notification from the clerk of court would not be possible. There is no doubt that the nebulous authorization envisioned by this statute "in conjunction with a statute imposing strict civil and criminal liability . . . could have a profound chilling effect on the willingness of physicians to perform abortions . . . ." *Colautti* v. *Franklin*, 439 U. S. 379, 396 (1979). I agree with the Court of Appeals that the "practical effect" of the "'pocket approval'" provision is to frustrate the minor's right to an expedient disposition of her petition. 854 F. 2d, at 868.

E

If the minor is able to wend her way through the intricate course of preliminaries Ohio has set up for her and at last reaches the court proceeding, the State shackles her even more tightly with still another "extra layer and burden of regulation on the abortion decision." *Danforth*, 428 U. S., at 66. The minor must demonstrate by "clear and convincing evidence" either (1) her maturity; (2) or that one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her; or (3) that notice to a parent is not in her best interest. § 2151.85(C). The imposition of this heightened standard of proof unduly burdens the minor's right to seek an abortion and demonstrates a fundamental misunderstanding of the real nature of a court-bypass proceeding.

The function of a standard of proof is to "'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions,'" *Addington* v. *Texas*, 441 U. S. 418, 423 (1979), quoting *In re Winship*, 397 U. S. 358, 370 (1970) (concurring opinion), and is "a societal judgment about how the risk of error

should be distributed between the litigants." *Santosky* v. *Kramer*, 455 U. S. 745, 755 (1982). By imposing such a stringent standard of proof, this Ohio statute improperly places the risk of an erroneous decision on the minor, the very person whose fundamental right is at stake. Cf. *id.*, at 756 (clear and convincing standard of proof usually has been employed to preserve fundamental fairness in a variety of *government-initiated* proceedings that threaten to deprive the *individual* involved with a significant deprivation of liberty). Even if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a "clear and convincing" standard of proof.

The majority asserts that a State may require a heightened standard of proof because the procedure is *ex parte*. *Ante*, at 516. According to the majority, the only alternative to the "clear and convincing" standard is a preponderance of the evidence standard, which would require proof by the greater weight of the evidence. The majority reasons that the preponderance standard is unsuited to a *Bellotti II* bypass because, if the minor presents any evidence at all, and no evidence is put forth in opposition, the minor always will present the greater weight of the evidence. Yet, as the State explained at argument, the bypass procedure is inquisitorial in nature, where the judge questions the minor to discover if she meets the requirements set down in *Bellotti II*. See Tr. of Oral Arg. 9. The judge will be making this determination after a hearing that resembles an interview, not an evidentiary proceeding.[3] The District Court observed, "the

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[3] *Bellotti* v. *Baird*, 443 U. S. 622 (1979), itself recognized the unique nature of the bypass procedure when it required the minor merely to show or satisfy the court that she is mature or that an abortion would be in her best interests, without imposing any standard of proof. See also *id.*, at 643, n. 22 (opinion of Powell, J.) ("Much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction").

judge's decision will necessarily be based largely on subjective standards without the benefit of any evidence other then a woman's testimony." 633 F. Supp., at 1137. Thus, unlike the procedure the majority seems to envision, it is not the quantity of the evidence presented that is crucial in the bypass proceeding; rather, the crucial factors are the nature of the minor's statements to the judge and her demeanor. Contrary to the majority's theory, if the minor presents evidence that she is mature, she still must *satisfy* the judge that this is so, even without this heightened standard of proof. The use of a heightened standard in the very special context of *Bellotti*'s court-bypass procedure does little to facilitate a fair and reliable result and imports an element from the adversarial process into this unique inquiry where it has no rightful place.

Although I think the provision is constitutionally infirm for all minors, I am particularly concerned about the effect it will have on sexually or physically abused minors. I agree that parental interest in the welfare of their children is "particularly strong where a *normal* family relationship exists." *Bellotti II*, 443 U. S., at 648 (opinion of Powell, J.) (emphasis added). A minor needs no statute to seek the support of loving parents. Where trust and confidence exist within the family structure, it is likely that communication already exists.[4] If that compassionate support is lacking, an unwanted pregnancy is a poor way to generate it.

Sadly, not all children in our country are fortunate enough to be members of loving families. For too many young pregnant women, parental involvement in this most intimate deci-

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[4] It has been said that the majority of all minors voluntarily tell their parents about their pregnancy. The overwhelming majority of those under 16 years of age do so. See Torres, Forrest, & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Family Planning Perspectives 284, 287–288, 291 (1980).

sion threatens harm, rather than promises comfort.[5] The Court's selective blindness to this stark social reality is bewildering and distressing. Lacking the protection that young people typically find in their intimate family associations, these minors are desperately in need of constitutional protection. The sexually or physically abused minor may indeed be "lonely or even terrified," *ante*, at 520, not of the abortion procedure, but of an abusive family member.[6] The Court's placid reference, *ibid.*, to the "compassionate and mature" advice the minor will receive from within the family must seem an unbelievable and cruel irony to those children trapped in violent families.[7]

Under the system Ohio has set up, a sexually abused minor must go to court and demonstrate to a complete stranger by clear and convincing evidence that she has been the victim of a pattern of sexual abuse. When asked at argument what kind of evidence a minor would be required to adduce at her bypass hearing, the State answered that the minor would tell her side to the judge and the judge would consider how well

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[5] In 1986, more than 1 million children and adolescents suffered harm from parental abuse or neglect, including sexual abuse. See Brief for American Psychological Association et al. as *Amici Curiae* 9–10, and sources cited therein. This figure is considered to be a minimum estimate because the incidence of abuse is substantially underreported. Pregnancy does not deter, and may even precipitate, physical attacks on women. *Ibid.*

[6] "[P]regnant minors may attempt to self-abort or to obtain an illegal abortion rather than risk parental notification." *H. L.* v. *Matheson*, 450 U. S., at 439, and n. 26 (dissenting opinion).

[7] The majority and the State of Ohio piously fail to mention what happens to these unwanted babies, born to mothers who are little more than children themselves, who have little opportunity, education, or life skills. Too often, the unwanted child becomes trapped in a cycle of poverty, despair, and violence. This Court, by experience, knows all too well that the States are unable adequately to supervise and protect these vulnerable citizens. See *Baltimore City Dept. of Social Services* v. *Bouknight*, 493 U. S. 549 (1990); *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189 (1989).

"the minor is able to articulate what her particular concerns are." Tr. of Oral Arg. 9. The court procedure alone, in many cases, is extremely traumatic. See *Hodgson*, *ante*, at 441, and n. 29. The State and the Court are impervious to the additional burden imposed on the abused minor who, as any experienced social worker or counselor knows, is often afraid and ashamed to reveal what has happened to her to anyone outside the home. The Ohio statute forces that minor, despite her very real fears, to experience yet one more hardship. She must attempt, in public, and before strangers, to "articulate what her particular concerns are" with sufficient clarity to meet the State's "clear and convincing evidence" standard. The upshot is that for the abused minor the risk of error entails a risk of violence.

I would affirm the judgments below on the grounds of the several constitutional defects identified by the District Court and the Court of Appeals. The pleading requirements, the so-called and fragile guarantee of anonymity, the insufficiency of the expedited procedures, the constructive-authorization provision, and the "clear and convincing evidence" requirement singly and collectively cross the limit of constitutional acceptance.

III

Even if the Ohio statute complied with the *Bellotti II* requirements for a constitutional court bypass, I would conclude that the Ohio procedure is unconstitutional because it requires the physician's personal and nondelegable obligation to give the required statutory notice. Particularly when viewed in context with the other impediments this statute places in the minor's path, there is more than a "possibility" that the physician-notification provision "was motivated more by a legislative interest in placing obstacles in the woman's path to an abortion, see *Maher* v. *Roe*, 432 U. S. 464, 474 (1977), than by a genuine interest in fostering informed decisionmaking." *Ante*, at 524 (STEVENS, J., concurring in judgment). Most telling in this regard is the fact that, according

to the Court of Appeals and the District Court, the State has never claimed that personal notice by the physician was required to effectuate an interest in the minor's health until the matter reached this Court. In fact, the State has taken three different positions as to its justification for this provision. See 854 F. 2d, at 862 ("[T]he state's interest is in insuring that immature, unemancipated minors or minors whose best interests require notification have an adequate opportunity for parental intervention. The state has made no showing that this interest is advanced by requiring the attending physician, as opposed to another qualified, responsible person, to effectuate notification"); 633 F. Supp., at 1135 ("[T]he state's attempt to characterize this duty as 'merely ministerial' does not advance its case at all, but rather suggests that its interest in having the physician perform this function is even less weighty than having him or her perform counseling to obtain informed consent [that was struck down in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983)]." If these chimerical health concerns now asserted in fact were the true motivation behind this provision, I seriously doubt that the State would have taken so long to say so.

Even if the State's interest in the health of the minor were the motivation behind the provision, the State never explains why it is that a physician interested in obtaining information, or a parent interested in providing information to a physician, cannot do so following the actual notification by some other competent professional, such as a nurse or counselor. And the State and the majority never explain why, if the physician's ability to garner information from the parents is of such paramount importance that only the physician may notify the parent, the statute allows the physician to send notice by mail if he or she cannot reach the minor's parent "after a reasonable effort." § 2919.12(B)(2).

The State's asserted interest in the minor's health care is especially ironic in light of the statute's interference with her

physician's experienced professional judgment.[8] "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment," *Doe* v. *Bolton*, 410 U. S. 179, 199 (1973), and he should be permitted to exercise that judgment as to whether he or another professional should be the person who will notify a minor's parents of her decision to terminate her pregnancy. I have no doubt that the attending physician, better than the Ohio Legislature, will know when a consultation with the parent is necessary. "If he fails in this, professional censure and deprivation of his license are available remedies" already in place. *Ibid.* The strictures of this Ohio law not only unduly burden the minor's right to an abortion, but impinge on the physician's professional discretion in the practice of medicine.[9]

IV

The Ohio Legislature, in its wisdom, in 1985 enacted its antiabortion statute. That statute, when subjected to facial challenge, has been held unconstitutional by the United States District Court for the Northern District of Ohio and by the Court of Appeals for the Sixth Circuit. It is now, however, upheld on that challenge by a majority of this Court. The majority opinion takes up each challenged provi-

[8] In light of its asserted interest, I find it odd that Ohio allows minors to consent to treatment for sexually transmitted diseases, Ohio Rev. Code Ann. § 3709.241 (1988), and drug and alcohol abuse, § 3719.012(A). In each of these sensitive areas of health care, the State apparently trusts the physician to use his informed medical judgment as to whether he should question or inform the parent about the minor's medical and psychological condition.

[9] The majority's reliance on *H. L.* v. *Matheson* is misplaced. In that case, unlike this one, the Utah Supreme Court had limited the steps that a physician would have to take to notify the minor's parents. See 450 U. S., at 405. In contrast, in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), the Court pointed out that the "critical factor is whether she obtains the necessary information and counseling from a *qualified person*, not the identity of the person from whom she obtains it." *Id.*, at 448 (emphasis added).

sion in turn; concludes, with brief comment, that it is within the bounds of the principal opinion in *Bellotti II;* and moves on routinely and in the same fashion to the succeeding provisions, one by one. A plurality then concludes, in Part V of the primary opinion, with hyperbole that can have but one result: to further incite an American press, public, and pulpit already inflamed by the pronouncement made by a plurality of this Court last Term in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989). The plurality indulges in paternalistic comments about "profound philosophic choices"; the "[woman's] own destiny and personal dignity"; the "origins of the other human life that lie within the embryo"; the family as "society's most intimate association"; the striving of the family to give to the minor "advice that is both compassionate and mature"; and the desired assumption that "in most cases" the woman will receive "guidance and understanding from a parent." *Ante*, at 520.

Some of this may be so "in most cases" and, it is to be hoped, in judges' own and other warm and protected, nurturing family environments. But those "most cases" need not rely on constitutional protections that are so vital for others. I have cautioned before that there is "another world 'out there'" that the Court "either chooses to ignore or fears to recognize." *Beal* v. *Doe*, 432 U. S. 438, 463 (1977). It is the unfortunate denizens of that world, often frightened and forlorn, lacking the comfort of loving parental guidance and mature advice, who most need the constitutional protection that the Ohio Legislature set out to make as difficult as possible to obtain.

That that legislature set forth with just such a goal is evident from the statute it spawned. The underlying nature of the Ohio statute is proclaimed by its strident and offensively restrictive provisions. It is as though the legislature said: "If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain" because, basically, whether on pro-

fessed moral or religious grounds or whatever, "we believe that is the way it must be." This often may be the way legislation is enacted, but few are the instances where the injustice is so evident and the impediments so gross as those inflicted by the Ohio Legislature on these vulnerable and powerless young women.

ALVARADO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 89-6985. Decided June 25, 1990

Petitioner Alvarado claimed at his criminal trial that the Government used peremptory challenges to remove black jurors solely because of race, contrary to *Batson* v. *Kentucky*, 476 U. S. 79. The District Court accepted the Government's explanations for its challenges, and Alvarado was convicted. In affirming the conviction, the Court of Appeals did not rule on Alvarado's argument that the Government's explanations were pretextual or the Government's arguments that he had not made out a prima facie *Batson* error and that it had race-neutral reasons for the challenges. The court held instead that no appellate inquiry was required into the merits of a *Batson* claim if the jury finally chosen represented a fair cross section of the community.

Held: The case is remanded for the Court of Appeals to pass on the adequacy of the Government's reasons for exercising its peremptory challenges. The Government agrees that the Court of Appeals' judgment rests on an improvident ground. Thus, it is appropriate for this Court to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court. See, *e. g.*, *Biddle* v. *United States*, 484 U. S. 1054. This result is not unusual even when, as here, the Government has suggested that there is another ground on which the decision below could be affirmed if the case were brought in this Court.

Certiorari granted; 891 F. 2d 439, vacated and remanded.

PER CURIAM.

At his criminal trial, petitioner claimed that the Government used certain peremptory challenges to remove black jurors solely on the grounds of race, contrary to *Batson* v. *Kentucky*, 476 U. S. 79 (1986). The District Court accepted the Government's explanations for its challenges, and petitioner was convicted. He pursued his *Batson* claim in the Court of Appeals, claiming that the Government's explanations were pretextual. The Government asserted that petitioner had

not made out a prima facie *Batson* error and that it had race-neutral reasons for each challenge. The Court of Appeals did not rule on these competing claims, for it held that no appellate inquiry was required into the merits of a *Batson* claim if the jury finally chosen represented a fair cross section of the community, as did this jury. The conviction was affirmed.

Petitioner, seeking certiorari, urges that the Court of Appeals relied on an erroneous ground in rejecting the *Batson* claim. The United States agrees that the Court of Appeals erred in holding that as long as the petit jury chosen satisfied the Sixth Amendment's fair-cross-section concept, it need not inquire into the claim that the prosecution had stricken jurors on purely racial grounds. That holding, the Government states, is contrary to *Batson* and is also discredited by our decision in *Holland* v. *Illinois*, 493 U. S. 474 (1990), which held that the fair-cross-section requirement of the Sixth Amendment did not apply to the petit jury and which was handed down after the Court of Appeals issued its opinion below. The Government urges us to deny certiorari, however, because petitioner failed to make out a prima facie case of intentional discrimination and because the reasons given for the challenges were race-neutral grounds for decision that the Court of Appeals did not reach.

When the Government has suggested that an error has been made by the court below, it is not unusual for us to grant certiorari, vacate the judgment below, and direct reconsideration in light of the representations made by the United States in this Court. See, *e. g.*, *Biddle* v. *United States*, 484 U. S. 1054 (1988); *Malone* v. *United States*, 484 U. S. 919 (1987). Nor is it novel to do so in a case where error is conceded but it is suggested that there is another ground on which the decision below could be affirmed if the case were brought here. Indeed, a case decided earlier this Term presented such a situation and, without dissent, we vacated the judgment below for reconsideration in light of the

position asserted by the Government in this Court. *Chappell* v. *United States*, 494 U. S. 1075 (1990). This is the appropriate course to follow in this case. If the judgment below rested on an improvident ground, as the Government suggests, the Court of Appeals should in the first instance pass on the adequacy of the Government's reasons for exercising its peremptory challenges.

Consequently, the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of the position asserted by the Government in its brief filed May 21, 1990.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

I have previously expressed my doubt as to the wisdom of automatically vacating a Court of Appeals judgment favorable to the Government when the Government confesses error in this Court. See *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (dissenting opinion). Today the Court carries this unfortunate practice to new lengths: The Government has not confessed error in this case, but instead has taken the position that the judgment of the Court of Appeals was correct and that certiorari should be denied.

The Government's brief in opposition contains the following statement:

> "Although petitioner's *Batson* claim lacks merit, we agree with petitioner that the court of appeals' analysis departed from the general approach to discrimination in jury selection that this Court marked out in *Batson*." Brief in Opposition 12.

The Court seizes upon this concession that the "analysis" of the Court of Appeals may have been wrong as a justification

for vacating the judgment. But the entire thrust of the Government's brief is that the result reached by the Court of Appeals was correct.

A confession of error is at least a deliberate decision on the part of the Government to concede that a Court of Appeals *judgment* in favor of the Government was wrong. In the present case, however, we have only the above-quoted statement of the Government in its brief opposing a grant of certiorari. If we are now to vacate judgments on the basis of what are essentially observations in the Government's brief about the "approach" of the Court of Appeals in a particular case, I fear we may find the Government's future briefs in opposition much less explicit and frank than they have been in the past. Since we depend heavily on the Government in deciding whether to grant certiorari in cases in which the Government is a party, the Court will be the loser as a result.

METRO BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 89–453. Argued March 28, 1990—Decided June 27, 1990*

These cases consider the constitutionality of two minority preference policies adopted by the Federal Communications Commission (FCC). First, the FCC awards an enhancement for minority ownership and participation in management, which is weighed together with all other relevant factors, in comparing mutually exclusive applications for licenses for new radio or television broadcast stations. Second, the FCC's so-called "distress sale" policy allows a radio or television broadcaster whose qualifications to hold a license have come into question to transfer that license before the FCC resolves the matter in a noncomparative hearing, but only if the transferee is a minority enterprise that meets certain requirements. The FCC adopted these policies in an attempt to satisfy its obligation under the Communications Act of 1934 to promote diversification of programming, taking the position that its past efforts to encourage minority participation in the broadcast industry had not resulted in sufficient broadcast diversity, and that this situation was detrimental not only to the minority audience but to all of the viewing and listening public. Metro Broadcasting, Inc., petitioner in No. 89–453, sought review in the Court of Appeals of an FCC order awarding a new television license to Rainbow Broadcasting in a comparative proceeding, which action was based on the ruling that the substantial enhancement granted Rainbow because of its minority ownership outweighed factors favoring Metro. The court remanded the appeal for further consideration in light of the FCC's separate, ongoing Docket 86–484 inquiry into the validity of its minority ownership policies. Prior to completion of that inquiry, however, Congress enacted the FCC appropriations legislation for fiscal year 1988, which prohibited the FCC from spending any appropriated funds to examine or change its minority policies. Thus, the FCC closed its Docket 86–484 inquiry and reaffirmed its grant of the license to Rainbow, and the Court of Appeals affirmed. Shurberg Broadcasting of Hartford, Inc., one of the respondents in No. 89–700,

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*Together with No. 89–700, *Astroline Communications Company Limited Partnership* v. *Shurberg Broadcasting of Hartford, Inc., et al.*, also on certiorari to the same court.

sought review in the Court of Appeals of an FCC order approving Faith Center, Inc.'s distress sale of its television license to Astroline Communications Company Limited Partnership, a minority enterprise. Disposition of the appeal was delayed pending resolution of the Docket 86–484 inquiry by the FCC, which, upon closing that inquiry as discussed *supra*, reaffirmed its order allowing the distress sale to Astroline. The court then invalidated the distress sale policy, ruling that it deprived Shurberg, a nonminority applicant for a license in the relevant market, of its right to equal protection under the Fifth Amendment.

Held: The FCC policies do not violate equal protection, since they bear the *imprimatur* of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity. Pp. 563–601.

(a) It is of overriding significance in these cases that the minority ownership programs have been specifically approved—indeed mandated—by Congress. In light of that fact, this Court owes appropriate deference to Congress' judgment, see *Fullilove* v. *Klutznick*, 448 U. S. 448, 472–478, 490, 491 (opinion of Burger, C. J.); *id.*, at 500–510, 515–516, n. 14 (Powell, J., concurring); *id.*, at 517–520 (MARSHALL, J., concurring in judgment), and need not apply strict scrutiny analysis, see *id.*, at 474 (opinion of Burger, C. J.); *id.*, at 519 (MARSHALL, J., concurring in judgment). Benign race-conscious measures mandated by Congress—even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, distinguished and reconciled. Pp. 563–566.

(b) The minority ownership policies serve an important governmental objective. Congress and the FCC do not justify the policies strictly as remedies for victims of demonstrable discrimination in the communications media, but rather have selected them primarily to promote broadcast diversity. This Court has long recognized as axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience, and that the widest possible dissemination of information from diverse and antagonistic sources is essential to the public welfare. *Associated Press* v. *United States*, 326 U. S. 1, 20. Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission, serves important First Amendment values, and is, at the very least, an important governmental objective that is a sufficient basis for the policies in question. Pp. 566–568.

(c) The minority ownership policies are substantially related to the achievement of the Government's interest in broadcast diversity. First, the FCC's conclusion that there is an empirical nexus between minority ownership and greater diversity, which is consistent with its longstanding view that ownership is a prime determinant of the range of programming available, is a product of its expertise and is entitled to deference. Second, by means of the recent appropriations legislation and by virtue of a long history of support for minority participation in the broadcasting industry, Congress has also made clear its view that the minority ownership policies advance the goal of diverse programming. Great weight must be given to the joint determination of the FCC and Congress. Pp. 569–579.

(d) The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Neither Congress nor the FCC assumes that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Nor do they pretend that all programming that appeals to minorities can be labeled "minority" or that programming that might be so described does not appeal to nonminorities. Rather, they maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. This judgment is corroborated by a host of empirical evidence suggesting that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities, and has a special impact on the way in which images of minorities are presented. In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles where they can have an impact on station policies. The FCC's policies are thus a product of analysis rather than a stereotyped reaction based on habit. Cf. *Fullilove*, *supra*, at 534, n. 4 (STEVENS, J., dissenting). The type of reasoning employed by the FCC and Congress is not novel, but is utilized in many areas of the law, including the selection of jury venires on the basis of a fair cross section, and the reapportionment of electoral districts to preserve minority voting strength. Pp. 579–584.

(e) The minority ownership policies are in other relevant respects substantially related to the goal of promoting broadcast diversity. The FCC adopted and Congress endorsed minority ownership preferences only after long study, painstaking consideration of all available alternatives, and the emergence of evidence demonstrating that race-neutral means had not produced adequate broadcasting diversity. Moreover, the FCC did not act precipitately in devising the policies, having under-

taken thorough evaluations in 1960, 1971, and 1978 before adopting them. Furthermore, the considered nature of the FCC's judgment in selecting these particular policies is illustrated by the fact that it has rejected other, more expansive types of minority preferences—*e. g.*, set-asides of certain frequencies for minority broadcasters. In addition, the minority ownership policies are aimed directly at the barriers that minorities face in entering the broadcasting industry. Thus, the FCC assigned a preference to minority status in the comparative licensing proceeding in order to compensate for a dearth of minority broadcasting experience. Similarly, the distress sale policy addresses the problem of inadequate access to capital by effectively lowering the sale price of existing stations and the problem of lack of information regarding license availability by providing existing licensees with an incentive to seek out minority buyers. The policies are also appropriately limited in extent and duration and subject to reassessment and reevaluation before renewal, since Congress has manifested its support for them through a series of appropriations Acts of finite duration and has continued to hold hearings on the subject of minority ownership. Provisions for administrative and judicial review also guarantee that the policies are applied correctly in individual cases and that there will be frequent opportunities to revisit their merits. Finally, the policies impose only slight burdens on nonminorities. Award of a preference contravenes no legitimate, firmly rooted expectation of competing applicants, since the limited number of frequencies available means that no one has First Amendment right to a license, and the granting of licenses requires consideration of public interest factors. Nor does the distress sale policy impose an undue burden on nonminorities, since it may be invoked only with respect to a small fraction of broadcast licenses, only when the licensee chooses to sell out at a low price rather than risk a hearing, and only when no competing application has been filed. It is not a quota or fixed quantity set-aside, and nonminorities are free to compete for the vast remainder of other available license opportunities. Pp. 584–600.

No. 89–453, 277 U. S. App. D. C. 134, 873 F. 2d 347, affirmed and remanded; No. 89–700, 278 U. S. App. D. C. 24, 876 F. 2d 902, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 601. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 602. KENNEDY, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 631.

Gregory H. Guillot argued the cause for petitioner in No. 89–453. With him on the briefs was *John H. Midlen, Jr.* *J. Roger Wollengerg* argued the cause for petitioner in No. 89–700. On the briefs were *Lee H. Simowitz* and *Linda R. Bocchi.*

Daniel M. Armstrong argued the cause for the federal respondent in No. 89–453. With him on the brief were *Robert L. Pettit* and *C. Grey Pash, Jr.* *Margot Polivy* argued the cause for respondent Rainbow Broadcasting Co. With her on the brief was *Katrina Renouf.* *Harry F. Cole* argued the cause for respondents in No. 89–700 and filed a brief for respondent Shurberg Broadcasting of Hartford, Inc. *Robert L. Pettit, Daniel M. Armstrong,* and *C. Grey Pash, Jr.*, filed a brief for the Federal Communications Commission, as respondent under this Court's Rule 12.4, in support of petitioner in No. 89–700.†

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†Briefs of *amici curiae* urging reversal in No. 89–453 were filed for the United States by *Acting Solicitor General Roberts, Acting Assistant Attorney General Turner, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Clegg,* and *Michael R. Lazerwitz;* for Associated General Contractors of America, Inc., by *Charles J. Cooper, Michael A. Carvin,* and *Michael E. Kennedy;* for Galaxy Communications, Inc., by *Ronald D. Maines;* for the Mountain States Legal Foundation et al. by *William Perry Pendley;* for the Pacific Legal Foundation by *Ronald A. Zumbrun, Anthony T. Caso,* and *Sharon L. Browne;* and for the Washington Legal Foundation by *Glen D. Nager, Patricia A. Dunn, Daniel J. Popeo, Paul D. Kamenar,* and *John C. Scully.* *Vincent A. Pepper* and *Louis C. Stephens* filed a brief for the Committee to Promote Diversity as *amicus curiae* urging reversal in No. 89–700.

Brief of *amici curiae* urging affirmance in No. 89–453 and reversal in No. 89–700 were filed for the American Civil Liberties Union by *Burt Neuborne, Steven R. Shapiro, John A. Powell,* and *Sarah E. Burns;* for the Congressional Black Caucus by *David E. Honig, Squire Padgett,* and *George W. Jones, Jr.;* for the National Association of Black Owned Broadcasters, Inc., by *Walter E. Diercks, James L. Winston,* and *Lois E. Wright;* and for the National Bar Association by *J. Clay Smith, Jr.*

Briefs of *amici curiae* urging affirmance in No. 89–453 were filed for the United States Senate by *Michael Davidson, Ken U. Benjamin, Jr.*, and *Morgan J. Frankel;* for the American Jewish Committee et al. by *Angela*

JUSTICE BRENNAN delivered the opinion of the Court.

The issue in these cases, consolidated for decision today, is whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth Amendment. The policies in question are (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority "distress sale" program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms. We hold that these policies do not violate equal protection principles.

I

A

The policies before us today can best be understood by reference to the history of federal efforts to promote minority

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Briefs of *amici curiae* urging affirmance in No. 89–700 were filed for the United States by *Acting Solicitor General Roberts*, *Acting Assistant Attorney General Turner*, *Deputy Solicitor General Merrill*, *Deputy Assistant Attorney General Clegg*, and *Michael R. Lazerwitz;* for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Anthony T. Caso*, and *Sharon L. Browne;* and for Southeastern Legal Foundation, Inc., by *Robert L. Barr, Jr.*, and *G. Stephen Parker.*

Briefs of *amici curiae* in No. 89–453 were filed for American Women in Radio and Television, Inc., by *Richard P. Holme;* and for Jerome Thomas Lamprecht by *Michael P. McDonald.*

participation in the broadcasting industry.[1] In the Communications Act of 1934, 48 Stat. 1064, as amended, Congress assigned to the Federal Communications Commission (FCC or Commission) exclusive authority to grant licenses, based on "public convenience, interest, or necessity," to persons wishing to construct and operate radio and television broadcast stations in the United States. See 47 U. S. C. §§ 151, 301, 303, 307, 309 (1982 ed.). Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country and none of the more than 1,000 television stations, see *TV 9, Inc.* v. *FCC*, 161 U. S. App. D. C. 349, 357, n. 28, 495 F. 2d 929, 937, n. 28 (1973), cert. denied, 419 U. S. 986 (1974); see also 1 U. S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort—1974, p. 49 (Nov. 1974); in 1978, minorities owned less than 1 percent of the Nation's radio and television stations, see FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting 1 (1978) (hereinafter Task Force Report); and in 1986, they owned just 2.1 percent of the more than 11,000 radio and television stations in the United States. See National Association of Broadcasters, Minority Broadcasting Facts 6 (Sept. 1986). Moreover, these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority

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[1] The FCC has defined the term "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F. C. C. 2d 979, 980, n. 8 (1978). See also *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849, 849, n. 1 (1982), citing 47 U. S. C. § 309(i)(3)(C) (1982 ed.).

broadcasters serve geographically limited markets with relatively small audiences.[2]

The Commission has recognized that the viewing and listening public suffers when minorities are underrepresented among owners of television and radio stations:

> "Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities." Task Force Report 1.

The Commission has therefore worked to encourage minority participation in the broadcast industry. The FCC began by formulating rules to prohibit licensees from discriminating against minorities in employment.[3] The FCC explained that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F. C. C. 2d 766, 769 (1968). Regulations dealing with employment practices were justified as necessary to enable the FCC to satisfy

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[2] See Task Force Report 1; Wimmer, Deregulation and Market Failure in Minority Programming: The Socioeconomic Dimensions of Broadcast Reform, 8 Comm/Ent L. J. 329, 426, n. 516 (1986). See also n. 46, *infra*.

[3] See, *e. g.*, *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F. C. C. 2d 240 (1969); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F. C. C. 2d 430 (1970); *Nondiscrimination in Employment Policies and Practices of Broadcast Licensees*, 54 F. C. C. 2d 354 (1975); *Nondiscrimination in Employment Policies and Practices of Broadcast Licensees*, 60 F. C. C. 2d 226 (1976). The FCC's current equal employment opportunity policy is outlined at 47 CFR § 73.2080 (1989).

its obligation under the Communications Act of 1934 to promote diversity of programming. See *NAACP* v. *FPC*, 425 U. S. 662, 670, n. 7 (1976). The United States Department of Justice, for example, contended that equal employment opportunity in the broadcast industry could "'contribute significantly toward reducing and ending discrimination in other industries'" because of the "'enormous impact which television and radio have upon American life.'" *Nondiscrimination Employment Practices*, *supra*, at 771 (citation omitted).

Initially, the FCC did not consider minority status as a factor in licensing decisions, maintaining as a matter of Commission policy that no preference to minority ownership was warranted where the record in a particular case did not give assurances that the owner's race likely would affect the content of the station's broadcast service to the public. See *Mid-Florida Television Corp.*, 33 F. C. C. 2d 1, 17–18 (Rev. Bd.), review denied, 37 F. C. C. 2d 559 (1972), rev'd, *TV 9, Inc.* v. *FCC*, *supra*. The Court of Appeals for the District of Columbia Circuit, however, rejected the Commission's position that an "assurance of superior community service attributable to . . . Black ownership and participation" was required before a preference could be awarded. *TV 9, Inc.*, *supra*, at 358, 495 F. 2d, at 938. "'Reasonable expectation,'" the court held, "'not advance demonstration, is a basis for merit to be accorded relevant factors.'" *Ibid.* See also *Garrett* v. *FCC*, 168 U. S. App. D. C. 266, 273, 513 F. 2d 1056, 1063 (1975).

In April 1977, the FCC conducted a conference on minority ownership policies, at which participants testified that minority preferences were justified as a means of increasing diversity of broadcast viewpoint. See Task Force Report 4–6. Building on the results of the conference, the recommendations of the task force, the decisions of the Court of Appeals for the District of Columbia Circuit, and a petition proposing

several minority ownership policies filed with the Commission in January 1978 by the Office of Telecommunications Policy (then part of the Executive Office of the President) and the Department of Commerce,[4] the FCC adopted in May 1978 its *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F. C. C. 2d 979. After recounting its past efforts to expand broadcast diversity, the FCC concluded:

> "[W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.*, at 980–981 (footnotes omitted).

Describing its actions as only "first steps," *id.*, at 984, the FCC outlined two elements of a minority ownership policy.

First, the Commission pledged to consider minority ownership as one factor in comparative proceedings for new licenses. When the Commission compares mutually exclusive applications for new radio or television broadcast stations,[5] it

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[4] See Telecommunications Minority Assistance Program, Public Papers of the Presidents, Jimmy Carter, Vol. 1, Jan. 31, 1978, pp. 252, 253 (1979). The petition observed that "[m]inority ownership markedly serves the public interest, for it ensures the sustained and increased sensitivity to minority audiences." *Id.*, at 252. See also n. 45, *infra*.

[5] In *Ashbacker Radio Corp.* v. *FCC*, 326 U. S. 327 (1945), we held that when the Commission was faced with two "mutually exclusive" bona fide applications for license—that is, two proposed stations that would be incompatible technologically—it was obligated to set the applications for a comparative hearing. See *id.*, at 333.

looks principally at six factors: diversification of control of mass media communications, full-time participation in station operation by owners (commonly referred to as the "integration" of ownership and management), proposed program service, past broadcast record, efficient use of the frequency, and the character of the applicants. See *Policy Statement on Comparative Broadcast Hearings*, 1 F. C. C. 2d 393, 394–399 (1965); *West Michigan Broadcasting Co.* v. *FCC*, 236 U. S. App. D. C. 335, 338–339, 735 F. 2d 601, 604–607 (1984), cert. denied, 470 U. S. 1027 (1985). In the Policy Statement on Minority Ownership, the FCC announced that minority ownership and participation in management would be considered in a comparative hearing as a "plus" to be weighed together with all other relevant factors. See *WPIX, Inc.*, 68 F. C. C. 2d 381, 411–412 (1978). The "plus" is awarded only to the extent that a minority owner actively participates in the day-to-day management of the station.

Second, the FCC outlined a plan to increase minority opportunities to receive reassigned and transferred licenses through the so-called "distress sale" policy. See 68 F. C. C. 2d, at 983. As a general rule, a licensee whose qualifications to hold a broadcast license come into question may not assign or transfer that license until the FCC has resolved its doubts in a noncomparative hearing. The distress sale policy is an exception to that practice, allowing a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for hearing, to assign the license to an FCC-approved minority enterprise. See *ibid.*; *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849, 851 (1982). The assignee must meet the FCC's basic qualifications, and the minority ownership must exceed 50 percent or be controlling.[6] The buyer must purchase the license be-

[6] In 1982, the FCC determined that a limited partnership could qualify as a minority enterprise if the general partner is a member of a minority

fore the start of the revocation or renewal hearing, and the price must not exceed 75 percent of fair market value. These two Commission minority ownership policies are at issue today.[7]

B

1

In No. 89–453, petitioner Metro Broadcasting, Inc. (Metro), challenges the Commission's policy awarding preferences to minority owners in comparative licensing proceedings. Several applicants, including Metro and Rainbow Broadcasting (Rainbow), were involved in a comparative proceeding to select among three mutually exclusive proposals to construct and operate a new UHF television station in the Orlando, Florida, metropolitan area. After an evidentiary hearing, an Administrative Law Judge (ALJ) granted Metro's application. *Metro Broadcasting, Inc.*, 96 F. C. C. 2d 1073 (1983). The ALJ disqualified Rainbow from consideration because of "misrepresentations" in its application. *Id.*, at 1087. On review of the ALJ's decision, however, the Commission's Review Board disagreed with the ALJ's finding regarding Rainbow's candor and concluded that Rainbow was qualified. *Metro Broadcasting, Inc.*, 99 F. C. C. 2d 688 (1984). The Board proceeded to consider Rainbow's comparative showing and found it superior to Metro's. In so doing, the Review Board awarded Rainbow a substantial enhance-

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group who holds at least a 20 percent interest and who will exercise "complete control over a station's affairs." 92 F. C. C. 2d, at 855.

[7] The FCC also announced in its 1978 statement a tax certificate policy and other minority preferences, see 68 F. C. C. 2d, at 983, and n. 19; 92 F. C. C. 2d, at 850–851, which are not at issue today. Similarly, the Commission's gender preference policy, see *Gainesville Media, Inc.*, 70 F. C. C. 2d 143, 149 (Rev. Bd. 1978); *Mid-Florida Television Corp.*, 69 F. C. C. 2d 607, 651–652 (Rev. Bd. 1978), set aside on other grounds, 87 F. C. C. 2d 203 (1981), is not before us today. See *Winter Park Communications, Inc.* v. *FCC*, 277 U. S. App. D. C. 134, 139–140, n. 5, 873 F. 2d 347, 352–353, n. 5 (1989); *Metro Broadcasting, Inc.*, 3 F. C. C. Rcd 866, 867, n. 1 (1988).

ment on the ground that it was 90 percent Hispanic owned, whereas Metro had only one minority partner who owned 19.8 percent of the enterprise. The Review Board found that Rainbow's minority credit outweighed Metro's local residence and civic participation advantage. *Id.*, at 704. The Commission denied review of the Board's decision largely without discussion, stating merely that it "agree[d] with the Board's resolution of this case." No. 85–558 (Oct. 18, 1985), p. 2, App. to Pet. for Cert. in No. 89–453, p. 61a.

Metro sought review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit, but the appeal's disposition was delayed; at the Commission's request, the court granted a remand of the record for further consideration in light of a separate ongoing inquiry at the Commission regarding the validity of its minority and female ownership policies, including the minority enhancement credit. See *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 F. C. C. Rcd 1315 (1986) (Docket 86–484).[8] The Commission determined that the outcome in the licensing proceeding between Rainbow and Metro might depend on whatever the Commission concluded

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[8] That inquiry grew out of the Court of Appeals' decision in *Steele* v. *FCC*, 248 U. S. App. D. C. 279, 770 F. 2d 1192 (1985), in which a panel of the Court of Appeals held that the FCC lacks statutory authority to grant enhancement credits in comparative license proceedings to women owners. Although the panel expressly stated that "[u]nder our decisions, the Commission's authority to adopt minority preferences . . . is clear," *id.*, at 283, 770 F. 2d, at 1196, the Commission believed that the court's opinion nevertheless raised questions concerning its minority ownership policies. After the en banc court vacated the panel opinion and set the case for rehearing, the FCC requested that the Court of Appeals remand the case without considering the merits to allow the FCC to reconsider the basis of its preference policy. The request was granted. The Commission, "despite its prior misgivings, has now indicated clearly that it supports the distress sale" and other minority ownership policies, *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 278 U. S. App. D. C. 24, 81, 876 F. 2d 902, 959 (1989) (Wald, C. J., dissenting from denial of rehearing en banc), and has defended them before this Court.

in its general evaluation of minority ownership policies, and accordingly it held the licensing proceeding in abeyance pending further developments in the Docket 86–484 review. See *Metro Broadcasting, Inc.*, 2 F. C. C. Rcd 1474, 1475 (1987).

Prior to the Commission's completion of its Docket 86–484 inquiry, however, Congress enacted and the President signed into law the FCC appropriations legislation for fiscal year 1988. The measure prohibited the Commission from spending any appropriated funds to examine or change its minority ownership policies.[9] Complying with this directive, the Commission closed its Docket 86–484 inquiry. See *Reexamination of Racial, Ethnic or Gender Classifications, Order*, 3 F. C. C. Rcd 766 (1988). The FCC also reaffirmed its grant of the license in this case to Rainbow Broadcasting. See *Metro Broadcasting, Inc.*, 3 F. C. C. Rcd 866 (1988).

The case returned to the Court of Appeals, and a divided panel affirmed the Commission's order awarding the license to Rainbow. The court concluded that its decision was controlled by prior Circuit precedent and noted that the Commission's action was supported by "'highly relevant congressional action that showed clear recognition of the extreme underrepresentation of minorities and their perspectives in

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[9] The appropriations legislation provided:

"That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U. S. C. § 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F. C. C. 2d 979 and 69 F. C. C. 2d 1591, as amended, 52 R. R. 2d [1301] (1982) and Mid-Florida Television Corp., [69] F. C. C. 2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86–484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry." Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100–202, 101 Stat. 1329–31.

the broadcast mass media.'" *Winter Park Communications, Inc.* v. *FCC*, 277 U. S. App. D. C. 134, 140, 873 F. 2d 347, 353 (1989), quoting *West Michigan*, 236 U. S. App. D. C., at 347, 735 F. 2d, at 613. After petitions for rehearing and suggestions for rehearing en banc were denied, we granted certiorari. 493 U. S. 1017 (1990).

2

The dispute in No. 89–700 emerged from a series of attempts by Faith Center, Inc., the licensee of a Hartford, Connecticut, television station, to execute a minority distress sale. In December 1980, the FCC designated for a hearing Faith Center's application for renewal of its license. See *Faith Center, Inc.*, FCC 80–680 (Dec. 21, 1980). In February 1981, Faith Center filed with the FCC a petition for special relief seeking permission to transfer its license under the distress sale policy. The Commission granted the request, see *Faith Center, Inc.*, 88 F. C. C. 2d 788 (1981), but the proposed sale was not completed, apparently due to the purchaser's inability to obtain adequate financing. In September 1983, the Commission granted a second request by Faith Center to pursue a distress sale to another minority-controlled buyer. The FCC rejected objections to the distress sale raised by Alan Shurberg, who at that time was acting in his individual capacity.[10] See *Faith Center, Inc.*, 54 Radio Reg. 2d (P&F) 1286, 1287–1288 (1983); *Faith Center, Inc.*, 55 Radio Reg. 2d (P&F) 41, 44–46 (Mass Media Bur. 1984). This second distress sale also was not consummated, apparently because of similar financial difficulties on the buyer's part.

In December 1983, respondent Shurberg Broadcasting of Hartford, Inc. (Shurberg), applied to the Commission for a permit to build a television station in Hartford. The application was mutually exclusive with Faith Center's renewal

[10] Mr. Shurberg is the sole owner of Shurberg Broadcasting of Hartford, Inc., respondent in No. 89–700.

application, then still pending. In June 1984, Faith Center again sought the FCC's approval for a distress sale, requesting permission to sell the station to Astroline Communications Company Limited Partnership (Astroline), a minority applicant. Shurberg opposed the sale to Astroline on a number of grounds, including that the FCC's distress sale program violated Shurberg's right to equal protection. Shurberg therefore urged the Commission to deny the distress sale request and to schedule a comparative hearing to examine the application Shurberg had tendered alongside Faith Center's renewal request. In December 1984, the FCC approved Faith Center's petition for permission to assign its broadcast license to Astroline pursuant to the distress sale policy. See *Faith Center, Inc.*, 99 F. C. C. 2d 1164 (1984). The FCC rejected Shurberg's equal protection challenge to the policy as "without merit." *Id.*, at 1171.

Shurberg appealed the Commission's order to the United States Court of Appeals for the District of Columbia Circuit, but disposition of the appeal was delayed pending completion of the Commission's Docket 86–484 inquiry into the minority ownership policies. See *supra*, at 559. After Congress enacted and the President signed into law the appropriations legislation prohibiting the FCC from continuing the Docket 86–484 proceeding, see *supra*, at 560, the Commission reaffirmed its order granting Faith Center's request to assign its Hartford license to Astroline pursuant to the minority distress sale policy. See *Faith Center, Inc.*, 3 F. C. C. Rcd 868 (1988).

A divided Court of Appeals invalidated the Commission's minority distress sale policy. *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 278 U. S. App. D. C. 24, 876 F. 2d 902 (1989). In a *per curiam* opinion, the panel majority held that the policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote

programming diversity" and that "the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate." *Id.*, at 24–25, 876 F. 2d, at 902–903. Petitions for rehearing and suggestions for rehearing en banc were denied, and we granted certiorari. 493 U. S. 1018 (1990).

II

It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress. In *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), Chief Justice Burger, writing for himself and two other Justices, observed that although "[a] program that employs racial or ethnic criteria . . . calls for close examination," when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.*, at 472; see also *id.*, at 491; *id.*, at 510, and 515–516, n. 14 (Powell, J., concurring); *id.*, at 517–520 (MARSHALL, J., concurring in judgment). We explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, see *id.*, at 490 (opinion of Burger, C. J.); *id.*, at 498 (Powell, J., concurring), as well as Congress' powers under the Commerce Clause, see *id.*, at 475–476 (opinion of Burger, C. J.); *id.*, at 499 (Powell, J., concurring), the Spending Clause, see *id.*, at 473–475, 478 (opinion of Burger, C. J.), and the Civil War Amendments, see *id.*, at 476–478 (opinion of Burger, C. J.); *id.*, at 500, 508–509 (Powell, J., concurring).[11]

[11] JUSTICE O'CONNOR's suggestion that the deference to Congress described in *Fullilove* rested entirely on Congress' powers under § 5 of the

A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue. Three Members inquired "whether the *objectives* of th[e] legislation are within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible *means* for achieving the congressional objectives." *Id.*, at 473 (opinion of Burger, C. J.) (emphasis in original). Three other Members would have upheld benign racial classifications that "serve important governmental objectives and are substantially related to achievement of those objectives." *Id.*, at 519 (MARSHALL, J., concurring in judgment). We apply that standard today. We hold that benign race-conscious measures mandated by Congress[12]—even if those

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Fourteenth Amendment, *post*, at 606–607, is simply incorrect. The Chief Justice expressly noted that in enacting the provision at issue, "Congress employed an amalgam of its specifically delegated powers." 448 U. S., at 473.

[12] We fail to understand how JUSTICE KENNEDY can pretend that examples of "benign" race-conscious measures include South African apartheid, the "separate-but-equal" law at issue in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), and the internment of American citizens of Japanese ancestry upheld in *Korematsu* v. *United States*, 323 U. S. 214 (1944). We are confident that an "examination of the legislative scheme and its history," *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648, n. 16 (1975), will separate benign measures from other types of racial classifications. See, *e. g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 728–730 (1982). Of course, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger*, *supra*, at 648; see also Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 21–22 (1976); Strauss, The Myth of Colorblindness, 1986 Sup. Ct. Rev. 99, 128–129. The concept of benign race-conscious measures—even those with at least some nonremedial purposes—is as old as the Fourteenth Amendment. For example, the Freedman's Bureau Acts authorized the provision of land, education, medical care, and other assistance to Afro-Americans. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 630 (1866) (statement of Rep. Hubbard) ("I think that the nation will be a great gainer by encouraging the policy of the Freedman's Bureau, in the cultivation of its wild lands, in the increased wealth which industry brings and in the res-

measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Our decision last Term in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989), concerning a minority set-aside program adopted by a municipality, does not prescribe the level of scrutiny to be applied to a benign racial classification employed by Congress. As JUSTICE KENNEDY noted, the question of congressional action was not before the Court, *id.*, at 518 (opinion concurring in part and concurring in judgment), and so *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. For example, JUSTICE O'CONNOR, joined by two other Members of this Court, noted that "Congress may identify and redress the effects of society-wide discrimination," 488 U. S., at 490, and that Congress "need not make specific findings of discrimination to engage in race-conscious relief." *Id.*, at 489.[13] Echoing *Fullilove*'s emphasis on Con-

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toration of law and order in the insurgent States"). See generally Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. Rev. 653, 664–666 (1975); Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 754–783 (1985).

[13] JUSTICE O'CONNOR, in a passage joined by THE CHIEF JUSTICE and JUSTICE WHITE, observed that the decision in *Fullilove* had been influenced by the fact that the set-aside program at issue was "'*congressionally* mandated.'" 488 U. S., at 491 (citation omitted; emphasis in original). JUSTICE O'CONNOR's opinion acknowledged that our decision in *Fullilove* regarding a congressionally approved preference "did not employ 'strict scrutiny.'" 488 U. S., at 487.

gress as a National Legislature that stands above factional politics, JUSTICE SCALIA argued that as a matter of "social reality and governmental theory," the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination. 488 U. S., at 522 (opinion concurring in judgment). JUSTICE SCALIA explained that "[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units." *Id.*, at 522, 523.[14]

We hold that the FCC minority ownership policies pass muster under the test we announce today. First, we find that they serve the important governmental objective of broadcast diversity. Second, we conclude that they are substantially related to the achievement of that objective.

A

Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H. R. Conf. Rep. No. 97–765, p. 43 (1982). Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.

We have long recognized that "[b]ecause of the scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views

[14] See also *id.*, at 495–496 (opinion of O'CONNOR, J.); Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 728–735 (1974), cited with approval in *Croson*, 488 U. S., at 496.

should be expressed on this unique medium." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969). The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic officer," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 215 (1943); rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission. We have observed that "'the "public interest" standard necessarily invites reference to First Amendment principles,'" *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775, 795 (1978), quoting *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 122 (1973), and that the Communications Act of 1934 has designated broadcasters as "fiduciaries for the public." *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 377 (1984). "[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment," and "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, *supra*, at 390. "Congress may . . . seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." *League of Women Voters*, *supra*, at 377.

Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient

basis for the Commission's minority ownership policies. Just as a "diverse student body" contributing to a "'robust exchange of ideas'" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, *Regents of University of California* v. *Bakke*, 438 U. S. 265, 311–313 (1978) (opinion of Powell, J.), the diversity of views and information on the airwaves serves important First Amendment values. Cf. *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 314–315 (1986) (STEVENS, J., dissenting).[15] The benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. As Congress found, "the American public will benefit by having access to a wider diversity of information sources." H. R. Conf. Rep. No. 97–765, *supra*, at 45; see also Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 1st Sess., 66 (1989) (testimony of Roderick Porter, Deputy Chief, Mass Media Bureau of the FCC) ("[T]he FCC's minority policies are based on our conclusion that the entire broadcast audience, regardless of its racial composition, will benefit").

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[15] In *Wygant* v. *Jackson Board of Education*, JUSTICE O'CONNOR noted that, "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." 476 U. S., at 286 (opinion concurring in part and concurring in judgment). She further stated that "nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Ibid.* Cf. *post*, at 612 (O'CONNOR, J., dissenting).

B

We also find that the minority ownership policies are substantially related to the achievement of the Government's interest. One component of this inquiry concerns the relationship between expanded minority ownership and greater broadcast diversity; both the FCC and Congress have determined that such a relationship exists. Although we do not "'defer' to the judgment of the Congress and the Commission on a constitutional question," and would not "hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity" to equal protection principles, *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S., at 103, we must pay close attention to the expertise of the Commission and the factfinding of Congress when analyzing the nexus between minority ownership and programming diversity. With respect to this "complex" empirical question, *ibid.*, we are required to give "great weight to the decisions of Congress and the experience of the Commission." *Id.*, at 102.

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The FCC has determined that increased minority participation in broadcasting promotes programming diversity. As the Commission observed in its 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, "ownership of broadcast facilities by minorities is [a] significant way of fostering the inclusion of minority views in the area of programming," and "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming." 68 F. C. C. 2d, at 981. Four years later, the FCC explained that it had taken "steps to enhance the ownership and participation of minorities in the media" in order to "increas[e] the diversity in the control of the media and thus diversity in the selection of available programming, benefitting the public and serving the principle of the First Amendment." *Minority Ownership in Broadcast-*

ing, 92 F. C. C. 2d, at 849–850. See also *Radio Jonesboro, Inc.*, 100 F. C. C. 2d 941, 945, n. 9 (1985) ("'[T]here is a critical underrepresentation of minorities in broadcast ownership, and full minority participation in the ownership and management of broadcast facilities is essential to realize the fundamental goals of programming diversity and diversification of ownership'") (citation omitted). The FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference.

Furthermore, the FCC's reasoning with respect to the minority ownership policies is consistent with longstanding practice under the Communications Act. From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience.[16] Thus, "it is upon *ownership* that public policy places

[16] For example, in 1953, the Commission promulgated the first of its multiple ownership rules, the "fundamental purpose" of which is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints." *Amendment of Sections 3.35, 3.240, and 3.636 of Rules and Regulations Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations, Report and Order*, 18 F. C. C. 288, 291. Initially, the multiple ownership rules limited only the common control of broadcast stations. The Commission's current rules include limitations on broadcast/newspaper cross-ownership, cable/television cross-ownership, broadcast service cross-ownership, and common control of broadcast stations. See 47 CFR §§ 73.3555, 76.501 (1989). The Commission has always focused on ownership, on the theory that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest." *Amendment of Sections 73.34, 73.240, and 73.636 of Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F. C. C. 2d 1046, 1050 (1975); see also *Amendment of Sections 73.35, 73.240, and 73.636 of Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, First Report and Order*, 22 F. C. C. 2d 306, 307 (1970) (multiple ownership rules "promot[e] diversification of programming sources and viewpoints"); *Amend-*

primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news." *TV 9, Inc.*, 161 U. S. App. D. C., at 358, 495 F. 2d, at 938 (emphasis added). The Commission has never relied on the market alone to ensure that the needs of the audience are met. Indeed, one of the FCC's elementary regulatory assumptions is that broadcast content is not purely market driven; if it were, there would be little need for consideration in licensing decisions of such factors as integration of ownership and management, local residence, and civic participation. In this vein, the FCC has compared minority preferences to local residence and other integration credits:

> "[B]oth local residence and minority ownership are fundamental considerations in our licensing scheme. Both policies complement our concern with diversification of control of broadcast ownership. Moreover, similar assumptions underlie both policies. We award enhancement credit for local residence because . . . [i]t is expected that [an] increased knowledge of the community of license will be reflected in a station's programming. Likewise, credit for minority ownership and participation is awarded in a comparative proceeding [because] 'minority ownership is likely to increase diversity of content, especially of opinion and viewpoint.'" *Radio Jonesboro, Inc., supra*, at 945 (footnotes omitted).

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ment of Sections 73.35, 73.240, and 73.636 of Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Report and Order, 45 F. C. C. 1476, 1477, 1482 (1964) ("[T]he greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect in a . . . programming sense, on public opinion at the regional level' "); *Editorializing by Broadcast Licensees*, 13 F. C. C. 1246, 1252 (1949) (ownership enables licensee "to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts").

Congress also has made clear its view that the minority ownership policies advance the goal of diverse programming. In recent years, Congress has specifically required the Commission, through appropriations legislation, to maintain the minority ownership policies without alteration. See n. 9, *supra*. We would be remiss, however, if we ignored the long history of congressional support for those policies prior to the passage of the appropriations Acts because, for the past two decades, Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry and has expressed emphatic support for the Commission's attempts to promote programming diversity by increasing minority ownership. Limiting our analysis to the immediate legislative history of the appropriations Acts in question "would erect an artificial barrier to [a] full understanding of the legislative process." *Fullilove* v. *Klutznick*, 448 U. S., at 502 (Powell, J., concurring). The "special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Id.*, at 502–503; see also *id.*, at 478 (opinion of Burger, C. J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings").

Congress' experience began in 1969, when it considered a bill that would have eliminated the comparative hearing in license renewal proceedings, in order to avoid "the filing of a

multiplicity of competing applications, often from groups unknown" and to restore order and predictability to the renewal process to "give the current license holder the benefit of the doubt warranted by his previous investment and experience." 115 Cong. Rec. 14813 (1969) (letter of Sen. Scott). Congress heard testimony that, because the most valuable broadcast licenses were assigned many years ago, comparative hearings at the renewal stage afford an important opportunity for excluded groups, particularly minorities, to gain entry into the industry.[17] Opponents warned that the bill would "exclude minority groups from station ownership in important markets" by "fr[eezing]" the distribution of existing licenses.[18] Congress rejected the bill.

Congress confronted the issue again in 1973 and 1974, when congressional subcommittees held extensive hearings on proposals to extend the broadcast license period from three to five years and to modify the comparative hearing process for license renewals. Witnesses reiterated that renewals provided a valuable opportunity for minorities to obtain a foothold in the industry.[19] The proposals were never enacted, and the renewal process was left intact.

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[17] See Amend the Communications Act of 1934: Hearings on S. 2004 before the Subcommittee on Communications of the Senate Committee on Commerce, 91st Cong., 1st Sess., pt. 1, p. 128 (1969) (testimony of Earle Moore, National Citizens Committee for Broadcasting); *id.*, pt. 2, at 520–521 (testimony of John Pamberton, American Civil Liberties Union); *id.*, at 566–567 (testimony of David Batzka, United Christian Missionary Society); *id.*, at 626–627 (testimony of William Hudgins, Freedom National Bank).

[18] *Id.*, at 642 (testimony of John McLaughlin, then associate editor of America magazine).

[19] See Broadcast License Renewal: Hearings on H. R. 5546 et al. before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess., pt. 1, pp. 495–497 (1973) (testimony of William E. Hanks, Pittsburgh Community Coalition for Media Change); *id.*, at 552–559 (testimony of Rev. George Brewer, Greater Dallas-Fort Worth Coalition for the Free Flow of Information); *id.*, at 572–594 (testimony of James McCuller, Action for a Better Community, Inc.); *id.*, pt. 2, at 686–689 (testimony of Morton Ham-

During 1978, both the FCC and the Office of Telecommunications Policy presented their views to Congress as it considered a bill to deregulate the broadcast industry. The proposed Communications Act of 1978 would have, among other things, replaced comparative hearings with a lottery and created a fund for minorities who sought to purchase stations. As described by Representative Markey, the measure was intended to increase "the opportunities for blacks and women and other minorities in this country to get into the communications systems in this country so that their point of view and their interests can be represented." The Communications Act of 1978: Hearings on H. R. 13015 before the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., vol. 5, pt. 1, p. 59 (1978). The bill's sponsor, Representative Van Deerlin, stated: "It was the hope, and with some reason the expectation of the framers of the bill, that the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be by doing something at the top, that is, increasing minority ownership and management and control in broadcast stations." *Id.*, vol. 3, at 698.

The Executive Branch objected to the lottery proposal on the ground that it would harm minorities by eliminating the credit granted under the comparative hearing scheme as developed by the FCC. See *id.*, at 50. Although it acknowledged that a lottery could be structured to alleviate that concern by attributing a weight to minority ownership, see *id.*, at 85, the Executive Branch explained that it preferred to

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burg, adjunct assistant professor of communications law, New York University); Broadcast License Renewal Act: Hearings on S. 16 et al. before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong., 2d Sess., pt. 1, pp. 325–329 (1974) (testimony of Ronald H. Brown, National Urban League); *id.*, at 376–381 (testimony of Gladys T. Lindsay, Citizens Committee on Media); *id.*, at 408–411 (testimony of Joseph L. Rauh, Jr., Leadership Conference on Civil Rights and Americans for Democratic Action); *id.*, pt. 2, at 785–800 (testimony of Manuel Fierro, Raza Association of Spanish Surnamed Americans).

grant credit for minority ownership during comparative hearings as a more finely tuned way of achieving the Communication Act's goal of broadcast diversity. See *ibid.* (contending that a lottery would not take into account the individual needs of particular communities).

Although no lottery legislation was enacted that year, Congress continued to explore the idea,[20] and when in 1981 it ultimately authorized a lottery procedure, Congress established a concomitant system of minority preferences. See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97–35, 95 Stat. 357, 736–737. The Act provided that where more than one application for an initial license or construction permit was received, the Commission could grant the license or permit to a qualified applicant "through the use of a system of random selection," 47 U. S. C. § 309(i)(1) (1982 ed.), so long as the FCC adopted rules to ensure "significant preferences" in the lottery process to groups underrepresented in the ownership of telecommunications facilities. § 309(i)(3)(A). The accompanying Conference Report announced Congress' "firm intention" to award a lottery preference to minorities and other historically underrepresented groups, so that "the objective of increasing the number of media outlets owned by such persons or groups [would] be met." H. R. Conf. Rep. No. 97–208, p. 897 (1981). After the FCC complained of the difficulty of defining "underrepresented" groups and raised other problems concerning the statute,[21] Congress enacted a second lottery statute reaffirming its intention in unmistakable terms. Section 115 of the Communications Amend-

[20] For example, the proposed Communications Act of 1979 would have provided that any minority applicant for a previously unassigned license would be counted twice in the lottery pool. See Staff of the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, H. R. 3333, "The Communications Act of 1979" Section-by-Section Analysis, 96th Cong., 1st Sess., 39–41 (Comm. Print 1979).

[21] See *Amendment of Part 1 of Commission's Rules to Allow Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 89 F. C. C. 2d 257, 277–284 (1982).

ments Act of 1982, Pub. L. 97–259, 96 Stat. 1094 (amending 47 U. S. C. § 309(i) (1982 ed.)), directs that in any random selection lottery conducted by the FCC, a preference is to be granted to every applicant whose receipt of a license would increase the diversification of mass media ownership and that, "[t]o further diversify the ownership of the media of mass communications, an additional significant preference [is to be given] to any applicant controlled by a member or members of a minority group." § 309(i)(3)(A). Observing that the nexus between ownership and programming "has been repeatedly recognized by both the Commission and the courts," Congress explained that it sought "to promote the diversification of media ownership and consequent diversification of programming content," a principle that "is grounded in the First Amendment." H. R. Conf. Rep. No. 97–765, p. 40 (1982). With this new mandate from Congress, the Commission adopted rules to govern the use of a lottery system to award licenses for low power television stations.[22]

The minority ownership issue returned to the Congress in October 1986,[23] when a House subcommittee held a hearing to examine the Commission's inquiry into the validity of its minority ownership policies. The subcommittee chair expressed his view that "[t]he most important message of this

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[22] See *Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 F. C. C. 2d 952 (1983).

[23] The issue had surfaced briefly in the 98th Congress, where proposals to codify and expand the FCC's minority ownership policies were the subject of extensive hearings in the House. See Minority Participation in the Media: Hearings before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. (1983); Parity for Minorities in the Media: Hearing on H. R. 1155 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 1st Sess. (1983); Broadcast Regulation and Station Ownership: Hearings on H. R. 6122 and H. R. 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th Cong., 2nd Sess. (1984). No legislation was passed.

hearing today, is that the Commission must not dismantle these longstanding diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts direct otherwise." Minority-Owned Broadcast Stations: Hearing on H. R. 5373 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess., 13 (1986) (Rep. Wirth). After the Commission issued an order holding in abeyance, pending completion of the inquiry, actions on licenses and distress sales in which a minority preference would be dispositive,[24] a number of bills proposing codification of the minority ownership policies were introduced in Congress.[25] Members of Congress questioned representatives of the FCC during hearings over a span of six months in 1987 with respect to the FCC appropriation for fiscal year 1988,[26] legislation to reauthorize the Commission for fiscal years 1988 and 1989,[27] and legislation to codify the Commission's minority ownership policies.[28]

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[24] See *Notice of Inquiry on Racial, Ethnic or Gender Classifications*, 1 F. C. C. Rcd 1315, 1319 (1986), as amended, 2 F. C. C. Rcd 2377 (1987).

[25] These bills recognized the link between minority ownership and diversity. In introducing S. 1095, for example, Senator Lautenberg explained that "[d]iversity of ownership does promote diversity of views. Minority . . . broadcasters serve a need that is not as well served as others. They address issues that others do not." 133 Cong. Rec. 9745 (1987); see also *id.*, at 860 (H. R. 293); *id.*, at 3300 (H. R. 1090); *id.*, at 13742–13745 (S. 1277).

[26] See Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H. R. 2763 before a Subcommittee of the Senate Committee on Appropriations, 100th Cong., 1st Sess. (1987).

[27] See FCC Authorization: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 55 (1987); FCC and NTIA Authorizations: Hearings on H. R. 2472 before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 130–131, 211–212 (1987).

[28] See Broadcasting Improvements Act of 1987: Hearings on S. 1277 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 51 (1987).

Ultimately, Congress chose to employ its appropriations power to keep the FCC's minority ownership policies in place for fiscal year 1988.[29] See *supra*, at 560. The Report of the originating Committee on Appropriations explained: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences." S. Rep. No. 100–182, p. 76 (1987). The Committee recognized the continuity of congressional action in the field of minority ownership policies, noting that "[i]n approving a lottery system for the selection of certain broadcast licensees, Congress explicitly approved the use of preferences to promote minority and women ownership." *Id.*, at 76–77.

Congress has twice extended the prohibition on the use of appropriated funds to modify or repeal minority ownership policies[30] and has continued to focus upon the issue. For example, in the debate on the fiscal year 1989 legislation, Senator Hollings, chair of both the authorizing committee and the appropriations subcommittee for the FCC, presented to the Senate a summary of a June 1988 report prepared by the Congressional Research Service (CRS), entitled Minority

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[29] Congress did not simply direct a "kind of mental standstill," *Winter Park*, 277 U. S. App. D. C., at 151, 873 F. 2d, at 364 (Williams, J., concurring in part dissenting in part), but rather in the appropriations legislation expressed its unqualified support for the minority ownership policies and instructed the Commission in no uncertain terms that in Congress' view there was no need to study the topic further. Appropriations Acts, like any other laws, are binding because they are "passe[d] [by] both Houses and . . . signed by the President." *United States* v. *Munoz-Flores*, 495 U. S. 385, 396 (1990); *id.*, at 401 (STEVENS, J., concurring in judgment). See also *United States* v. *Will*, 449 U. S. 200, 222 (1980); *United States* v. *Dickerson*, 310 U. S. 554, 555 (1940).

[30] See Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. 100–459, 102 Stat. 2216; Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. 101–162, 103 Stat. 1020.

Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? The study, Senator Hollings reported, "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." 134 Cong. Rec. 18982 (1988).

As revealed by the historical evolution of current federal policy, both Congress and the Commission have concluded that the minority ownership programs are critical means of promoting broadcast diversity. We must give great weight to their joint determination.

C

The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete "minority viewpoint" on the airwaves. Neither does it pretend that all programming that appeals to minority audiences can be labeled "minority programming" or that programming that might be described as "minority" does not appeal to nonminorities. Rather, both Congress and the FCC maintain simply that expanded minority ownership of broadcast outlets will, in the aggregate, result in greater broadcast diversity. A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group. The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on average, "to the 'robust exchange of ideas.'" 438 U. S., at 313. To be sure, there is no ironclad guarantee that each minority owner will contribute to diversity. But neither was there an

assurance in *Bakke* that minority students would interact with nonminority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints. See *id.*, at 312 (opinion of Powell, J.) (noting only that educational excellence is "*widely believed* to be promoted by a diverse student body") (emphasis added); *id.*, at 313, n. 48 ("'In the nature of things, it is hard to know how, and when, and even if, this informal "learning through diversity" actually occurs'") (citation omitted).

Although all station owners are guided to some extent by market demand in their programming decisions, Congress and the Commission have determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts. This judgment—and the conclusion that there is a nexus between minority ownership and broadcasting diversity—is corroborated by a host of empirical evidence.[31] Evidence

[31] For example, the CRS analyzed data from some 8,720 FCC-licensed radio and television stations and found a strong correlation between minority ownership and diversity of programming. See CRS, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (June 29, 1988). While only 20 percent of stations with no Afro-American ownership responded that they attempted to direct programming at Afro-American audiences, 65 percent of stations with Afro-American ownership reported that they did so. See *id.*, at 13. Only 10 percent of stations without Hispanic ownership stated that they targeted programming at Hispanic audiences, while 59 percent of stations with Hispanic owners said they did. See *id.*, at 13, 15. The CRS concluded:

"[A]n argument can be made that FCC policies that enhanced minority . . . station ownership may have resulted in more minority and other audience targeted programming. To the degree that increasing minority programming across audience markets is considered adding to programming diversity, then, based on the FCC survey data, an argument can be made that the FCC preference policies contributed, in turn, to programming diversity." *Id.*, at cover page.

Other surveys support the FCC's determination that there is a nexus between ownership and programming. A University of Wisconsin study found that Afro-American-owned, Afro-American-oriented radio stations have more diverse playlists than white-owned, Afro-American-oriented

suggests that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint, especially on matters of particular concern to minorities. "[M]inority ownership does appear to have specific impact on the presentation of minority images in local news,"[32] inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.[33] In addition, studies show that a minority owner is more likely to employ minorities in managerial and other important roles

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stations. See J. Jeter, A Comparative Analysis of the Programming Practices of Black-Owned Black-Oriented Radio Stations and White-Owned Black-Oriented Radio Stations 130, 139 (1981) (University of Wisconsin-Madison). See also M. Spitzer, Justifying Minority Preferences in Broadcasting, California Institute of Technology Working Paper No. 718, pp. 19–29 (March 1990) (explaining why minority status of owner might affect programming behavior).

[32] Fife, The Impact of Minority Ownership on Minority Images in Local TV News, in Communications: A Key to Economic and Political Change, Selected Proceedings from the 15th Annual Howard University Communications Conference 113 (1986) (survey of four Standard Metropolitan Statistical Areas); see also M. Fife, The Impact of Minority Ownership on Broadcast News Content: A Multi-Market Study 52 (June 1986) (report submitted to National Association of Broadcasters).

[33] For example, a University of Massachusetts at Boston survey of 3,000 local Boston news stories found a statistically significant difference in the treatment of events, depending on the race of ownership. See K. Johnson, Media Images of Boston's Black Community 16–29 (Jan. 28, 1987) (William Monroe Trotter Institute). A comparison between an Afro-American-owned television station and a white-owned station in Detroit concluded that "the overall mix of topic and location coverage between the two stations is statistically different, and with its higher use of blacks in newsmaker roles and its higher coverage of issues of racial significance, [the Afro-American-owned station's] content does represent a different perspective on news than [that of the white-owned station]." M. Fife, The Impact of Minority Ownership On Broadcast Program Content: A Case Study of WGPR–TV's Local News Content, Report to the National Association of Broadcasters, Office of Research and Planning 45 (Sept. 1979). See also R. Wolseley, The Black Press, U. S. A. 3–4, 11 (2d ed. 1990) (documenting importance of minority ownership).

where they can have an impact on station policies.[34] If the FCC's equal employment policies "ensure that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups," *NAACP* v. *FPC*, 425 U. S., at 670, n. 7, it is difficult to deny that minority-owned stations that follow such employment policies on their own will also contribute to diversity. While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves. The policies are thus a product of "'analysis'" rather than

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[34] Afro-American-owned radio stations, for example, have hired Afro-Americans in top management and other important job categories at far higher rates than have white-owned stations, even those with Afro-American-oriented formats. The same has been true of Hispanic hiring at Hispanic-owned stations, compared to Anglo-owned stations with Spanish-language formats. See Honig, Relationships Among EEO, Program Service, and Minority Ownership in Broadcast Regulation, in Proceedings from the Tenth Annual Telecommunications Policy Research Conference 88–89 (O. Gandy, P. Espinoza, & J. Ordover eds. 1983). As of September 1986, half of the 14 Afro-American or Hispanic general managers at TV stations in the United States worked at minority-owned or controlled stations. See National Association of Broadcasters, Minority Broadcasting Facts 9–10, 55–57 (Sept. 1986). In 1981, 13 of the 15 Spanish-language radio stations in the United States owned by Hispanics also had a majority of Hispanics in management positions, while only a third of Anglo-owned Spanish-language stations had a majority of Hispanic managers, and 42 percent of the Anglo-owned, Spanish-language stations had no Hispanic managers at all. See Schement & Singleton, The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio, 31 J. Communication 78, 80–81 (1981). See generally Johnson, *supra*, at 5 ("Many observers agree that the single largest reason for the networks' poor coverage of racial news is related to the racial makeup of the networks' own staffs"); Wimmer, *supra* n. 2, at 426–427 ("[M]inority-owned broadcast outlets tend to hire more minority employees. . . . A policy of minority ownership could, over time, lead to a growth in minority employment, which has been shown to produce minority-responsive programming") (footnotes omitted).

a "'stereotyped reaction'" based on "'[h]abit.'" *Fullilove*, 448 U. S., at 534, n. 4 (STEVENS, J., dissenting) (citation omitted).

Our cases demonstrate that the reasoning employed by the Commission and Congress is permissible. We have recognized, for example, that the fair-cross-section requirement of the Sixth Amendment forbids the exclusion of groups on the basis of such characteristics as race and gender from a jury venire because "[w]ithout that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition." *Holland* v. *Illinois*, 493 U. S. 474, 480–481 (1990). It is a small step from this logic to the conclusion that including minorities in the electromagnetic spectrum will be more likely to produce a "fair cross section" of diverse content. Cf. *Duren* v. *Missouri*, 439 U. S. 357, 358–359, 363–364 (1979); *Taylor* v. *Louisiana*, 419 U. S. 522, 531–533 (1975).[35] In addition, many of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection. We have held, for example, that in safeguarding the "'effective exercise of the electoral franchise'" by racial minorities, *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U. S. 144, 159 (1977) (plurality opinion), quoting *Beer* v. *United States*, 425 U. S. 130, 141 (1976), "[t]he permissible use of racial criteria is not confined to eliminating

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[35] See also *Peters* v. *Kiff*, 407 U. S. 493, 503–504 (1972) (opinion of MARSHALL, J.) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented").

the effects of past discriminatory districting or apportionment." 430 U. S., at 161. Rather, a State subject to § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c, may "deliberately creat[e] or preserv[e] black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5"; "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment." 430 U. S., at 161.

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We find that the minority ownership policies are in other relevant respects substantially related to the goal of promoting broadcast diversity. First, the Commission adopted and Congress endorsed minority ownership preferences only after long study and painstaking consideration of all available alternatives. See *Fullilove*, 448 U. S., at 463–467 (opinion of Burger, C. J.); *id.*, at 511 (Powell, J., concurring). For many years, the FCC attempted to encourage diversity of programming content without consideration of the race of station owners.[36] When it first addressed the issue, in a 1946

[36] The Commission has eschewed direct federal control over discrete programming decisions by radio and television stations. See, *e. g.*, Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960) ("[W]hile the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear"). In order to ensure diversity by means of administrative decree, the Commission would have been required to familiarize itself with the needs of every community and to monitor the broadcast content of every station. Such a scheme likely would have presented insurmountable practical difficulties, in light of the thousands of broadcast outlets in the United States and the myriad local variations in audience tastes and interests. Even were such an ambitious policy of central planning feasible, it would have raised "serious First Amendment issues" if it denied a broadcaster the ability to "carry a particular program or to publish his own views," if it risked "government censorship of a particular program," or if it led to "the official government view dominating public broadcasting." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 396 (1969);

report entitled Public Service Responsibility of Broadcast Licensees (Blue Book), the Commission stated that although licensees bore primary responsibility for program service, "[i]n issuing and in renewing the licenses of broadcast stations, the Commission [would] give particular consideration to four program service factors relevant to the public interest." *Id.*, at 55.[37] In 1960, the Commission altered course somewhat, announcing that "the principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service." Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7295 (1960). Licensees were advised that they could meet this obligation in two ways: by canvassing members of the listening public who could receive the station's signal, and by meeting with "leaders in community life . . . and others who bespeak the interests which make up the community." *Id.*, at 7296.

By the late 1960's, it had become obvious that these efforts had failed to produce sufficient diversity in programming. The Kerner Commission, for example, warned that the vari-

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cf. *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475 (1940). The Commission, with the approval of this Court, has therefore "avoid[ed] unnecessary restrictions on licensee discretion" and has interpreted the Communications Act of 1934 as "seek[ing] to preserve journalistic discretion while promoting the interests of the listening public." *FCC* v. *WNCN Listeners Guild*, 450 U. S. 582, 596 (1981).

[37] One factor was the extent to which a station carried programs unsponsored by commercial advertisers during hours "when the public is awake and listening." Blue Book 55–56. The Commission believed that this would expand diversity by permitting the broadcast of less popular programs that would appeal to particular tastes and interests in the listening audience that might otherwise go unserved. See *id.*, at 12. Second, the Commission called for local live programs to encourage local self-expression. See *id.*, at 56. Third, the Commission expected "program-[ming] devoted to the discussion of public issues." *Ibid.* The final factor was the amount of advertising aired by the licensee. *Ibid.*

ous elements of the media "have not communicated to whites a feeling for the difficulties and frustrations of being a Negro in the United States. They have not shown understanding or appreciation of—and thus have not communicated—a sense of Negro culture, thought, or history. . . . The world that television and newspapers offer to their black audience is almost totally white . . . ." Report of the National Advisory Commission on Civil Disorders 210 (1968). In response, the FCC promulgated equal employment opportunity regulations, see *supra*, at 554–555, and formal "ascertainment" rules requiring a broadcaster as a condition of license "to ascertain the problems, needs and interests of the residents of his community of license and other areas he undertakes to serve," and to specify "what broadcast matter he proposes to meet those problems, needs and interests." *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F. C. C. 2d 650, 682 (1971).[38] The Commission explained that although it recognized there was "no single answer for all stations," it expected each licensee to devote a "'significant proportion'" of a station's programming to community concerns. *Id.*, at 686 (citation omitted).[39] The Com-

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[38] The Commission also devised policies to guard against discrimination in programming. For example, it determined that "arbitrar[y] refus[al] to present members of an ethnic group, or their views" in programming, or refusal to present members of such groups "in integrated situations with members of other groups," would constitute a ground for license nonrenewal. *Citizens Communications Center*, 25 F. C. C. 2d 705, 707 (1970).

[39] In addition, the Commission developed nonentertainment guidelines, which called for broadcasters to devote a certain percentage of their programming to nonentertainment subjects such as news, public affairs, public service announcements, and other topics. See *WNCN Listeners Guild*, *supra*, at 598–599, n. 41; *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F. C. C. 2d 1076, 1078 (1984) (hereinafter *Deregulation of Television*); *Deregulation of Radio*, 84 F. C. C. 2d 968, 975 (1981). Applicants proposing less than the guideline amounts of nonentertainment programming could not have their applica-

mission expressly included "minority and ethnic groups" as segments of the community that licensees were expected to consult. See, *e. g.*, *Ascertainment of Community Problems by Broadcast Applicants*, 57 F. C. C. 2d 418, 419, 442 (1976); *Ascertainment of Community Problems by Noncommercial Educational Broadcast Applicants*, 54 F. C. C. 2d 766, 767, 775, 776 (1975). The FCC held that a broadcaster's failure to ascertain and serve the needs of sizable minority groups in its service area was, in itself, a failure of licensee responsibility regardless of any intent to discriminate and was a sufficient ground for the nonrenewal of a license. See, *e. g.*, *Chapman Radio and Television Co.*, 24 F. C. C. 2d 282, 286 (1970). The Commission observed that "[t]he problems of minorities must be taken into consideration by broadcasters in planning their program schedules to meet the needs and interests of the communities they are licensed to serve." *Time-Life Broadcast, Inc.*, 33 F. C. C. 2d 1081, 1093 (1972); see also *Mahoning Valley Broadcasting Corp.*, 39 F. C. C. 2d 52, 58 (1972); *WKBN Broadcasting Corp.*, 30 F. C. C. 2d 958, 970 (1971). Pursuant to this policy, for example, the Commission refused to renew licenses for eight educational stations in Alabama and denied an application for a construction permit for a ninth, all on the ground that the licensee "did not take the trouble to inform itself of the needs and interests of a minority group consisting of 30 percent of the population of the State of Alabama" and that such a failure was "fundamentally irreconcilable with the obligations which the Communications Act places upon those who receive authorizations to use the airwaves." *Alabama Educational Television Comm'n*, 50 F. C. C. 2d 461, 472, 473 (1975), citing *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). The Commission's ascertainment policy was not static; in order to facilitate application of the ascertainment requirement, the Commission devised a community leader checklist consisting

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tions routinely processed by the Commission staff; rather, such applications were brought to the attention of the Commission itself.

of 19 groups and institutions commonly found in local communities, see 57 F. C. C. 2d, at 418–419, and it continued to consider improvements to the ascertainment system. See, *e. g.*, *Amendment of Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees*, 47 Radio Reg. 2d (P&F) 189 (1980).

By 1978, however, the Commission had determined that even these efforts at influencing broadcast content were not effective means of generating adequate programming diversity. The FCC noted that "[w]hile the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." *Minority Ownership Statement*, 68 F. C. C. 2d, at 980 (footnotes omitted). As support, the Commission cited a report by the United States Commission on Civil Rights, which found that minorities "are underrepresented on network dramatic television programs and on the network news. When they do appear they are frequently seen in token or stereotyped roles." Window Dressing on the Set 3 (Aug. 1977). The FCC concluded that "despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming." 68 F. C. C. 2d, at 981; see also *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849, 850 (1982) ("[I]t became apparent that in order to broaden minority voices and spheres of influence over the airwaves, additional

measures were necessary" beyond the equal employment and ascertainment rules).[40]

In short, the Commission established minority ownership preferences only after long experience demonstrated that race-neutral means could not produce adequate broadcasting diversity.[41] The FCC did not act precipitately in devising the programs we uphold today; to the contrary, the Commission undertook thorough evaluations of its policies *three* times—in 1960, 1971, and 1978—before adopting the minority ownership programs.[42] In endorsing the minority ownership

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[40] The Commission recently eliminated its ascertainment policies for commercial radio and television stations, together with its nonentertainment programming guidelines. See *Deregulation of Radio*, *supra*, at 975–999, reconsideration denied, 87 F. C. C. 2d 797 (1981), rev'd on other grounds *sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 228 U. S. App. D. C. 8, 707 F. 2d 1413 (1983); *Deregulation of Television*, *supra*, at 1096–1101, reconsideration denied, 104 F. C. C. 2d 358 (1986), remanded on other grounds *sub nom. Action for Children's Television* v. *FCC*, 261 U. S. App. D. C. 253, 821 F. 2d 741 (1987). The Commission found that the ascertainment rules imposed significant burdens on licensees without producing corresponding benefits in terms of responsiveness to community issues. See 98 F. C. C. 2d, at 1098 ("Ascertainment procedures . . . were intended as a means of ensuring that licensees actively discovered the problems, needs and issues facing their communities . . . . Yet, we have no evidence that these procedures have had such an effect") (footnote omitted).

[41] Although the Commission has concluded that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" have rendered "the fairness doctrine unnecessary," *Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F. C. C. 2d 143, 197 (1985), the Commission has not made such a finding with respect to its minority ownership policies. To the contrary, the Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its "regulations designed to promote diversity." *Syracuse Peace Council (Reconsideration)*, 3 F. C. C. Rcd 2035, 2041, n. 56 (1988).

[42] JUSTICE O'CONNOR offers few race-neutral alternatives to the policies that the FCC has already employed and found wanting. She insists that "[t]he FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity." *Post*,

preferences, Congress agreed with the Commission's assessment that race-neutral alternatives had failed to achieve the necessary programming diversity.[43]

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at 622. But the Commission's efforts to use the ascertainment policy to determine the programming needs of each community and the comparative licensing procedure to provide licensees incentives to address their programming to these needs met with failure. A system of FCC-mandated "diverse" programming would have suffered the same fate, while introducing new problems as well. See n. 36, *supra*.

JUSTICE O'CONNOR's proposal that "[t]he FCC . . . evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints," *post*, at 623, similarly ignores the practical difficulties in determining the "underrepresented viewpoints" of each community. In addition, JUSTICE O'CONNOR's proposal is in tension with her own view of equal protection. On the one hand, she criticizes the Commission for failing to develop specific definitions of "minority viewpoints" so that it might implement her suggestion. *Ibid.*; see also *post*, at 629 (noting that the FCC has declined to identify "any *particular* deficiency in the *viewpoints* contained in the broadcast spectrum") (emphasis added). On the other hand, she implies that any such effort would violate equal protection principles, which she interprets as prohibiting the FCC from "identifying what constitutes a 'Black viewpoint,' an 'Asian viewpoint,' an 'Arab viewpoint,' and so on [and] determining which viewpoints are underrepresented." *Post*, at 615. In this light, JUSTICE O'CONNOR should perceive as a virtue rather than a vice the FCC's decision to enhance broadcast diversity by means of the minority ownership policies rather than by defining a specific "Black" or "Asian" viewpoint.

JUSTICE O'CONNOR maintains that the FCC should have experimented with "[r]ace-neutral financial and informational measures," *post*, at 623, in order to promote minority ownership. This suggestion is so vague that it is difficult to evaluate. In any case, both Congress, see *supra*, at 574 (describing minority financing fund that would have accompanied lottery system), and the Commission considered steps to address directly financial and informational barriers to minority ownership. After the Minority Ownership Task Force identified the requirement that licensees demonstrate the availability of sufficient funds to construct and operate a station for one year, see *Ultravision Broadcasting Co.*, 1 F. C. C. 2d 544, 547 (1965), as an obstacle to minority ownership, see Task Force Report 11–12, that requirement was subsequently reduced to three months. See *Finan-*

[Footnote 43 is on p. 591]

Moreover, the considered nature of the Commission's judgment in selecting the particular minority ownership policies at issue today is illustrated by the fact that the Commission

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cial Qualifications Standards, 72 F. C. C. 2d 784 (1979) (television applicants); *Financial Qualifications for Aural Applicants*, 69 F. C. C. 2d 407, 407–408 (1978) (radio applicants). In addition, the Commission noted that minority broadcasters are eligible for assistance from the Small Business Administration and other federal agencies. See Task Force Report 17–22. The Commission also disseminated information about potential minority buyers of broadcast properties. See, *e. g.*, FCC EEO-Minority Enterprise Division, Minority Ownership of Broadcast Facilities: A Report 8–9 (Dec. 1979). Despite these race-neutral initiatives, the Commission concluded in 1982 that the "'dearth of minority ownership' in the telecommunications industry" remained a matter of "serious concern." *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849, 852 (1982).

The Commission has continued to employ race-neutral means of promoting broadcast diversity. For example, it has worked to expand the number of broadcast outlets within workable technological limits, see, *e. g.*, *Implementation of BC Docket No. 80–90 To Increase Availability of FM Broadcast Assignments*, 100 F. C. C. 2d 1332 (1985), to develop strict cross-ownership rules, see n. 16, *supra*, and to encourage issue-oriented programming by recognizing a licensee's obligation to present programming responsive to issues facing the community of license. See, *e. g.*, *Television Deregulation*, 104 F. C. C. 2d 358, 359 (1986); *Deregulation of Radio*, 84 F. C. C. 2d, at 982–983. The Commission has nonetheless concluded that these efforts cannot substitute for its minority ownership policies. See, *e. g.*, *id.*, at 977.

[43] Congress followed closely the Commission's efforts to increase programming diversity, see *supra*, at 572–579, including the development of the ascertainment policy. See, *e. g.*, S. Rep. No. 93–1190, pp. 6–7 (1974); Broadcast License Renewal Act: Hearings on S. 16 et al. before the Subcommittee on Communications of the Senate Committee on Commerce, 93d Cong., 2d Sess., pt. 1, p. 63 (1974) (testimony of Sen. Scott); *id.*, at 65 (testimony of Rep. Brown). Congress heard testimony from the chief of the Commission's Mass Media Bureau that the ascertainment rules were "seriously flawed" because they "became highly ritualistic and created unproductive unseemly squabbling over administrative trivia." Broadcast Regulation and Station Ownership: Hearings on H. R. 6122 and H. R. 6134 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 98th

has rejected other types of minority preferences. For example, the Commission has studied but refused to implement the more expansive alternative of setting aside certain frequencies for minority broadcasters. See *Nighttime Operations on Clear Channels*, 3 F. C. C. Rcd 3597, 3599–3600 (1988); *Deletion of AM Acceptance Criteria*, 102 F. C. C. 2d 548, 555–558 (1985); *Clear Channel Broadcasting*, 78 F. C. C. 2d 1345, reconsideration denied, 83 F. C. C. 2d 216, 218–219 (1980), aff'd *sub nom. Loyola University* v. *FCC*, 216 U. S. App. D. C. 403, 670 F. 2d 1222 (1982). In addition, in a ruling released the day after it adopted the comparative hearing credit and the distress sale preference, the FCC declined to adopt a plan to require 45-day advance public notice before a station could be sold, which had been advocated on the ground that it would ensure minorities a chance to bid on stations that might otherwise be sold to industry insiders without ever coming on the market. See 43 Fed. Reg. 24560 (1978).[11] Soon afterward, the Commission re-

Cong., 2d Sess., 165 (1984). Other witnesses testified that the minority ownership policies were adopted "only after specific findings by the Commission that ascertainment policies, and equal opportunity rules fell far short of increasing minority participation in programming and ownership." Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 1st Sess., p. 157 (1989) (testimony of J. Clay Smith, Jr., National Bar Association). In enacting the lottery statute, Congress explained the "current comparative hearing process" had failed to produce adequate programming diversity and that "[t]he policy of encouraging diversity of information sources is best served . . . by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so." H. R. Conf. Rep. No. 97–765, p. 43 (1982). Only in this way would "the American public [gain] access to a wider diversity of information sources." *Id.*, at 45.

[11] The proposal was withdrawn after vociferous opposition from broadcasters, who maintained that a notice requirement "would create a burden on stations by causing a significant delay in the time it presently takes to sell a station" and that it might require the disclosure of confidential financial information. 43 Fed. Reg. 24561 (1978).

jected other minority ownership proposals advanced by the Office of Telecommunications Policy and the Department of Commerce that sought to revise the FCC's time brokerage, multiple ownership, and other policies.[45]

The minority ownership policies, furthermore, are aimed directly at the barriers that minorities face in entering the broadcasting industry. The Commission's task force identified as key factors hampering the growth of minority ownership a lack of adequate financing, paucity of information regarding license availability, and broadcast inexperience. See Task Force Report 8–29; Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, Final Report, Strategies for Advancing Minority Ownership Opportunities 25–30 (May 1982). The Commission assigned a preference to minority status in the comparative licensing proceeding, reasoning that such an enhancement might help to compensate for a dearth of broadcasting experience. Most license acquisitions, however, are by necessity purchases of existing stations, because only a limited number of new stations are available, and those are often in less desirable markets or on less profitable portions

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[45] See Public Papers of the Presidents, *supra* n. 4, at 253; *Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 F. C. C. 2d 1591, 1593 (1978). The petition advanced such proposals as a blanket exemption for minorities from certain then-existing Commission policies, such as a rule restricting assignments of stations by owners who had held their stations for less than three years, see 47 CFR § 1.597 (1978); multiple ownership regulations that precluded an owner from holding more than one broadcast facility in a given service that overlapped with another's signal, see *id.*, §§ 73.35, 73.240, and 73.636; and the "Top 50" policy, which required a showing of compelling public interest before the same owner was allowed to acquire a third VHF or fourth (either VHF or UHF) television station in the 50 largest television markets. The Commission rejected these proposals on the ground that while minorities might qualify for waivers on a case-by-case basis, a blanket exception for minorities "would be inappropriate." 69 F. C. C. 2d, at 1597.

of spectrum, such as the UHF band.[46] Congress and the FCC therefore found a need for the minority distress sale policy, which helps to overcome the problem of inadequate access to capital by lowering the sale price and the problem of lack of information by providing existing licensees with an incentive to seek out minority buyers. The Commission's choice of minority ownership policies thus addressed the very factors it had isolated as being responsible for minority underrepresentation in the broadcast industry.

The minority ownership policies are "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment." *Fullilove*, 448 U. S., at 489 (opinion of Burger, C. J.) (footnote omitted). Although it has underscored emphatically its support for the minority ownership policies, Congress has manifested that support through a series of appropriations Acts of finite duration, thereby ensuring future reevaluations of the need for the minority ownership program as the number of minority broadcasters increases. In addition, Congress has continued to hold hearings on the subject of minority ownership.[47] The FCC has noted with

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[46] As of mid-1973, licenses for 66.6 percent of the commercial television stations—and 91.4 percent of the VHF stations—that existed in mid-1989 had already been awarded. Sixty-eight and one-half percent of the AM and FM radio station licenses authorized by the FCC as of mid-1989 had already been issued by mid-1973, including 85 percent of the AM stations. See Brief for Capital Cities/ABC, Inc., as *Amicus Curiae* in No. 89–453, p. 11, n. 19. See also n. 2, *supra;* Honig, The FCC and Its Fluctuating Commitment to Minority Ownership of Broadcast Facilities, 27 How. L. J. 859, 875, n. 87 (1984) (reporting 1980 statistics that Afro-Americans "tended to own the least desirable AM properties"—those with the lowest power and highest frequencies, and hence those with the smallest areas of coverage).

[47] See, *e. g.*, Minority Ownership of Broadcast Stations: Hearing before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989). See also *supra*, at 578–579.

respect to the minority preferences contained in the lottery statute, 47 U. S. C. § 309(i)(3)(A) (1982 ed.), that Congress instructed the Commission to "report annually on the effect of the preference system and whether it is serving the purposes intended. Congress will be able to further tailor the program based on that information, and may eliminate the preferences when appropriate." *Amendment of Commission's Rules to Allow Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 93 F. C. C. 2d 952, 974 (1983). Furthermore, there is provision for administrative and judicial review of all Commission decisions, which guarantees both that the minority ownership policies are applied correctly in individual cases,[48] and that there will be frequent

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[48] As in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), the FCC minority preferences are subject to "administrative scrutiny to identify and eliminate from participation" those applicants who are not bona fide. *Id.*, at 487–488. See *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants and Other Participants to Comparative Renewal Process and to Prevention of Abuses of the Renewal Process*, 3 F. C. C. Rcd 5179 (1988). The FCC's Review Board, in supervising the comparative hearing process, seeks to detect sham integration credits claimed by all applicants, including minorities. See, *e. g.*, *Silver Springs Communications*, 5 F. C. C. Rcd 469, 479 (1990); *Metroplex Communications, Inc.*, 4 F. C. C. Rcd 8149, 8149–8150, 8159–8160 (1989); *Northampton Media Associates*, 3 F. C. C. Rcd 5164, 5170–5171 (Rev. Bd. 1988); *Washoe Shoshone Broadcasting*, 3 F. C. C. Rcd 3948, 3955 (Rev. Bd. 1988); *Mulkey*, 3 F. C. C. Rcd 590, 590–593 (Rev. Bd. 1988), modified, 4 F. C. C. Rcd 5520, 5520–5521 (1989); *Newton Television Limited*, 3 F. C. C. Rcd 553, 558–559, n. 2 (Rev. Bd. 1988); *Magdelene Gunden Partnership*, 3 F. C. C. Rcd 488, 488–489 (Rev. Bd. 1988); *Tulsa Broadcasting Group*, 2 F. C. C. Rcd 6124, 6129–6130 (Rev. Bd. 1987); *Pacific Television, Ltd.*, 2 F. C. C. Rcd 1101, 1102–1104 (Rev. Bd. 1987), review denied, 3 F. C. C. Rcd 1700 (1988); *Payne Communications, Inc.*, 1 F. C. C. Rcd 1052, 1054–1057 (Rev. Bd. 1986); *N. E. O. Broadcasting Co.*, 103 F. C. C. 2d 1031, 1033 (Rev. Bd. 1986); *Hispanic Owners, Inc.*, 99 F. C. C. 2d 1180, 1190–1191 (Rev. Bd. 1985); *KIST Corp.*, 99 F. C. C. 2d 173, 186–190 (Rev. Bd. 1984), aff'd as modified, 102 F. C. C. 2d 288, 292–293, and n. 11 (1985),

opportunities to revisit the merits of those policies. Congress and the Commission have adopted a policy of minority ownership not as an end in itself, but rather as a means of achieving greater programming diversity. Such a goal carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved. The FCC's plan, like the Harvard admissions program discussed in *Bakke*, contains the seed of its own termination. Cf. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616, 640 (1987) (agency's "express commitment to 'attain' a balanced work force" ensures that plan will be of limited duration).

Finally, we do not believe that the minority ownership policies at issue impose impermissible burdens on nonminorities.[49] Although the nonminority challengers in these cases concede that they have not suffered the loss of an already-awarded broadcast license, they claim that they have been handicapped in their ability to obtain one in the first instance. But just as we have determined that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy," *Wygant*, 476 U. S., at 280–281 (opinion of Powell, J.), we similarly find that a congressionally mandated, be-

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aff'd *sub nom. United American Telecasters, Inc.* v. *FCC*, 255 U. S. App. D. C. 397, 801 F. 2d 1436 (1986).

As evidenced by respondent Shurberg's own unsuccessful attack on the credentials of Astroline, see 278 U. S. App. D. C., at 31, 876 F. 2d, at 906, the FCC also entertains challenges to the bona fide nature of distress sale participants. See *1982 Policy Statement*, 92 F. C. C. 2d, at 855.

[49] Minority broadcasters, both those who obtain their licenses by means of the minority ownership policies and those who do not, are not stigmatized as inferior by the Commission's programs. Audiences do not know a broadcaster's race and have no reason to speculate about how he or she obtained a license; each broadcaster is judged on the merits of his or her programming. Furthermore, minority licensees must satisfy otherwise applicable FCC qualifications requirements. Cf. *Fullilove*, *supra*, at 521 (MARSHALL, J., concurring in judgment).

nign, race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose *undue* burdens on nonminorities. Cf. *Fullilove*, 448 U. S., at 484 (opinion of Burger, C. J.) ("It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible") (citation omitted); *id.*, at 521 (MARSHALL, J., concurring in judgment).

In the context of broadcasting licenses, the burden on nonminorities is slight. The FCC's responsibility is to grant licenses in the "public interest, convenience, or necessity," 47 U. S. C. §§ 307, 309 (1982 ed.), and the limited number of frequencies on the electromagnetic spectrum means that "[n]o one has a First Amendment right to a license." *Red Lion*, 395 U. S., at 389. Applicants have no settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership. Award of a preference in a comparative hearing or transfer of a station in a distress sale thus contravenes "no legitimate firmly rooted expectation[s]" of competing applicants. *Johnson*, *supra*, at 638.

Respondent Shurberg insists that because the minority distress sale policy operates to exclude nonminority firms completely from consideration in the transfer of certain stations, it is a greater burden than the comparative hearing preference for minorities, which is simply a "plus" factor considered together with other characteristics of the applicants.[50] Cf. *Bakke*, 438 U. S., at 317–318; *Johnson*, *supra*,

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[50] Petitioner Metro contends that, in practice, the minority enhancement credit is not part of a multifactor comparison of applicants but rather amounts to a *per se* preference for a minority applicant in a comparative licensing proceeding. But experience has shown that minority ownership does not guarantee that an applicant will prevail. See, *e. g.*, *Radio Jones-*

at 638. We disagree that the distress sale policy imposes an undue burden on nonminorities. By its terms, the policy may be invoked at the Commission's discretion only with respect to a small fraction of broadcast licenses—those designated for revocation or renewal hearings to examine basic qualification issues—and only when the licensee chooses to sell out at a distress price rather than to go through with the

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boro, Inc., 100 F. C. C. 2d 941, 945–946 (1985); *Lamprecht*, 99 F. C. C. 2d 1219, 1223 (Rev. Bd. 1984), review denied, 3 F. C. C. Rcd 2527 (1988), appeal pending, *Lamprecht* v. *FCC*, No. 88–1395 (CADC); *Horne Industries, Inc.*, 98 F. C. C. 2d 601, 603 (1984); *Vacationland Broadcasting Co.*, 97 F. C. C. 2d 485, 514–517 (Rev. Bd. 1984), modified, 58 Radio Reg. 2d (P&F) 439 (1985); *Las Misiones de Bejar Television Co.*, 93 F. C. C. 2d 191, 195 (Rev. Bd. 1983), review denied, FCC 84–97 (May 16, 1984); *Waters Broadcasting Corp.*, 88 F. C. C. 2d 1204, 1211–1212 (Rev. Bd. 1981).

In many cases cited by Metro, even when the minority applicant prevailed, the enhancement for minority status was not the dispositive factor in the Commission's decision to award the license. See, *e. g.*, *Silver Springs Communications, Inc.*, 5 F. C. C. Rcd 469, 479 (ALJ 1990); *Richardson Broadcasting Group*, 4 F. C. C. Rcd 7989, 7999 (ALJ 1989); *Pueblo Radio Broadcasting Service*, 4 F. C. C. Rcd 7802, 7812 (ALJ 1989); *Poughkeepsie Broadcasting Limited Partnership*, 4 F. C. C. Rcd 6543, 6551, and n. 4 (ALJ 1989); *Barden*, 4 F. C. C. Rcd 7043, 7045 (ALJ 1989); *Perry Television, Inc.*, 4 F. C. C. Rcd 4603, 4618, 4620 (ALJ 1989); *Corydon Broadcasting, Ltd.*, 4 F. C. C. Rcd 1537, 1539 (ALJ 1989), remanded, Order of Dec. 6, 1989 (Rev. Bd.); *Breaux Bridge Broadcasters Limited Partnership*, 4 F. C. C. Rcd 581, 585 (ALJ 1989); *Key Broadcasting Corp.*, 3 F. C. C. Rcd 6587, 6600 (ALJ 1988); *62 Broadcasting, Inc.*, 3 F. C. C. Rcd 4429, 4450 (ALJ 1988), aff'd, 4 F. C. C. Rcd 1768, 1774 (Rev. Bd. 1989), review denied, 5 F. C. C. Rcd 830 (1990); *Gali Communications, Inc.*, 2 F. C. C. Rcd 6967, 6994 (ALJ 1987); *Bogner Newton Corp.*, 2 F. C. C. Rcd 4792, 4805 (ALJ 1987); *Garcia*, 2 F. C. C. Rcd 4166, 4168, n. 1 (ALJ 1987), aff'd, 3 F. C. C. Rcd 1065 (Rev. Bd.), review denied, 3 F. C. C. Rcd 4767 (1988); *Magdalene Gunden Partnership*, 2 F. C. C. Rcd 1223, 1238 (ALJ 1987), aff'd, 2 F. C. C. Rcd 5513 (Rev. Bd. 1987), reconsideration denied, 3 F. C. C. Rcd 488 (Rev. Bd.), review denied, 3 F. C. C. Rcd 7186 (1988); *Tulsa Broadcasting Group*, 2 F. C. C. Rcd 1149, 1162 (ALJ), aff'd, 2 F. C. C. Rcd 6124 (Rev. Bd. 1987), review denied, 3 F. C. C. Rcd 4541 (1988); *Tomko*, 2 F. C. C. Rcd 206, 209, n. 3 (ALJ 1987).

hearing. The distress sale policy is not a quota or fixed quantity set-aside. Indeed, the nonminority firm exercises control over whether a distress sale will ever occur at all, because the policy operates only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in question have been filed with the Commission at the time of the designation. See *Clarification of Distress Sale Policy*, 44 Radio Reg. 2d (P&F) 479 (1978). Thus, a nonminority can prevent the distress sale procedures from ever being invoked by filing a competing application in a timely manner.[51]

In practice, distress sales have represented a tiny fraction—less than 0.4 percent—of all broadcast sales since 1979. See Brief for Federal Communications Commission in No. 89–700, p. 44. There have been only 38 distress sales since the policy was commenced in 1978. See A. Barrett, Federal Communications Commission, Minority Employment and Ownership in the Communications Market: What's Ahead in the 90's?, p. 7 (Address to the Bay Area Black

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[51] Faith Center also held broadcast licenses for three California stations, and in 1978, the FCC designated for a hearing Faith Center's renewal application for its San Bernadino station because of allegations of fraud in connection with over-the-air solicitation for funds and for failure to cooperate with an FCC investigation. Although respondent Shurberg did not file a competing application prior to the Commission's decision to designate for hearing Faith Center's renewal application for its Hartford station, timely filed competing applications against two of Faith Center's California stations prevented their transfer under the distress sale policy. See *Faith Center, Inc.*, 89 F. C. C. 2d 1054 (1982), and *Faith Center, Inc.*, 90 F. C. C. 2d 519 (1982).

Of course, a competitor may be unable to foresee that the FCC might designate a license for a revocation or renewal hearing, and so might neglect to file a competing application in timely fashion. But it is precisely in such circumstances that the minority distress sale policy would least disrupt any of the competitor's settled expectations. From the competitor's perspective, it has been denied an opportunity only at a windfall; it expected the current licensee to continue broadcasting indefinitely and did not anticipate that the license would become available.

Media Conference, San Francisco, Apr. 21, 1990). This means that, on average, only about 0.2 percent of renewal applications filed each year have resulted in distress sales since the policy was commenced in 1978. See 54 FCC Ann. Rep. 33 (1988).[52] Nonminority firms are free to compete for the vast remainder of license opportunities available in a market that contains over 11,000 broadcast properties. Nonminorities can apply for a new station, buy an existing station, file a competing application against a renewal application of an existing station, or seek financial participation in enterprises that qualify for distress sale treatment. See Task Force Report 9–10. The burden on nonminority firms is at least as "relatively light" as that created by the program at issue in *Fullilove*, which set aside for minorities 10 percent of federal funds granted for local public works projects. 448 U. S., at 484 (opinion of Burger, C. J.); see also *id.*, at 485, n. 72.

III

The Commission's minority ownership policies bear the *imprimatur* of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity. The judgment in No. 89–453 is affirmed, the judgment in

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[52] Even for troubled licensees, distress sales are relatively rare phenomena; most stations presented with the possibility of license revocation opt *not* to utilize the distress sale policy. Many seek and are granted special relief from the FCC enabling them to transfer the license to another concern as part of a negotiated settlement with the Commission, see *Coalition for the Preservation of Hispanic Broadcasting* v. *FCC*, 282 U. S. App. D. C. 200, 203–204, 893 F. 2d 1349, 1352–1353 (1990); bankrupt licensees can effect a sale for the benefit of innocent creditors under the "*Second Thursday*" doctrine, see *Second Thursday Corp.*, 22 F. C. C. 2d 515, 520–521 (1970), reconsideration granted, 25 F. C. C. 2d 112, 113–115 (1970); *Northwestern Indiana Broadcasting Corp. (WLTH)*, 65 F. C. C. 2d 66, 70–71 (1977); and still others elect to defend their practices at hearing.

No. 89–700 is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Today the Court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. *Ante*, at 564–565. I endorse this focus on the future benefit, rather than the remedial justification, of such decisions.[1]

I remain convinced, of course, that racial or ethnic characteristics provide a relevant basis for disparate treatment only in extremely rare situations and that it is therefore "especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Fullilove* v. *Klutznick*, 448 U. S. 448, 534–535 (1980) (dissenting opinion). The Court's opinion explains how both elements of that standard are satisfied. Specifically, the reason for the classification—the recognized interest in broadcast diversity—is clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way.[2] In addition, the Court demonstrates that these cases fall within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment.[3] The public interest in broadcast diver-

[1] See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 511–513 (1989) (STEVENS, J., concurring in part and concurring in judgment); *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 313–315 (1986) (STEVENS, J., dissenting).

[2] Cf. *Croson*, 488 U. S., at 516–517; *Fullilove*, 448 U. S., at 545, and n. 17.

[3] See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 452–454 (1985) (STEVENS, J., concurring) (in examining the "rational basis" for a classification, 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

sity—like the interest in an integrated police force,[4] diversity in the composition of a public school faculty[5] or diversity in the student body of a professional school[6]—is in my view unquestionably legitimate.

Therefore, I join both the opinion and the judgment of the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens "as *individuals*, not 'as simply components of a racial, religious, sexual or national class.'" *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1083 (1983). Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citi-

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of the disadvantaged class"); *Michael M.* v. *Superior Court of Sonoma County*, 450 U. S. 464, 497, n. 4 (1981) (STEVENS, J., dissenting) (discussing the level of scrutiny appropriate in equal protection cases).

[4] See *Wygant*, 476 U. S., at 314 (STEVENS, J., dissenting).

[5] See *id.*, at 315–316. See also JUSTICE O'CONNOR's opinion concurring in part and concurring in the judgment in *Wygant*, recognizing that the "goal of providing 'role models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty." *Id.*, at 288, n.

[6] See Justice Powell's opinion announcing the judgment in *Regents of University of California* v. *Bakke*, 438 U. S. 265, 311–319 (1978).

zens. The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution. I respectfully dissent.

I

As we recognized last Term, the Constitution requires that the Court apply a strict standard of scrutiny to evaluate racial classifications such as those contained in the challenged FCC distress sale and comparative licensing policies. See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989); see also *Bolling* v. *Sharpe*, 347 U. S. 497 (1954). "Strict scrutiny" requires that, to be upheld, racial classifications must be determined to be necessary and narrowly tailored to achieve a compelling state interest. The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation. Yet the Government's different treatment of citizens according to race is no routine concern. This Court's precedents in no way justify the Court's marked departure from our traditional treatment of race classifications and its conclusion that different equal protection principles apply to these federal actions.

In both the challenged policies, the Federal Communications Commission (FCC) provides benefits to some members of our society and denies benefits to others based on race or ethnicity. Except in the narrowest of circumstances, the Constitution bars such racial classifications as a denial to particular individuals, of any race or ethnicity, of "the equal protection of the laws." U. S. Const., Amdt. 14, § 1; cf. *Croson*, *supra*, at 493–494. The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict. See *Croson*, *supra*, at 493–494; *Korematsu* v. *United States*, 323 U. S. 214, 240 (1944) (Murphy, J., dissenting) (upholding treatment of individual based on inference from race is "to destroy the

dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow"). Such policies may embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution. Accord, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725–726 (1982). Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit. Cf. *Regents of University of California* v. *Bakke*, 438 U. S. 265, 358–362 (1978) (opinion of BRENNAN, J.). "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate." *Fullilove* v. *Klutznick*, 448 U. S. 448, 533–535 (1980) (STEVENS, J., dissenting) (footnotes omitted).

The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications. In *Bolling* v. *Sharpe*, *supra*, the companion case to *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the Court held that equal protection principles embedded in the Fifth Amendment's Due Process Clause prohibited the Federal Government from maintaining racially segregated schools in the District of Columbia: "[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*, at 500. Consistent with this view, the Court has repeatedly indicated that "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States* v.

Paradise, 480 U. S. 149, 166, n. 16 (1987) (plurality opinion) (considering remedial race classification); *id.*, at 196 (O'CONNOR, J., dissenting); see also, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975).

Nor does the congressional role in prolonging the FCC's policies justify any lower level of scrutiny. As with all instances of judicial review of federal legislation, the Court does not lightly set aside the considered judgment of a coordinate branch. Nonetheless, the respect due a coordinate branch yields neither less vigilance in defense of equal protection principles nor any corresponding diminution of the standard of review. In *Weinberger* v. *Wiesenfeld*, for example, the Court upheld a widower's equal protection challenge to a provision of the Social Security Act, found the assertedly benign congressional purpose to be illegitimate, and noted that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." 420 U. S., at 638, n. 2. The Court has not varied its standard of review when entertaining other equal protection challenges to congressional measures. See, *e. g.*, *Heckler* v. *Mathews*, 465 U. S. 728 (1984); *Califano* v. *Webster*, 430 U. S. 313 (1977) *(per curiam); Califano* v. *Goldfarb*, 430 U. S. 199, 210–211 (1977) (traditional equal protection standard applies despite deference to congressional benefit determinations) (opinion of BRENNAN, J.); *Buckley* v. *Valeo*, *supra*, at 93; *Frontiero* v. *Richardson*, 411 U. S. 677, 684–691 (1973) (opinion of BRENNAN, J.). And *Bolling* v. *Sharpe*, *supra*, itself involved extensive congressional regulation of the segregated District of Columbia public schools.

Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its "unique remedial powers . . . under § 5 of the Fourteenth Amendment," see *Croson*, *supra*, at 488 (opinion of O'CONNOR, J.), but this case does not implicate those powers. Section 5 empowers

Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials. Section 5 provides to Congress the "power to enforce, by appropriate legislation, the provisions of this article," which in part provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1. Reflecting the Fourteenth Amendment's "dramatic change in the balance between congressional and state power over matters of race," *Croson*, 488 U. S., at 490 (opinion of O'CONNOR, J.), that section provides to Congress a particular, structural role in the oversight of certain of the States' actions. See *id.*, at 488–491, 504; *Hogan*, *supra*, at 732 (§ 5 grants power to enforce Amendment "'to secure . . . equal protection of the laws against State denial or invasion,'" quoting *Ex parte Virginia*, 100 U. S. 339, 346 (1880)); *Fullilove*, *supra*, at 476–478, 483–484.

The Court asserts that *Fullilove* supports its novel application of intermediate scrutiny to "benign" race conscious measures adopted by Congress. *Ante*, at 564. Three reasons defeat this claim. First, *Fullilove* concerned an exercise of Congress' powers under § 5 of the Fourteenth Amendment. In *Fullilove*, the Court reviewed an Act of Congress that had required States to set aside a percentage of federal construction funds for certain minority-owned businesses to remedy past discrimination in the award of construction contracts. Although the various opinions in *Fullilove* referred to several sources of congressional authority, the opinions make clear that it was § 5 that led the Court to apply a different form of review to the challenged program. See, *e. g.*, 448 U. S., at 483 (opinion of Burger, C. J., joined by WHITE, J., and Powell, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees"); *id.*, at 508–510, 516 (Powell, J., concur-

ring). Last Term, *Croson* resolved any doubt that might remain regarding this point. In *Croson*, we invalidated a local set-aside for minority contractors. We distinguished *Fullilove*, in which we upheld a similar set-aside enacted by Congress, on the ground that in *Fullilove* "Congress was exercising its powers under § 5 of the Fourteenth Amendment." *Croson*, 488 U. S., at 504 (opinion of the Court); *id.*, at 490 (opinion of O'CONNOR, J., joined by REHNQUIST, C. J., and WHITE, J.). *Croson* indicated that the decision in *Fullilove* turned on "the unique remedial powers of Congress under § 5," *id.*, at 488 (opinion of O'CONNOR, J.), and that the latitude afforded Congress in identifying and redressing past discrimination rested on § 5's "specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.*, at 490. JUSTICE KENNEDY's concurrence in *Croson* likewise provides the majority with no support, for it questioned whether the Court should, as it had in *Fullilove*, afford any particular latitude even to measures undertaken pursuant to § 5. See *id.*, at 518.

Second, *Fullilove* applies at most only to congressional measures that seek to remedy identified past discrimination. The Court upheld the challenged measures in *Fullilove* only because Congress had identified discrimination that had particularly affected the construction industry and had carefully constructed corresponding remedial measures. See *Fullilove*, 448 U. S., at 456–467, 480–489 (opinion of Burger, C. J.); *id.*, at 498–499 (Powell, J., concurring). *Fullilove* indicated that careful review was essential to ensure that Congress acted solely for remedial rather than other, illegitimate purposes. See *id.*, at 486–487 (opinion of Burger, C. J.); *id.*, at 498–499 (Powell, J., concurring). The FCC and Congress are clearly not acting for any remedial purpose, see *infra*, at 611–612, and the Court today expressly extends its standard to racial classifications that are not remedial in any sense. See *ante*, at 564–565. This case does not present "a considered decision of the Congress and the President," *Fullilove*,

supra, at 473; nor does it present a remedial effort or exercise of § 5 powers.

Finally, even if *Fullilove* applied outside a remedial exercise of Congress' § 5 power, it would not support today's adoption of the intermediate standard of review proffered by JUSTICE MARSHALL, but rejected, in *Fullilove*. Under his suggested standard, the Government's use of racial classifications need only be "'substantially related to achievement'" of important governmental interests. *Ante*, at 565. Although the Court correctly observes that a majority did not apply strict scrutiny, six Members of the Court rejected intermediate scrutiny in favor of some more stringent form of review. Three Members of the Court applied strict scrutiny. See 448 U. S., at 496 (Powell, J., concurring) (challenged statute "employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); *id.*, at 498 ("means selected must be narrowly drawn"); *id.*, at 523 (Stewart, J., joined by REHNQUIST, J., dissenting). Chief Justice Burger's opinion, joined by JUSTICE WHITE and Justice Powell, declined to adopt a particular standard of review but indicated that the Court must conduct "a most searching examination," *id.*, at 491, and that courts must ensure that "any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Id.*, at 480. JUSTICE STEVENS indicated that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.*, at 537–538 (dissenting opinion). Even JUSTICE MARSHALL's opinion concurring in the judgment, joined by JUSTICE BRENNAN and JUSTICE BLACKMUN, undermines the Court's course today: That opinion expressly drew its lower standard of review from the plurality opinion in *Regents of University of California* v. *Bakke*, 438 U. S. 265 (1978), a case that did not involve con-

gressional action, and stated that the appropriate standard of review for the congressional measure challenged in *Fullilove* "is the same as that under the Fourteenth Amendment." 448 U. S., at 517–518, n. 2 (internal quotation omitted). And, of course, *Fullilove* preceded our determination in *Croson* that strict scrutiny applies to preferences that favor members of minority groups, including challenges considered under the Fourteenth Amendment.

The guarantee of equal protection extends to each citizen, regardless of race: The Federal Government, like the States, may not "deny to any person within its jurisdiction the equal protection of the laws." As we observed only last Term in *Croson*, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 488 U. S., at 493 (opinion of O'CONNOR, J.); see also *id.*, at 500, 494 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

The Court's reliance on "benign racial classifications," *ante*, at 564, is particularly troubling. "'Benign' racial classification" is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, see *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), securing to *each* individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group. The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. Untethered to nar-

rowly confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent." By expressly distinguishing "benign" from remedial race-conscious measures, the Court leaves the distinct possibility that any racial measure found to be substantially related to an important governmental objective is also, by definition, "benign." See *ante*, at 564–565. Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not. The standard of review establishes whether and when the Court and Constitution allow the Government to employ racial classifications. A lower standard signals that the Government may resort to racial distinctions more readily. The Court's departure from our cases is disturbing enough, but more disturbing still is the renewed toleration of racial classifications that its new standard of review embodies.

II

Our history reveals that the most blatant forms of discrimination have been visited upon some members of the racial and ethnic groups identified in the challenged programs. Many have lacked the opportunity to share in the Nation's wealth and to participate in its commercial enterprises. It is undisputed that minority participation in the broadcasting industry falls markedly below the demographic representation

of those groups, see, *e. g.*, Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? 42 (June 29, 1988) (minority owners possess an interest in 13.3 percent of stations and a controlling interest in 3.5 percent of stations), and this shortfall may be traced in part to the discrimination and the patterns of exclusion that have widely affected our society. As a Nation we aspire to create a society untouched by that history of exclusion, and to ensure that equality defines all citizens' daily experience and opportunities as well as the protection afforded to them under law.

For these reasons, and despite the harms that may attend the Government's use of racial classifications, we have repeatedly recognized that the Government possesses a compelling interest in remedying the effects of identified race discrimination. We subject even racial classifications claimed to be remedial to strict scrutiny, however, to ensure that the Government in fact employs any race-conscious measures to further this remedial interest and employs them only when, and no more broadly than, the interest demands. See, *e. g.*, *Croson*, *supra*, at 493–495, 498–502; *Wygant* v. *Jackson Bd. of Ed.*, 476 U. S. 267 (1986) (plurality opinion). The FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's power.

Yet it is equally clear that the policies challenged in these cases were not designed as remedial measures and are in no sense narrowly tailored to remedy identified discrimination. The FCC appropriately concedes that its policies embodied no remedial purpose, Tr. of Oral Arg. 40–42, and has disclaimed the possibility that discrimination infected the allocation of licenses. The congressional action at most simply endorsed a policy designed to further the interest in achieving diverse programming. Even if the appropriations

measure could transform the purpose of the challenged policies, its text reveals no remedial purpose, and the accompanying legislative material confirms that Congress acted upon the same diversity rationale that led the FCC to formulate the challenged policies. See S. Rep. No. 100–182, p. 76 (1987). The Court refers to the bare suggestion, contained in a Report addressing different legislation passed in 1982, that "past inequities" have led to "underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H. R. Conf. Rep. No. 97–765, p. 43 (1982); *ante*, at 566. This statement indicates nothing whatever about the purpose of the relevant appropriations measures, identifies no discrimination in the broadcasting industry, and would not sufficiently identify discrimination even if Congress were acting pursuant to its § 5 powers. Cf. *Fullilove*, 448 U. S., at 456–467 (opinion of Burger, C. J.) (surveying identification of discrimination affecting contracting opportunities); *id.*, at 502–506 (Powell, J., concurring). The Court evaluates the policies only as measures designed to increase programming diversity. *Ante*, at 566–568. I agree that the racial classifications cannot be upheld as remedial measures.

III

Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court does not claim otherwise. Rather, it employs its novel standard and claims that this asserted interest need only be, and is, "important." This conclusion twice compounds the Court's initial error of reducing its level

of scrutiny of a racial classification. First, it too casually extends the justifications that might support racial classifications, beyond that of remedying past discrimination. We have recognized that racial classifications are so harmful that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U. S., at 493. As Chief Justice Burger warned in *Fullilove:* "The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications." 448 U. S., at 486–487. Second, it has initiated this departure by endorsing an insubstantial interest, one that is certainly insufficiently weighty to justify tolerance of the Government's distinctions among citizens based on race and ethnicity. This endorsement trivializes the constitutional command to guard against such discrimination and has loosed a potentially far-reaching principle disturbingly at odds with our traditional equal protection doctrine.

An interest capable of justifying race-conscious measures must be sufficiently specific and verifiable, such that it supports only limited and carefully defined uses of racial classifications. In *Croson*, we held that an interest in remedying societal discrimination cannot be considered compelling. See 488 U. S., at 505 (because the city of Richmond had presented no evidence of identified discrimination, it had "failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race"). We determined that a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of race classifications. See *id.*, at 498 (internal quotation marks omitted). In *Wygant*, we rejected the asserted interest in "providing minority role models for [a public school system's] minority students, as an attempt to allevi-

ate the effects of societal discrimination," 476 U. S., at 274 (plurality opinion), because "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" and would allow "remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.*, at 276. Both cases condemned those interests because they would allow distribution of goods essentially according to the demographic representation of particular racial and ethnic groups. See *Croson*, *supra*, at 498, 505–506, 507; *Wygant*, 476 U. S., at 276 (plurality opinion).

The asserted interest in these cases suffers from the same defects. The interest is certainly amorphous: The FCC and the majority of this Court understandably do not suggest how one would define or measure a particular viewpoint that might be associated with race, or even how one would assess the diversity of broadcast viewpoints. Like the vague assertion of societal discrimination, a claim of insufficiently diverse broadcasting viewpoints might be used to justify equally unconstrained racial preferences, linked to nothing other than proportional representation of various races. And the interest would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture. We cannot deem to be constitutionally adequate an interest that would support measures that amount to the core constitutional violation of "outright racial balancing." *Croson*, *supra*, at 507.

The asserted interest would justify discrimination against members of any group found to contribute to an insufficiently diverse broadcasting spectrum, including those groups currently favored. In *Wygant*, we rejected as insufficiently weighty the interest in achieving role models in public schools, in part because that rationale could as readily be used to limit the hiring of teachers who belonged to particular minority groups. See *Wygant*, *supra*, at 275–276 (plurality

opinion). The FCC's claimed interest could similarly justify limitations on minority members' participation in broadcasting. It would be unwise to depend upon the Court's restriction of its holding to "benign" measures to forestall this result. Divorced from any remedial purpose and otherwise undefined, "benign" means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but "benign" discrimination.

Under the majority's holding, the FCC may also advance its asserted interest in viewpoint diversity by identifying what constitutes a "black viewpoint," an "Asian viewpoint," an "Arab viewpoint," and so on; determining which viewpoints are underrepresented; and then using that determination to mandate particular programming or to deny licenses to those deemed by virtue of their race or ethnicity less likely to present the favored views. Indeed, the FCC has, if taken at its word, essentially pursued this course, albeit without making express its reasons for choosing to favor particular groups or for concluding that the broadcasting spectrum is insufficiently diverse. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F. C. C. 2d 979 (1978) *(1978 Policy Statement)*.

We should not accept as adequate for equal protection purposes an interest unrelated to race, yet capable of supporting measures so difficult to distinguish from proscribed discrimination. The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination; yet the interest in diversity of viewpoints provides no legitimate, much less important, reason to employ race classifications apart from generalizations impermissibly equating race with thoughts and behavior. And it will prove impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued

views: No matter what its purpose, the Government will be able to claim that it has favored certain persons for their ability, stemming from race, to contribute distinctive views or perspectives.

Even considered as other than a justification for using race classifications, the asserted interest in viewpoint diversity falls short of being weighty enough. The Court has recognized an interest in obtaining diverse broadcasting viewpoints as a legitimate basis for the FCC, acting pursuant to its "public interest" statutory mandate, to adopt limited measures to increase the number of competing licensees and to encourage licensees to present varied views on issues of public concern. See, *e. g.*, *FCC* v. *National Citizens Committee for Broadcasting*, 436 U. S. 775 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192 (1956); *Associated Press* v. *United States*, 326 U. S. 1 (1945); *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943). We have also concluded that these measures do not run afoul of the First Amendment's usual prohibition of Government regulation of the marketplace of ideas, in part because First Amendment concerns support limited but inevitable Government regulation of the peculiarly constrained broadcasting spectrum. See, *e. g.*, *Red Lion*, *supra*, at 389–390. But the conclusion that measures adopted to further the interest in diversity of broadcasting viewpoints are neither beyond the FCC's statutory authority nor contrary to the First Amendment hardly establishes the interest as important for equal protection purposes.

The FCC's extension of the asserted interest in diversity of views in these cases presents, at the very least, an unsettled First Amendment issue. The FCC has concluded that the American broadcasting public receives the incorrect mix of ideas and claims to have adopted the challenged policies to supplement programming content with a particular set of views. Although we have approved limited measures de-

signed to increase information and views generally, the Court has never upheld a broadcasting measure designed to amplify a distinct set of views or the views of a particular class of speakers. Indeed, the Court has suggested that the First Amendment prohibits allocating licenses to further such ends. See *National Broadcasting Co.* v. *United States*, *supra*, at 226 ("But Congress did not authorize the Commission to choose among [license] applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the [First Amendment] issue before us would be wholly different"). Even if an interest is determined to be legitimate in one context, it does not suddenly become important enough to justify distinctions based on race.

IV

Our traditional equal protection doctrine requires, in addition to a compelling state interest, that the Government's chosen means be necessary to accomplish, and narrowly tailored to further, the asserted interest. See *Wygant*, 476 U. S., at 274 (plurality opinion); *Palmore* v. *Sidoti*, 466 U. S. 429, 432–433 (1984). This element of strict scrutiny is designed to "ensur[e] that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U. S., at 493 (opinion of O'CONNOR, J.). The chosen means, resting as they do on stereotyping and so indirectly furthering the asserted end, could not plausibly be deemed narrowly tailored. The Court instead finds the racial classifications to be "substantially related" to achieving the Government's interest, *ante*, at 569, a far less rigorous fit requirement. The FCC's policies fail even this requirement.

A

The FCC claims to advance its asserted interest in diverse viewpoints by singling out race and ethnicity as peculiarly linked to distinct views that require enhancement. The FCC's choice to employ a racial criterion embodies the related notions that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because "likely to provide [that] distinct perspective." Brief for FCC in No. 89–453, p. 17; see *1978 Policy Statement*, 68 F. C. C. 2d, at 981 (policies seek "representation of minority viewpoints in programming"); Brief for FCC in No. 89–700, p. 20 (current ownership structure creates programming deficient in "minorities['] . . . tastes and viewpoints"). The policies directly equate race with belief and behavior, for they establish race as a necessary and sufficient condition of securing the preference. The FCC's chosen means rest on the "premise that differences in race, or in the color of a person's skin, reflect real differences that are relevant to a person's right to share in the blessings of a free society. [T]hat premise is utterly irrational and repugnant to the principles of a free and democratic society." *Wygant*, *supra*, at 316 (STEVENS, J., dissenting) (internal quotation marks omitted; citation omitted). The policies impermissibly value individuals because they presume that persons think in a manner associated with their race. See *Steele* v. *FCC*, 248 U. S. App. D. C. 279, 285, 770 F. 2d 1192, 1198 (1985) (minority preference contrary to "one of our most cherished constitutional and societal principles . . . that an individual's tastes, beliefs, and abilities should be assessed on their own merits rather than by categorizing that individual as a member of a racial group presumed to think and behave in a particular way"), vacated, No. 84–1176 (Oct. 31, 1985), remanded (CADC, Oct. 9, 1986).

The FCC assumes a particularly strong correlation of race and behavior. The FCC justifies its conclusion that insuffi-

ciently diverse viewpoints are broadcast by reference to the percentage of minority-owned stations. This assumption is correct only to the extent that minority-owned stations provide the desired additional views, and that stations owned by individuals not favored by the preferences cannot, or at least do not, broadcast underrepresented programming. Additionally, the FCC's focus on ownership to improve programming assumes that preferences linked to race are so strong that they will dictate the owner's behavior in operating the station, overcoming the owner's personal inclinations and regard for the market. This strong link between race and behavior, especially when mediated by market forces, is the assumption that Justice Powell rejected in his discussion of health care service in *Bakke*. See 438 U. S., at 310–311. In that case, the state medical school argued that it could prefer members of minority groups because they were more likely to serve communities particularly needing medical care. Justice Powell rejected this rationale, concluding that the assumption was unsupported and that such individual choices could not be presumed from ethnicity or race. *Ibid.*

The majority addresses this point by arguing that the equation of race with distinct views and behavior is not "impermissible" in these particular cases. *Ante*, at 579. Apart from placing undue faith in the Government and courts' ability to distinguish "good" from "bad" stereotypes, this reasoning repudiates essential equal protection principles that prohibit racial generalizations. The Court embraces the FCC's reasoning that an applicant's race will likely indicate that the applicant possesses a distinct perspective, but notes that the correlation of race to behavior is "not a rigid assumption about how minority owners will behave in every case." *Ibid.* The corollary to this notion is plain: Individuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences and background that contribute to viewpoint diversity. Both the reasoning and its corollary reveal but disregard what is objectionable about a stereo-

type: The racial generalization inevitably does not apply to certain individuals, and those persons may legitimately claim that they have been judged according to their race rather than upon a relevant criterion. See *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 708 (1978) ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"). Similarly disturbing is the majority's reasoning that different treatment on the basis of race is permissible because efficacious "in the aggregate." *Ante*, at 579. In *Wiesenfeld*, we rejected similar reasoning: "Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support. But such a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support." 420 U. S., at 645 (citation omitted). Similarly in these cases, even if the Court's equation of race and programming viewpoint has some empirical basis, equal protection principles prohibit the Government from relying upon that basis to employ racial classifications. See *Manhart*, *supra*, at 709 ("Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals"). This reliance on the "aggregate" and on probabilities confirms that the Court has abandoned heightened scrutiny, which requires a direct rather than approximate fit of means to ends. We would not tolerate the Government's claim that hiring persons of a particular race leads to better service "in the aggregate," and we should not accept as legitimate the FCC's claim in these cases that members of certain races will provide superior programming, even if "in the aggregate." The Constitution's text, our cases, and our Nation's history foreclose such premises.

B

Moreover, the FCC's selective focus on viewpoints associated with race illustrates a particular tailoring difficulty. The asserted interest is in advancing the Nation's different "social, political, esthetic, moral, and other ideas and experiences," *Red Lion*, 395 U. S., at 390, yet of all the varied traditions and ideas shared among our citizens, the FCC has sought to amplify only those particular views it identifies through the classifications most suspect under equal protection doctrine. Even if distinct views could be associated with particular ethnic and racial groups, focusing on this particular aspect of the Nation's views calls into question the Government's genuine commitment to its asserted interest. See *Bakke*, 438 U. S., at 314 (opinion of Powell, J.) (race-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body).

Our equal protection doctrine governing intermediate review indicates that the Government may not use race and ethnicity as "a 'proxy for other, more germane bases of classification.'" *Hogan*, 458 U. S., at 726, quoting *Craig* v. *Boren*, 429 U. S. 190, 198 (1976). The FCC has used race as a proxy for whatever views it believes to be underrepresented in the broadcasting spectrum. This reflexive or unthinking use of a suspect classification is the hallmark of an unconstitutional policy. See, *e. g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 151–152 (1980); *Craig*, *supra*, at 198–199; *Wiesenfeld*, *supra*, at 643–645. The ill fit of means to ends is manifest. The policy is overinclusive: Many members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented, or will find them utterly foreign. The policy is underinclusive: It awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views. The FCC has failed to implement a case-by-case determination, and that failure is particularly unjus-

tified when individualized hearings already occur, as in the comparative licensing process. See *Orr* v. *Orr*, 440 U. S. 268, 281 (1979). Even in the remedial context, we have required that the Government adopt means to ensure that the award of a particular preference advances the asserted interest. In *Fullilove*, even reviewing an exercise of § 5 powers, the Court upheld the challenged set-aside only because it contained a waiver provision that ensured that the program served its remedial function in particular cases. See *Fullilove*, 448 U. S., at 487–488 (opinion of Burger, C. J.); see also *Croson*, 488 U. S., at 488–489 (opinion of O'CONNOR, J.).

Moreover, the FCC's programs cannot survive even intermediate scrutiny because race-neutral and untried means of directly accomplishing the governmental interest are readily available. The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity. The interest the FCC asserts is in programming diversity, yet in adopting the challenged policies, the FCC expressly disclaimed having attempted *any* direct efforts to achieve its asserted goal. See *1978 Policy Statement*, 68 F. C. C. 2d, at 981; *ante*, at 584–585, n. 36. The Court suggests that administrative convenience excuses this failure, *ibid.*, yet intermediate scrutiny bars the Government from relying upon that excuse to avoid measures that directly further the asserted interest. See, *e. g.*, *Orr* v. *Orr*, *supra*, at 281; *Craig* v. *Boren*, *supra*, at 198. The FCC and the Court suggest that First Amendment interests in some manner should exempt the FCC from employing this direct, race-neutral means to achieve its asserted interest. They essentially argue that we may bend our equal protection principles to avoid more readily apparent harm to our First Amendment values. But the FCC cannot have it both ways: Either the First Amendment bars the FCC from seeking to accomplish indirectly what it may not accomplish directly; or the FCC may pursue the goal, but must do so in a manner that comports with equal protection principles. And if the

FCC can direct programming in any fashion, it must employ that direct means before resorting to indirect race-conscious means.

Other race-neutral means also exist, and all are at least as direct as the FCC's racial classifications. The FCC could evaluate applicants upon their ability to provide, and commitment to offer, whatever programming the FCC believes would reflect underrepresented viewpoints. If the FCC truly seeks diverse programming rather than allocation of goods to persons of particular racial backgrounds, it has little excuse to look to racial background rather than programming to further the programming interest. Additionally, if the FCC believes that certain persons by virtue of their unique experiences will contribute as owners to more diverse broadcasting, the FCC could simply favor applicants whose particular background indicates that they will add to the diversity of programming, rather than rely solely upon suspect classifications. Also, race-neutral means exist to allow access to the broadcasting industry for those persons excluded for financial and related reasons. The Court reasons that various minority preferences, including those reflected in the distress sale, overcome barriers of information, experience, and financing that inhibit minority ownership. *Ante*, at 593–594. Race-neutral financial and informational measures most directly reduce financial and informational barriers.

The FCC could develop an effective ascertainment policy, one guaranteeing programming that reflects underrepresented viewpoints. The Court's discussion of alternatives nearly exclusively focuses on the FCC's ascertainment policy. *Ante*, at 585–589. Yet that policy applied only to existing licensees, addressed not viewpoints but issues of concern to often relatively homogeneous local communities, and, by the FCC's own admission, was toothless and ineffective. According to the FCC, the ascertainment policies altered programming little more than the market already did, and provided "no guarantee that once a concern is ascertained by

formal or informal means, programming responsive to that concern will be presented." *Commercial TV Stations*, 98 F. C. C. 2d 1076, 1098 (1984), reconsideration denied, 104 F. C. C. 2d 358 (1986), remanded on other grounds *sub nom. Action for Children's Television* v. *FCC*, 261 U. S. App. D. C. 253, 821 F. 2d 741 (1987); see also 98 F. C. C. 2d, at 1098–1101. Unsurprisingly, the FCC has concluded that this limited ascertainment policy has not proved to be effective, and has eliminated it throughout most media. See *id.*, at 1097–1101; *id.*, at 1099, and nn. 78–80 (surveying proceedings abandoning ascertainment requirements).

The FCC has posited a relative absence of "minority viewpoints," yet it has never suggested what those views might be or what other viewpoints might be absent from the broadcasting spectrum. It has never identified any particular deficiency in programming diversity that should be the subject of greater programming or that necessitates racial classifications.

The FCC has never attempted to assess what alternatives to racial classifications might prove effective. The *1978 Policy Statement* referred to only two alternatives that the Commission had undertaken: a minority hiring policy and the ascertainment policy. 68 F. C. C. 2d, at 979–980. Relying on ownership statistics and cursory evaluations of what viewpoints the broadcasting spectrum contained, the FCC asserted that insufficient programming diversity existed and that racial classifications were necessary. *Id.*, at 980–981. Not until 1986 did the FCC attempt to determine the nature of the viewpoints that might be underrepresented or to determine whether effective race-neutral measures might achieve the FCC's asserted interest. See, *e. g.*, *Notice of Inquiry on Racial, Ethnic, or Gender Classifications*, 1 F. C. C. Rcd 1315 (1986), modified, 2 F. C. C. Rcd 2377 (1987). The FCC solicited comment about a range of potential race-neutral alternatives: It asked what race-neutral means might effectively increase program diversity,

whether it should require an individualized showing of ability to contribute to program diversity, whether it should allow nonminority members to demonstrate their ability to contribute to diverse programming, and whether it should select applicants based on demonstrated commitment to particular issues rather than according to race. See 1 F. C. C. Rcd, at 1318. It was this inquiry, of course, that the congressional appropriations measures halted. See Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100–202, 101 Stat. 1329. Thus the record is clear: The FCC has never determined that it has any need to resort to racial classifications to achieve its asserted interest, and it has employed race-conscious means before adopting readily available race-neutral, alternative means.

The FCC seeks to avoid the tailoring difficulties by focusing on minority ownership rather than the asserted interest in diversity of broadcast viewpoints. The Constitution clearly prohibits allocating valuable goods such as broadcast licenses simply on the basis of race. See *Bakke*, 438 U. S., at 307 (opinion of Powell, J.). Yet the FCC refers to the lack of minority ownership of stations to support the existence of a lack of diversity of viewpoints, and has fitted its programs to increase ownership. See *1978 Policy Statement*, *supra*; *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, 92 F. C. C. 2d 849 (1982). This repeated focus on ownership supports the inference that the FCC seeks to allocate licenses based on race, an impermissible end, rather than to increase diversity of viewpoints, the asserted interest. And this justification that links the use of race preferences to minority ownership rather than to diversity of viewpoints ensures that the FCC's programs, like that at issue in *Croson*, "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Croson*, 488 U. S., at 507.

C

Even apart from these tailoring defects in the FCC's policies, one particular flaw underscores the Government's ill fit of means to ends. The FCC's policies assume, and rely upon, the existence of a tightly bound "nexus" between the owners' race and the resulting programming. The Court's lengthy discussion of this issue, *ante*, at 569–579, purports to establish only that some relation exists between owners' race and programming: *i. e.*, that the FCC's choice to focus on allocation of licenses is rationally related to the asserted end. The Court understandably makes no stronger claims, because the evidence provides no support and because the requisite deference would so obviously abandon heightened scrutiny. For argument's sake, we can grant that the Court's review of congressional hearings and social science studies establishes the existence of some rational nexus. But even assuming that to be true, the Court's discussion does not begin to establish that the programs are directly and substantially related to the interest in diverse programming. That equal protection issue turns on the degree owners' race is related to programming, rather than whether any relation exists. To the extent that the FCC cannot show the nexus to be nearly complete, that failure confirms that the chosen means do not directly advance the asserted interest, that the policies rest instead upon illegitimate stereotypes, and that individualized determinations must replace the FCC's use of race as a proxy for the desired programming.

Three difficulties suggest that the nexus between owners' race and programming is considerably less than substantial. First, the market shapes programming to a tremendous extent. Members of minority groups who own licenses might be thought, like other owners, to seek to broadcast programs that will attract and retain audiences, rather than programs that reflect the owner's tastes and preferences. See *Winter Park Communications, Inc.* v. *FCC*, 277 U. S. App. D. C. 134, 145–148, 873 F. 2d 347, 358–361 (1989) (case below) (Wil-

liams, J., concurring in part and dissenting in part) (surveying evidence suggesting programming geared to audience taste). Second, station owners have only limited control over the content of programming. The distress sale presents a particularly acute difficulty of this sort. Unlike the comparative licensing program, the distress sale policy provides preferences to minority owners who neither intend nor desire to manage the station in any respect. See *ante*, at 557–558; *Commission Policy Regarding Advancement of Minority Ownership in Broadcasting*, *supra*. Whatever distinct programming may attend the race of an owner actively involved in managing the station, an absentee owner would have far less effect on programming.

Third, the FCC had absolutely no factual basis for the nexus when it adopted the policies and has since established none to support its existence. Until the mid-1970's, the FCC believed that its public interest mandate and 1965 Policy Statement precluded it from awarding preference based on race and ethnicity, and instead required applicants to demonstrate particular entitlement to an advantage in a comparative hearing. *Policy Statement on Comparative Broadcast Hearings*, 1 F. C. C. 2d 393 (1965). See, *e. g.*, *Mid-Florida Television Corp.*, 33 F. C. C. 2d 1 (Rev. Bd.), review denied, 37 F. C. C. 2d 559 (1972), rev'd, *TV 9, Inc.* v. *FCC*, 161 U. S. App. D. C. 349, 495 F. 2d 929 (1973), cert. denied, 419 U. S. 986 (1974). The Court of Appeals for the District of Columbia Circuit rejected the FCC's position on statutory grounds. See *TV 9*, 161 U. S. App. D. C., at 356–358, 495 F. 2d, at 936–938. The court rejected the FCC's arguments that "the Communications Act, like the Constitution, is color-blind," and that a race preference was incompatible with the FCC's governing statute. *Ibid.* Instead, based on nothing other than its conception of the public interest, that court required that an applicant's membership in a minority group be presumed to lead to greater diversity of programming. *Id.*, at 357–358, 495 F. 2d, at

937–938; see *Garrett* v. *FCC*, 168 U. S. App. D. C. 266, 272–273, 513 F. 2d 1056, 1062–1063 (1975). Principally relying on the panel's presumed nexus between race and programming, the FCC in its *1978 Policy Statement* acquiesced and established the policies challenged in these cases. See *1978 Policy Statement*, *supra*, at 981–982. In the mid-1980's, the FCC, prompted by this Court's decisions indicating that a factual predicate must be established to support use of race classifications, unanimously sought to examine whether, and to what extent, any nexus existed between an owner's race and programming. See *Notice of Inquiry on Racial, Ethnic, or Gender Classifications*, 1 F. C. C. Rcd 1315 (1986), modified, 2 F. C. C. Rcd 2377 (1987). As the Chairman of the FCC explained to Congress:

> "To the extent that heightened scrutiny requires certain factual predicates, we discovered that notwithstanding our statements in the past regarding the assumed nexus between minority or female ownership and program diversity, a factual predicate has never been established.
>
> "For example, the Commission has at no time examined whether there is a nexus between a broadcast owner's race or gender and program diversity, either on a case-by-case basis or generically. We had no reason to, because the court in *TV 9* told us we could, indeed must, assume such a nexus." Minority-Owned Broadcast Stations, Hearing on H. R. 5373 before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 99th Cong., 2d Sess., 16 (1986).

Through the appropriations measures, Congress barred the FCC's attempt to initiate that examination. See Continuing Appropriations Act for Fiscal Year 1988, 101 Stat. 1329–31.

Even apart from the limited nature of the Court's claims, little can be discerned from the congressional action. First, the Court's survey does not purport to establish that the

FCC or Congress has identified any particular deficiency in the viewpoints contained in the broadcast spectrum. Second, no degree of congressional endorsement may transform the equation of race with behavior and thoughts into a permissible basis of governmental action. Even the most express and lavishly documented congressional declaration that members of certain races will as owners produce distinct and superior programming would not allow the Government to employ such reasoning to allocate benefits and burdens among citizens on that basis. Third, we should hesitate before accepting as definitive any declaration regarding even the existence of a nexus. The two legislative Reports that claim some nexus to exist refer to sources that provide no support for the proposition. See S. Rep. No. 100–182, p. 76 (1987); H. R. Conf. Rep. No. 97–765, p. 43 (1982). Congress, through appropriations measures, sought to foreclose examination of an issue that the FCC believed to be entirely unresolved. See Continuing Appropriations Act for Fiscal Year 1988, *supra*. Especially where Congress rejects the considered judgment of the executive officials possessing particular expertise regarding the matter in issue, courts are hardly bound to accept the congressional declaration. See, *e. g.*, *Rostker* v. *Goldberg*, 453 U. S. 57, 83–85 (1981) (WHITE, J., dissenting). Additionally, the FCC created the challenged policies. Congress has, through the appropriations process, frozen those policies in place by preventing the FCC from reexamining or altering them. That congressional action does not amount to an endorsement of the reasoning and empirical claims originally asserted and then abandoned by the FCC, and does not reflect the same considered judgment embodied in measures crafted through the legislative process and subject to the hearings and deliberation accompanying substantive legislation. Cf. *TVA* v. *Hill*, 437 U. S. 153 (1978); *Andrus* v. *Sierra Club*, 442 U. S. 347, 359–361 (1979).

D

Finally, the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups. See, *e. g.*, *Wygant*, 476 U. S., at 280–281 (plurality opinion). The challenged policies fail this independent requirement, as well as the other constitutional requirements. The comparative licensing and distress sale programs provide the eventual licensee with an exceptionally valuable property and with a rare and unique opportunity to serve the local community. The distress sale imposes a particularly significant burden. The FCC has at base created a specialized market reserved exclusively for minority controlled applicants. There is no more rigid quota than a 100% set-aside. This fact is not altered by the observation, see *ante*, at 598–599, that the FCC and the seller have some discretion over whether stations may be sold through the distress program. For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity. The Court's argument that the distress sale allocates only a small percentage of all license sales, *ante*, at 599, also misses the mark. This argument readily supports complete preferences and avoids scrutiny of particular programs: It is no response to a person denied admission at one school, or discharged from one job, solely on the basis of race, that other schools or employers do not discriminate.

The comparative licensing program, too, imposes a significant burden. The Court's emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not. The basic nonrace criteria are not difficult to meet, and, given the sums at stake, applicants have every incentive to structure their ownership arrangement to prevail in the comparative process. Applicants cannot alter their race, of course, and race is clearly the dispositive factor in a substantial percentage of comparative proceedings. Petitioner Metro asserts that

race is overwhelmingly the dispositive factor. In reply, the FCC admits that it has not assessed the operation of its own program, Brief for FCC in No. 89–453, p. 39, and the Court notes only that "minority ownership does not guarantee that an applicant will prevail." *Ante*, at 597–598, n. 50.

In sum, the FCC has not met its burden even under the Court's test that approves of racial classifications that are substantially related to an important governmental objective. Of course, the programs even more clearly fail the strict scrutiny that should be applied. The Court has determined, in essence, that Congress and all federal agencies are exempted, to some ill-defined but significant degree, from the Constitution's equal protection requirements. This break with our precedents greatly undermines equal protection guarantees and permits distinctions among citizens based on race and ethnicity which the Constitution clearly forbids. I respectfully dissent.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, dissenting.

Almost 100 years ago in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), this Court upheld a government-sponsored race-conscious measure, a Louisiana law that required "equal but separate accommodations" for "white" and "colored" railroad passengers. The Court asked whether the measures were "reasonable," and it stated that "[i]n determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort." *Id.*, at 550. The *Plessy* Court concluded that the "race-conscious measures" it reviewed were reasonable because they served the governmental interest of increasing the riding pleasure of railroad passengers. The fundamental errors in *Plessy*, its standard of review and its validation of rank racial insult by the State, distorted the law for six decades before the Court announced its apparent demise in *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

Plessy's standard of review and its explication have disturbing parallels to today's majority opinion that should warn us something is amiss here.

Today the Court grants Congress latitude to employ "benign race-conscious measures . . . [that] are not . . . designed to compensate victims of past governmental or societal discrimination," but that "serve important governmental objectives . . . and are substantially related to achievement of those objectives." *Ante*, at 564–565. The interest the Court accepts to uphold the race-conscious measures of the Federal Communications Commission (Commission or FCC) is "broadcast diversity." Furthering that interest, we are told, is worth the cost of discriminating among citizens on the basis of race because it will increase the listening pleasure of media audiences. In upholding this preference, the majority exhumes *Plessy*'s deferential approach to racial classifications. The Court abandons even the broad societal remedial justification for racial preferences once advocated by JUSTICE MARSHALL, *e. g.*, *Regents of University of California* v. *Bakke*, 438 U. S. 265, 396 (1978) (separate opinion), and now will allow the use of racial classifications by Congress untied to any goal of addressing the effects of past race discrimination. All that need be shown under the new approach, which until now only JUSTICE STEVENS had advanced, *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 511 (1989) (opinion concurring in part and concurring in judgment); *Wygant* v. *Jackson Board of Education*, 476 U. S. 267, 313 (1986) (dissenting opinion), is that the future effect of discriminating among citizens on the basis of race will advance some "important" governmental interest.

Once the Government takes the step, which itself should be forbidden, of enacting into law the stereotypical assumption that the race of owners is linked to broadcast content, it follows a path that becomes ever more tortuous. It must decide which races to favor. While the Court repeatedly refers to the preferences as favoring "minorities," *ante*, at 554, and

purports to evaluate the burdens imposed on "nonminorities," *ante*, at 596, it must be emphasized that the discriminatory policies upheld today operate to exclude the many racial and ethnic *minorities* that have not made the Commission's list. The enumeration of the races to be protected is borrowed from a remedial statute, but since the remedial rationale must be disavowed in order to sustain the policy, the race classifications bear scant relation to the asserted governmental interest. The Court's reasoning provides little justification for welcoming the return of racial classifications to our Nation's laws.[1]

I cannot agree with the Court that the Constitution permits the Government to discriminate among its citizens on the basis of race in order to serve interests so trivial as "broadcast diversity." In abandoning strict scrutiny to endorse this interest the Court turns back the clock on the level of scrutiny applicable to federal race-conscious measures. Even strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in *Korematsu* v. *United States*, 323 U. S. 214 (1944). But the relaxed standard of review embraced today would validate that case, and any number of future racial classifications the

[1] The Court fails to address the difficulties, both practical and constitutional, with the task of defining members of racial groups that its decision will require. The Commission, for example, has found it necessary to trace an applicant's family history to 1492 to conclude that the applicant was "Hispanic" for purposes of a minority tax certificate policy. See *Storer Broadcasting Co.*, 87 F. C. C. 2d 190 (1981). I agree that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove* v. *Klutznick*, 448 U. S. 448, 534, n. 5 (1980) (STEVENS, J., dissenting); see *id.*, at 531–532 (Stewart, J., dissenting). "If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8–9 (1946)." *Id.*, at 534, n. 5. Other examples are available. See Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985).

Government may find useful. Strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality. Under our modern precedents, as JUSTICE O'CONNOR explains, strict scrutiny must be applied to this statute. The approach taken to congressional measures under § 5 of the Fourteenth Amendment in *Fullilove* v. *Klutznick*, 448 U. S. 448 (1980), even assuming its validity, see *Croson*, *supra*, at 518 (opinion of KENNEDY, J.), is not applicable to this case.

As to other exercises of congressional power, our cases following *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), such as *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975), until they were in effect overruled today, had held that the Congress is constrained in its actions by the same standard applicable to the States: strict scrutiny of all racial classifications. The majority cannot achieve its goal of upholding the quotas here under the rigor of this standard, and so must devise an intermediate test. JUSTICE O'CONNOR demonstrates that this statute could not survive even intermediate scrutiny as it had been understood until today. The majority simply says otherwise, providing little reasoning or real attention to past cases in its opinion of 49 pages.

The Court insists that the programs under review are "benign." JUSTICE STEVENS agrees. "[T]he reason for the classification—the recognized interest in broadcast diversity—is clearly identified and does not imply any judgment concerning the abilities of owners of different races or the merits of different kinds of programming. Neither the favored nor the disfavored class is stigmatized in any way." *Ante*, at 601 (STEVENS, J., concurring).[2] A fundamental error

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[2]JUSTICE STEVENS' assertion that the FCC policy "does not imply any judgment concerning . . . the merits of different kinds of programming," *ante*, at 601, is curious. If this policy, which is explicitly aimed at the ultimate goal of altering programming content, does not "imply any judgment concerning . . . the merits of different kinds of programming," then it is

of the *Plessy* Court was its similar confidence in its ability to identify "benign" discrimination: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." 163 U. S., at 551. Although the majority is "confident" that it can determine when racial discrimination is benign, *ante*, at 564–565, n. 12, it offers no explanation as to how it will do so.

The Court also justifies its result on the ground that "Congress and the Commission have determined that there may be important differences between the broadcasting practices of minority owners and those of their nonminority counterparts." *Ante*, at 580. The Court is all too correct that the type of reasoning employed by the Commission and Congress is not novel. Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission's racial preference policy: "The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development." See South Africa and the Rule of Law 37 (1968) (official publication of the South African Government).

The history of governmental reliance on race demonstrates that racial policies defended as benign often are not seen that way by the individuals affected by them. Today's dismissive statements aside, a plan of the type sustained here may impose "stigma on its supposed beneficiaries," *Croson*, 488

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difficult to see how the FCC's policy serves *any* governmental interest, let alone substantially furthers an important one.

U. S., at 516–517 (opinion of STEVENS, J.), and "foster intolerance and antagonism against the entire membership of the favored classes," *Fullilove*, 448 U. S., at 547 (STEVENS, J., dissenting). Although the majority disclaims it, the FCC policy seems based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens. Special preferences also can foster the view that members of the favored groups are inherently less able to compete on their own. And, rightly or wrongly, special preference programs often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion.[3]

The perceptions of the excluded class must also be weighed, with attention to the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group. There is the danger that the "stereotypical thinking" that prompts policies such as the FCC rules here "stigmatizes the disadvantaged class with the unproven charge of past racial discrimination." *Croson*, 488 U. S., at 516 (opinion of STEVENS, J.). Whether or not such programs can be described as "remedial," the message conveyed is that it is acceptable to harm a member of the group excluded from the benefit or privilege. If this is to be considered acceptable under the Constitution, there are various possible explanations. One is that the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disad-

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[3] The record in one of these two cases indicates that Astroline Communications Company, the beneficiary of the distress sale policy in this case, had a total capitalization of approximately $24 million. Its sole minority principal was a Hispanic-American who held 21% of Astroline's overall equity and 71% of its voting equity. His total cash contribution was $210. See App. in No. 89–700, pp. 68–69.

vantage minority groups. But this is not a proposition that the many citizens, who to their knowledge "have never discriminated against anyone on the basis of race," *ibid.*, will find easy to accept.

Another explanation might be that the stigma imposed upon the excluded class should be overlooked, either because past wrongs are so grievous that the disfavored class must bear collective blame, or because individual harms are simply irrelevant in the face of efforts to compensate for racial inequalities. But these are not premises that the Court even appears willing to address in its analysis. Until the Court is candid about the existence of stigma imposed by racial preferences on both affected classes, candid about the "animosity and discontent" they create, *Fullilove*, *supra*, at 532–533 (STEVENS, J., dissenting), and open about defending a theory that explains why the cost of this stigma is worth bearing and why it can consist with the Constitution, no basis can be shown for today's casual abandonment of strict scrutiny.

Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law." *Plessy*, 163 U. S., at 560 (dissenting opinion). Perhaps the Court can succeed in its assumed role of case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin. Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension. But history suggests much peril in this enterprise, and so the Constitution forbids us to undertake it. I regret that after a

century of judicial opinions we interpret the Constitution to do no more than move us from "separate but equal" to "unequal but benign."

Syllabus

WALTON *v.* ARIZONA

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 88–7351. Argued January 17, 1990—Decided June 27, 1990

Petitioner Walton was found guilty in an Arizona court of first-degree murder and was sentenced in a separate sentencing hearing before the judge, as required by state law. Under that law, the judge, *inter alia*, determines the existence of aggravating and mitigating circumstances and "shall impose" a death sentence if he finds one or more of several enumerated aggravating circumstances and that there are no mitigating circumstances sufficiently substantial to call for leniency. The burden is on the prosecution to establish the existence of aggravating circumstances and on the defendant to establish mitigating ones. The judge sentenced Walton to death, after finding the presence of two aggravating circumstances—that the murder was committed "in an especially heinous, cruel or depraved manner," and that it was committed for pecuniary gain—and that, considering all of the mitigating factors urged by Walton, the mitigating circumstances did not call for leniency. The State Supreme Court upheld the sentence. In an independent review, the court concluded that the evidence was sufficient to prove the existence of both aggravating factors. As to the first factor, the court noted that it had previously defined "especially cruel" to mean that the victim had suffered mental anguish before his death and had defined "especially depraved" to mean that the perpetrator had relished the murder, evidencing debasement or perversion. The court also agreed that there were no mitigating factors sufficient to call for leniency and determined that the sentence was proportional to sentences imposed in similar cases.

Held: The judgment is affirmed.

159 Ariz. 571, 769 P. 2d 1017, affirmed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and V, concluding:

1. Arizona's capital sentencing scheme does not violate the Sixth Amendment. The Constitution does not require that every finding of fact underlying a sentencing decision be made by a jury rather than by a judge. See *Clemons* v. *Mississippi*, 494 U. S. 738, 745; *Hildwin* v. *Florida*, 490 U. S. 638. Since Arizona's aggravating factors are standards to guide the making of the choice between verdicts of death and life imprisonment rather than "elements of the offense," the judge's finding of any particular aggravating circumstance does not require the death penalty, and the failure to find any particular aggravating

circumstance does not preclude that penalty. *Poland* v. *Arizona*, 476 U. S. 147. Moreover, if the Constitution does not require that the finding of *Enmund* v. *Florida*, 458 U. S. 782—that the defendant killed, attempted to kill, or intended to kill—be proved as an element of the offense of capital murder and be made by a jury, it cannot be concluded that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine such circumstances' existence. Pp. 647–649.

2. The especially heinous, cruel, or depraved aggravating circumstance, as construed by the State Supreme Court, furnishes sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments. The court's definition of "especially cruel" is virtually identical to the construction approved in *Maynard* v. *Cartwright*, 486 U. S. 356, 364–365. Similarly, its definition of "depraved" cannot be faulted. Although juries must be instructed in more than bare terms about an aggravating circumstance that is unconstitutionally vague on its face, trial judges are presumed to know the law and to apply narrower definitions in their decisions. *Maynard* v. *Cartwright*, *supra*, at 358–359, 363–364; *Godfrey* v. *Georgia*, 446 U. S. 420, 426, distinguished. Walton's challenge to the State Supreme Court's proportionality review—that it should be overturned because it did not distinguish his case from others in which the death sentence was not imposed—is rejected. Such review is not constitutionally required where, as here, the challenged factor has been construed in a manner to give the sentencer sufficient guidance. Furthermore, the Constitution does not require this Court to look behind the state court's conclusion where it plainly undertook its review in good faith. Pp. 652–656.

JUSTICE WHITE, joined by THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY, concluded in Parts III and IV:

1. Walton's Eighth and Fourteenth Amendment rights have not been violated by placing on him the burden of proving by a preponderance of the evidence the existence of mitigating circumstances sufficiently substantial to call for leniency, since Arizona's method of allocating the burdens of proof does not lessen the State's burden to prove the existence of aggravating circumstances. Cf., *e. g.*, *Martin* v. *Ohio*, 480 U. S. 228. *Lockett* v. *Ohio*, 438 U. S. 586; *Mullaney* v. *Wilbur*, 421 U. S. 684; *Mills* v. *Maryland*, 486 U. S. 367, distinguished. Pp. 649–651.

2. *Blystone* v. *Pennsylvania*, 494 U. S. 299, and *Boyde* v. *California*, 494 U. S. 370, foreclose Walton's argument that the state statute creates an unconstitutional presumption under the Eighth and Fourteenth Amendments that death is the proper sentence by requiring that the court "shall impose" the death penalty under the specified circumstances. The statute neither precludes the court from considering any

type of mitigating evidence nor automatically imposes a death sentence for certain types of murder. States are free to structure and shape consideration of mitigating evidence in an attempt to achieve a more rational and equitable administration of the death penalty. Pp. 651–652.

JUSTICE SCALIA concluded that he will no longer seek to apply, and will not, here or in the future, vote to uphold a claim based upon, the principle of *Woodson* v. *North Carolina*, 428 U. S. 280, and *Lockett* v. *Ohio*, 438 U. S. 586, that the sentencer in a capital case may not be precluded from considering any mitigating factor. This principle is rationally irreconcilable with the principle of *Furman* v. *Georgia*, 408 U. S. 238—that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion. *Furman* requires constraints on the sentencer's discretion to "impose" the death penalty, while *Woodson-Lockett* forbids constraints on the sentencer's discretion to "decline to impose" it—which are one and the same. Although the Eighth Amendment's text arguably supports the view in *Furman* that unfettered discretion makes death sentences so random and infrequent as to make their imposition cruel and unusual, the *Woodson-Lockett* principle bears no relation to the Amendment's text. Nor does the doctrine of *stare decisis* require adherence to *Woodson-Lockett*, since the objectives of the doctrine, certainty and predictability, have been demonstrably undermined rather than furthered by the attempt to rest a jurisprudence upon two incompatible principles. Thus, even if correct, Walton's assertion that in two respects the state procedure deprived the sentencer of discretion to consider all mitigating circumstances cannot state an Eighth Amendment violation. Pp. 656–674.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts III and IV, in which REHNQUIST, C. J., and O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 656. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 674. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 677. STEVENS, J., filed a dissenting opinion, *post*, p. 708.

Timothy K. Ford argued the cause for petitioner. With him on the briefs was *Denise I. Young*.

Paul J. McMurdie, Assistant Attorney General of Arizona, argued the cause for respondent. With him on the

brief were *Robert K. Corbin*, Attorney General, and *Jessica Gifford Funkhouser.**

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY joined.

At issue in this case is the validity of the death sentence imposed by an Arizona trial court after a jury found petitioner Jeffrey Walton guilty of committing first-degree murder.

The Arizona statutes provide that a person commits first-degree murder if "[i]ntending or knowing that his conduct will cause death, such person causes the death of another with premeditation" or if in the course of committing certain specified offenses and without any mental state other than what is required for the commission of such offenses, he causes the death of any person. Ariz. Rev. Stat. Ann.

**John A. Powell*, *Michael Laurence*, *Welsh S. White*, and *Randy Hertz* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the Commonwealth of Pennsylvania et al. by *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Robert A. Graci*, Chief Deputy Attorney General, and *Mary Benefield Seiverling*, Deputy Attorney General, *John J. Kelly*, Chief State's Attorney of Connecticut, *Robert Butterworth*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *Michael C. Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry*, Attorney General of Oklahoma, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Joseph B. Meyer*, Attorney General of Wyoming.

§ 13–1105 (1989). After a person has been found guilty of first-degree murder, the sentence for such crime is determined in accordance with the provisions of § 13–703(B). It is there directed that a "separate sentencing hearing . . . shall be conducted before the court alone" to determine whether the sentence shall be death or life imprisonment. In the course of such hearing, the judge is instructed to determine the existence or nonexistence of any of the aggravating or mitigating circumstances defined in subsections (F) and (G) of § 13–703. Subsection (F) defines 10 aggravating circumstances that may be considered. One of them is whether the offense was committed with the expectation of receiving anything of pecuniary value. § 13–703(F)(5). Another is whether the defendant committed the offense in an especially heinous, cruel, or depraved manner. § 13–703(F)(6). Subsection (G) defines mitigating circumstances as any factors "which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to" five specified factors.[1] The burden of establishing the existence of any of the aggravating circumstances is on the prosecution, while the burden of establishing mitigating circumstances is

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[1] Those factors are as follows:

"1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

"2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

"3. The defendant was legally accountable for the conduct of another under the provisions of § 13–303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

"4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

"5. The defendant's age." Ariz. Rev. Stat. Ann. § 13–703(G) (1989).

on the defendant. § 13–703(C). The court is directed to return a special verdict setting forth its findings as to aggravating and mitigating circumstances and then "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection (F) of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency." § 13–703(E).

I

Petitioner Walton and his two codefendants, Robert Hoover and Sharold Ramsey, went to a bar in Tucson, Arizona, on the night of March 2, 1986, intending to find and rob someone at random, steal his car, tie him up, and leave him in the desert while they fled the State in the car. In the bar's parking lot, the trio encountered Thomas Powell, a young, off-duty Marine. The three robbed Powell at gunpoint and forced him into his car which they then drove out into the desert. While driving out of Tucson, the three asked Powell questions about where he lived and whether he had any more money. When the car stopped, Ramsey told a frightened Powell that he would not be hurt. Walton and Hoover then forced Powell out of the car and had him lie face down on the ground near the car while they debated what to do with him. Eventually, Walton instructed Hoover and Ramsey to sit in the car and turn the radio up loud. Walton then took a .22 caliber derringer and marched Powell off into the desert. After walking a short distance, Walton forced Powell to lie down on the ground, placed his foot on Powell's neck, and shot Powell once in the head. Walton later told Hoover and Ramsey that he had shot Powell and that he had "never seen a man pee in his pants before." Powell's body was found approximately a week later, after Walton was arrested and led police to the murder site. A medical examiner determined that Powell had been blinded and rendered unconscious by the shot but was not immediately killed. Instead, Powell regained consciousness, apparently floundered about in the

desert, and ultimately died from dehydration, starvation, and pneumonia approximately a day before his body was found.

A jury convicted Walton of first-degree murder after being given instructions on both premeditated and felony murder. See Ariz. Rev. Stat. Ann. § 13–1105 (1989). The trial judge then conducted the separate sentencing hearing required by § 13–703(B). The State argued that two aggravating circumstances were present: (1) The murder was committed "in an especially heinous, cruel or depraved manner," § 13–703(F)(6), and (2) the murder was committed for pecuniary gain. § 13–703(F)(5). In mitigation Walton presented testimony from a psychiatrist who opined that Walton had a long history of substance abuse which impaired his judgment, see § 13–703(G)(1), and that Walton may have been abused sexually as a child. Walton's counsel also argued Walton's age, 20 at the time of sentencing, as a mitigating circumstance. See § 13–703(G)(5). At the conclusion of the hearing, the trial court found "beyond any doubt" that Walton was the one who shot Powell. The court also found that the two aggravating circumstances pressed by the State were present. The court stated that it had considered Walton's age and his capacity to appreciate the wrongfulness of his conduct, as well as all of the mitigating factors urged by defendant's counsel. The court then concluded that that there were "no mitigating circumstances sufficiently substantial to call for leniency." App. 61. See § 13–703. The court sentenced Walton to death.

The Arizona Supreme Court affirmed Walton's conviction and sentence. 159 Ariz. 571, 769 P. 2d 1017 (1989). Relying on its prior decisions, the court rejected various specific challenges to the constitutionality of the Arizona death penalty statute, some of which are pressed here, and then proceeded to conduct its independent review of Walton's sentence in order to "ensure that aggravating factors were proven beyond a reasonable doubt and all appropriate mitigation was

considered." *Id.*, at 586, 769 P. 2d, at 1032.[2] The court began by examining the "especially heinous, cruel or depraved" aggravating circumstance found by the trial judge. The court pointed out that it previously had determined that a murder is committed in an especially cruel manner when "the perpetrator inflicts mental anguish or physical abuse before the victim's death," *id.*, at 586, 769 P. 2d, at 1032, (citations omitted), and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." *Ibid.* In this case, the court concluded that there was ample evidence that Powell suffered mental anguish prior to his death.[3] The Arizona Supreme Court also found the evidence sufficient to conclude that the crime was committed in an especially depraved manner, pointing out that it had defined a depraved murder as one where "the perpetrator relishes the murder, evidencing debasement or perversion." *Id.*, at 587, 769 P. 2d, at 1033.[4]

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[2] In the course of its opinion, the court also rejected Walton's challenge, not repeated in this Court, that Hoover and not Walton actually shot Powell. The court pointed out that because the jury was instructed on both felony and premeditated murder but entered only a general verdict, the trial court was required under Arizona law to independently make the determination mandated by *Enmund* v. *Florida*, 458 U. S. 782 (1982), and *Tison* v. *Arizona*, 481 U. S. 137 (1987), that Walton killed, intended to kill, attempted to kill, or as a participant in a felony was recklessly indifferent to the killing of Powell. 159 Ariz., at 585, 769 P. 2d, at 1031. The court then held that the trial court's *Enmund* determination was based on substantial evidence. 159 Ariz., at 586, 769 P. 2d, at 1032.

[3] The court argued that Powell must have realized as he was being driven out of Tucson into the desert that he might be harmed, and the court pointed out that Powell was obviously frightened enough that Ramsey tried to reassure him that he would not be harmed. Then, the court noted, Walton and Hoover forced Powell to lie on the ground while they argued over his fate, and eventually Walton marched Powell off into the desert with a gun but no rope, surely making Powell realize that he was not going to be tied up and left unharmed. The court further observed that Powell was so frightened that he urinated on himself. *Id.*, at 586–587, 769 P. 2d, at 1032–1033.

[4] The court concluded that Walton's reference to having "'never seen a man pee in his pants before'" constituted evidence of "callous fascination

Additionally, the court found that the pecuniary gain circumstance was present. *Id.*, at 588, 769 P. 2d, at 1034. After examining Walton's mitigating evidence regarding his substance abuse and his youth, the court concluded that there were "no mitigating circumstances sufficient to call for lenience." *Id.*, at 589, 769 P. 2d, at 1035. Finally, the court conducted its proportionality review and determined that Walton's death sentence was "proportional to sentences imposed in similar cases." *Id.*, at 590, 769 P. 2d, at 1036.

Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see *Adamson* v. *Ricketts*, 865 F. 2d 1011 (1988) (en banc), we granted certiorari, 493 U. S. 808 (1989), to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty. We now affirm the judgment of the Arizona Supreme Court.

II

Walton's first argument is that every finding of fact underlying the sentencing decision must be made by a jury, not by a judge, and that the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those findings. Contrary to Walton's assertion, however: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Clemons* v. *Mississippi*, 494 U. S. 738, 745 (1990).

We repeatedly have rejected constitutional challenges to Florida's death sentencing scheme, which provides for sentencing by the judge, not the jury. *Hildwin* v. *Florida*, 490

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with the murder" and demonstrated "an indifference to the suffering of the victim and . . . a sense of pleasure" taken "in the killing." *Id.*, at 587, 769 P. 2d, at 1033.

U. S. 638 (1989) *(per curiam); Spaziano* v. *Florida*, 468 U. S. 447 (1984); *Proffitt* v. *Florida*, 428 U. S. 242 (1976). In *Hildwin*, for example, we stated that "[t]his case presents us once again with the question whether the Sixth Amendment requires a jury to specify the aggravating factors that permit the imposition of capital punishment in Florida," 490 U. S., at 638, and we ultimately concluded that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Id.*, at 640–641.

The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton also suggests that in Florida aggravating factors are only sentencing "considerations" while in Arizona they are "elements of the offense." But as we observed in *Poland* v. *Arizona*, 476 U. S. 147 (1986), an Arizona capital punishment case: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i. e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i. e.*, preclude the death penalty)." *Id.*, at 156 (citation omitted).

Our holding in *Cabana* v. *Bullock*, 474 U. S. 376 (1986), provides further support for our conclusion. *Cabana* held that an appellate court could constitutionally make the *Enmund* v. *Florida*, 458 U. S. 782 (1982), finding—that the

defendant killed, attempted to kill, or intended to kill—in the first instance. We noted that "*Enmund*, 'does not affect the state's definition of any substantive offense, even a capital offense,'" 474 U. S., at 385 (citations omitted), and that "while the Eighth Amendment prohibits the execution of such defendants, it does not supply a new element of the crime of capital murder that must be found by the jury." *Id.*, at 385, n. 3. *Enmund* only places "a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury." 474 U. S., at 386. If the Constitution does not require that the *Enmund* finding be proved as an element of the offense of capital murder, and does not require a jury to make that finding, we cannot conclude that a State is required to denominate aggravating circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.

We thus conclude that the Arizona capital sentencing scheme does not violate the Sixth Amendment.

III

Also unpersuasive is Walton's contention that the Arizona statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency. See Ariz. Rev. Stat. Ann. §§ 13–703(C) and 13–703(E) (1989). It is true that the Court has refused to countenance state-imposed restrictions on what mitigating circumstances may be considered in deciding whether to impose the death penalty. See, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). But Walton is not complaining that the Arizona statute or practice excludes from consideration any particular type of mitigating evidence; and it does not follow from *Lockett* and its progeny that a State is precluded from specifying how mitigating circumstances are to be proved. Indeed, in *Lockett* itself, we expressly reserved opinion on

whether "it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases." *Id.*, at 609, and n. 16 (plurality opinion).

In *Martin* v. *Ohio*, 480 U. S. 228 (1987), we upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that she was acting in self-defense when she allegedly committed the murder. In *Leland* v. *Oregon*, 343 U. S. 790 (1952), the Court upheld, in a capital case, a requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant, see also *Rivera* v. *Delaware*, 429 U. S. 877 (1976), and in *Patterson* v. *New York*, 432 U. S. 197 (1977), we rejected the argument that a State violated due process by imposing a preponderance of the evidence standard on a defendant to prove the affirmative defense of extreme emotional disturbance.

The basic principle of these cases controls the result in this case. So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), is not to the contrary. *Mullaney* struck down on due process grounds a state statute that required a convicted murder defendant to negate an element of the offense of murder in order to be entitled to a sentence for voluntary manslaughter. No such burden is placed on defendants by Arizona's capital sentencing scheme. We therefore decline to adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence.

Neither does *Mills* v. *Maryland*, 486 U. S. 367 (1988), lend support to Walton's position. There this Court reversed a

death sentence because it concluded that the jury instructions given at the sentencing phase likely led the jury to believe that any particular mitigating circumstance could not be considered unless the jurors unanimously agreed that such circumstance was present. The Court's focus was on whether reasonable jurors would have read the instructions to require unanimity and, if so, the possible consequences of such an understanding. Here, of course, the judge alone is the sentencer, and *Mills* is therefore beside the point.

Furthermore, *Mills* did not suggest that it would be forbidden to require each individual juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstance has been proved by a preponderance of the evidence. To the contrary, the jury in that case was instructed that it had to find that any mitigating circumstances had been proved by a preponderance of the evidence. *Id.*, at 387. Neither the petitioner in *Mills* nor the Court in its opinion hinted that there was any constitutional objection to that aspect of the instructions.

We therefore reject Walton's argument that Arizona's allocation of the burdens of proof in a capital sentencing proceeding violates the Constitution.

IV

Walton insists that because § 13–703(E) provides that the court "shall" impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence. Our recent decisions in *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), and *Boyde* v. *California*, 494 U. S. 370 (1990), foreclose this submission. *Blystone* rejected a challenge to a jury instruction based on a Pennsylvania statute requiring the imposition of the death penalty if aggravating circumstances were found to exist but no miti-

gating circumstances were present. We pointed out that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence," 494 U. S., at 307 (footnote omitted), and concluded that because the Pennsylvania statute did not preclude the sentencer from considering any type of mitigating evidence, *id.*, at 308, it was consonant with that principle. In addition, the Court concluded that the statute was not "impermissibly 'mandatory' as that term was understood" in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), because it did not automatically impose death upon conviction for certain types of murder. 494 U. S., at 305. The same is true of the Arizona statute.

Similarly, *Boyde* v. *California*, *supra*, upheld a pattern jury instruction which stated that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." See 494 U. S., at 374 (emphasis omitted). The Court specifically noted that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Id.*, at 377 (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion)). Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*.

V

Walton's final contention is that the especially heinous, cruel, or depraved aggravating circumstance as interpreted by the Arizona courts fails to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments. Walton contends that the Arizona factor fails to pass constitutional muster for the same reasons this Court found Oklahoma's "especially heinous, atrocious, or cruel" ag-

gravating circumstance to be invalid in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), and Georgia's "outrageously or wantonly vile, horrible or inhuman" circumstance to be invalid in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

Maynard v. *Cartwright* and *Godfrey* v. *Georgia*, however, are distinguishable in two constitutionally significant respects. First, in both *Maynard* and *Godfrey* the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 U. S., at 358–359, 363–364; 446 U. S., at 426 (plurality opinion). Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the state appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 U. S., at 364; 446 U. S., at 429 (plurality opinion). These points were crucial to the conclusion we reached in *Maynard*. See 486 U. S., at 363–364. They are equally crucial to our decision in this case.

When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge. Trial judges are presumed to know the law and to apply it in making their decisions. If the Arizona Supreme Court has narrowed the definition of the "especially heinous, cruel or depraved" aggravating circumstance, we presume that Arizona trial judges are applying the narrower definition. It is irrelevant that the statute itself may not narrow the construction of the factor. Moreover, even if a trial judge fails to apply the narrowing construction or applies an improper construction, the Constitution does not necessarily require that a

state appellate court vacate a death sentence based on that factor. Rather, as we held in *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined or the court may eliminate consideration of the factor altogether and determine whether any remaining aggravating circumstances are sufficient to warrant the death penalty.

When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i. e.*, whether they provide *some* guidance to the sentencer. In this case there is no serious argument that Arizona's "especially heinous, cruel or depraved" aggravating factor is not facially vague. But the Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements.

The Arizona Supreme Court stated that "a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death," and that "[m]ental anguish includes a victim's uncertainty as to his ultimate fate." 159 Ariz., at 586, 769 P. 2d, at 1032. The court rejected the State's argument that the six days Powell suffered after being shot constituted cruelty within the meaning of the statute. The court pointed out that it had limited the cruelty circumstance in prior cases to situations where the suffering of the victim was intended by or foreseeable to the killer. *Id.*, at 587, 769 P. 2d, at 1033.

In *Maynard* v. *Cartwright*, we expressed approval of a definition that would limit Oklahoma's "especially heinous,

atrocious, or cruel" aggravating circumstance to murders involving "some kind of torture or physical abuse," 486 U. S., at 364–365, but we also noted that such a construction was not the only one "that would be constitutionally acceptable." *Id.*, at 365. The construction given by the Arizona Supreme Court to the cruelty aspect of the Arizona aggravating circumstance is virtually identical to the construction we approved in *Maynard*.

The Arizona Supreme Court's construction also is similar to the construction of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance that we approved in *Proffitt* v. *Florida*, 428 U. S., at 255–256 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the "especially cruel" provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in an especially "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing. See 159 Ariz., at 587, 769 P. 2d, at 1033.

Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we "lawfully may presume that [Walton's] death sentence was not 'wantonly and freakishly' imposed—

and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment." *McCleskey* v. *Kemp*, 481 U. S. 279, 306, 308 (1987); *Pulley* v. *Harris*, 465 U. S. 37, 43 (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion.

The judgment of the Arizona Supreme Court is affirmed.

It is so ordered.

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

Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right. The ultimate choice in capital sentencing, he would point out, is a unitary one—the choice between death and imprisonment. One cannot have discretion whether to select the one yet lack discretion whether to select the other. Our imaginary observer would then be surprised to discover that, under this Court's Eighth Amendment jurisprudence of the past 15 years, petitioner would have a strong chance of winning on *both* of these antagonistic claims, simultaneously—as evidenced by the facts that four Members of this Court think he should win on both, see *post*, at 677 (BLACKMUN, J., dissenting), and that an en banc panel of a Federal Court of Appeals so held in an essentially identical case, see *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1029–1044 (CA9 1988). But that just shows that our jurisprudence and logic have long since parted ways. I write separately to say that, and explain why, I will no longer seek to apply one of the two in-

compatible branches of that jurisprudence. I agree with the Court's analysis of petitioner's first claim, and concur in its opinion as to Parts I, II, and V. As to the second claim, I concur only in the judgment.

I

A

Over the course of the past 15 years, this Court has assumed the role of rulemaking body for the States' administration of capital sentencing—effectively requiring capital sentencing proceedings separate from the adjudication of guilt, see, *e. g.*, *Woodson* v. *North Carolina*, 428 U. S. 280, 301–305 (1976) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (opinion announcing judgment), dictating the type and extent of discretion the sentencer must and must not have, see, *e. g.*, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), requiring that certain categories of evidence must and must not be admitted, see, *e. g.*, *Skipper* v. *South Carolina*, 476 U. S. 1 (1986); *Booth* v. *Maryland*, 482 U. S. 496 (1987), undertaking minute inquiries into the wording of jury instructions to ensure that jurors understand their duties under our labyrinthine code of rules, see, *e. g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985); *Mills* v. *Maryland*, 486 U. S. 367 (1988), and prescribing the procedural forms that sentencing decisions must follow, see, *e. g.*, *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). The case that began the development of this Eighth Amendment jurisprudence was *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, which has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion.

In *Furman*, we overturned the sentences of two men convicted and sentenced to death in state courts for murder and one man so convicted and sentenced for rape, under statutes

that gave the jury complete discretion to impose death for those crimes, with no standards as to the factors it should deem relevant. The brief *per curiam* gave no reasons for the Court's decision, other than to say that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.*, at 239–240. To uncover the reasons underlying the decision in *Furman*, one must turn to the opinions of the five Justices forming the majority, each of whom wrote separately and none of whom joined any other's opinion. Of these opinions, two rested on the broadest possible ground—that the death penalty was cruel and unusual punishment in all circumstances. See *id.*, at 305 (BRENNAN, J., concurring); *id.*, at 369–371 (MARSHALL, J., concurring). A third, that of Justice Douglas, rested on a narrower ground—that the discretionary capital sentencing systems under which the petitioners had been sentenced were operated in a manner that discriminated against racial minorities and unpopular groups. See *id.*, at 256–257 (concurring opinion).

The critical opinions, however, in light of the subsequent development of our jurisprudence, were those of JUSTICES Stewart and WHITE. They focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed. Justice Stewart wrote:

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique

penalty to be so wantonly and so freakishly imposed." *Id.*, at 309–310 (concurring opinion) (footnotes omitted).

JUSTICE WHITE took a similar view. In his opinion the death sentences under review violated the Eighth Amendment because "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.*, at 313. "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not," *ibid.*, so that it constitutes a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes," *id.*, at 312. The opinions of both Justice Stewart and JUSTICE WHITE went out of the way to say that capital punishment was not in itself a cruel and unusual punishment, and that a mandatory system of capital sentencing, in which everyone convicted of a particular crime received that punishment, would "present quite different issues." *Id.*, at 310–311 (WHITE, J., concurring); see also *id.*, at 307–308 (Stewart, J., concurring).

Furman led at least 35 States to adopt new capital sentencing procedures that eliminated some of the discretion previously conferred to impose or withhold the death penalty. See *Gregg* v. *Georgia*, *supra*, at 179. In 1976, we upheld against Eighth Amendment challenge three "guided discretion" schemes representative of these measures, which, in varying forms, required the sentencer to consider certain specified aggravating and mitigating circumstances in reaching its decision. In the principal case, *Gregg* v. *Georgia*, *supra*, the three-Justice opinion announcing the judgment read *Furman* as "mandat[ing] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that *discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action*," *id.*, at 189 (joint opinion of Stewart, Powell, and STEVENS,

JJ.) (emphasis added). See also *id.*, at 221–222 (WHITE, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment); *Proffitt* v. *Florida*, 428 U. S. 242, 251 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 260 (WHITE, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 279 (WHITE, J., joined by Burger, C. J., and REHNQUIST, J., concurring in judgment).

Since the 1976 cases, we have routinely read *Furman* as standing for the proposition that "channelling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," *Maynard* v. *Cartwright*, 486 U. S. 356, 362 (1988), and have insisted that States furnish the sentencer with "'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., at 428 (footnotes omitted). Only twice since 1976 have we actually invalidated a death sentence because of inadequate guidance to the sentencer, see *Maynard*, *supra*, at 362–364; *Godfrey*, *supra*, at 428–429, 433, but we have repeatedly incanted the principle that "unbridled discretion" is unacceptable, *Penry* v. *Lynaugh*, 492 U. S. 302, 326 (1989), that capital sentencing procedures must constrain and guide the sentencer's discretion to ensure "that the death penalty is not meted out arbitrarily and capriciously," *California* v. *Ramos*, 463 U. S. 992, 999 (1983), that "the State must establish rational criteria that narrow the decisionmaker's judgment," *McCleskey* v. *Kemp*, 481 U. S. 279, 305 (1987), that "death penalty statutes [must] 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), that our cases require "procedural protections . . . to ensure that the death penalty will be imposed in a consistent, rational manner," *Barclay* v. *Florida*, 463 U. S. 939, 960 (1983) (STE-

VENS, J., concurring in judgment), and that "[States] must administer [the death] penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not," *Spaziano* v. *Florida*, 468 U. S. 447, 460 (1984). See also *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983); *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982); *Pulley* v. *Harris*, 465 U. S. 37, 51 (1984); *Booth* v. *Maryland*, 482 U. S., at 502; *Mills* v. *Maryland*, 486 U. S., at 374; *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988).

B

Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to "impose" the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to "*decline* to impose" it. *McCleskey* v. *Kemp*, *supra*, at 304 (emphasis deleted). This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of "guided discretion" once had.

Some States responded to *Furman* by making death the mandatory punishment for certain categories of murder. We invalidated these statutes in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), a plurality of the Court concluding that the sentencing process must accord at least some consideration to the "character and record of the individual offender." *Woodson*, *supra*, at 304 (plurality opinion). Other States responded to *Furman* by leaving the sentencer some discretion to spare capital defendants, but limiting the kinds of mitigating circumstances the sentencer could consider. We invalidated these statutes in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), a plurality saying the Eighth Amendment requires that the sentencer "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 that the defendant proffers as a basis for a sentence less than death," *id.*,

at 604 (opinion of Burger, C. J., joined by Stewart, Powell, and STEVENS, JJ.) (emphasis omitted and added). The reasoning of the pluralities in these cases was later adopted by a majority of the Court. See *Sumner* v. *Shuman*, 483 U. S. 66 (1987) (embracing *Woodson*); *Eddings* v. *Oklahoma*, *supra* (embracing *Lockett*).

These decisions, of course, had no basis in *Furman*. One might have supposed that curtailing or eliminating discretion in the sentencing of capital defendants was not only consistent with *Furman*, but positively required by it—as many of the States, of course, *did* suppose. But in *Woodson* and *Lockett*, it emerged that uniform treatment of offenders guilty of the same capital crime was not only not *required* by the Eighth Amendment, but was all but *prohibited*. Announcing the proposition that "[c]entral to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment," *Woodson*, *supra*, at 288, and pointing to the steady growth of discretionary sentencing systems over the previous 150 years (those very systems we had found unconstitutional in *Furman*), *Woodson*, *supra*, at 291–292, the pluralities in those cases determined that a defendant could not be sentenced to death unless the sentencer was convinced, by an unconstrained and unguided evaluation of offender and offense, that death was the appropriate punishment, *id.*, at 304–305; *Lockett*, *supra*, at 604–605. In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required.

As elaborated in the years since, the *Woodson-Lockett* principle has prevented States from imposing all but the most minimal constraints on the sentencer's discretion to decide that an offender eligible for the death penalty should nonetheless not receive it. We have, in the first place, repeatedly rebuffed States' efforts to channel that discretion by

specifying objective factors on which its exercise should rest. It would misdescribe the sweep of this principle to say that "all mitigating evidence" must be considered by the sentencer. That would assume some objective criterion of what is mitigating, which is precisely what we have forbidden. Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood; that he had a great love for the victim's race, or that he had a pathological hatred for the victim's race; that he has limited mental capacity, or that he has a brilliant mind which can make a great contribution to society; that he was kind to his mother, or that he despised his mother. *Whatever* evidence bearing on the crime or the criminal the defense wishes to introduce as rendering the defendant less deserving of the death penalty must be admitted into evidence and considered by the sentencer. See, *e. g.*, *Lockett*, *supra*, at 597 ("character, prior record, age, lack of specific intent to cause death, and . . . relatively minor part in the crime"); *Eddings* v. *Oklahoma*, *supra*, at 107 (*inter alia*, that the defendant's "parents were divorced when he was 5 years old, and until he was 14 [he] lived with his mother without rules or supervision"); *Hitchcock* v. *Dugger*, 481 U. S. 393, 397 (1987) (*inter alia*, that "petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle"); *Skipper* v. *South Carolina*, 476 U. S., at 4 (that "petitioner had been a well-behaved and well-adjusted prisoner" while awaiting trial). Nor may States channel the sentencer's consideration of this evidence by defining the weight or significance it is to receive—for example, by making evidence of mental retardation relevant only insofar as it bears on the question whether the crime was committed deliberately. See *Penry* v. *Lyn-*

augh, 492 U. S. 302, 322–323, 328 (1989). Rather, they must let the sentencer "give effect," *McKoy* v. *North Carolina*, 494 U. S. 433, 442–443 (1990), to mitigating evidence in whatever manner it pleases. Nor, when a jury is assigned the sentencing task, may the State attempt to impose structural rationality on the sentencing decision by requiring that mitigating circumstances be found unanimously, see *id.*, at 443; each juror must be allowed to determine and "give effect" to his perception of what evidence favors leniency, regardless of whether those perceptions command the assent of (or are even comprehensible to) other jurors.

To acknowledge that "there perhaps is an inherent tension" between this line of cases and the line stemming from *Furman*, *McCleskey* v. *Kemp*, 481 U. S., at 363 (BLACKMUN, J., dissenting), is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing "twin objectives," *Spaziano* v. *Florida*, 468 U. S., at 459, is rather like referring to the twin objectives of good and evil. They cannot be reconciled. Pursuant to *Furman*, and in order "to achieve a more rational and equitable administration of the death penalty," *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988), we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,'" *Godfrey* v. *Georgia*, 446 U. S., at 428. In the next breath, however, we say that "the State *cannot* channel the sentencer's discretion . . . to consider any relevant [mitigating] information offered by the defendant," *McCleskey* v. *Kemp*, *supra*, at 306 (emphasis added), and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death," *Penry* v. *Lynaugh*, *supra*, at 326. The latter requirement quite obviously destroys whatever

rationality and predictability the former requirement was designed to achieve.*

The Court has attempted to explain the contradiction by saying that the two requirements serve different functions: The first serves to "narrow" according to rational criteria the class of offenders eligible for the death penalty, while the second guarantees that each offender who is death eligible is not actually sentenced to death without "an individualized assessment of the appropriateness of the death penalty." *Penry* v. *Lynaugh*, *supra*, at 317; see also *Zant* v. *Stephens*, 462 U. S., at 878–879. But it is not "individualized assessment" that is the issue here. No one asserts that the Con-

*JUSTICE STEVENS contends that the purpose of *Furman* is merely to narrow the group of crimes (to which the sentencer's unconstrained discretion is then applied) to some undefined point near the "tip of the pyramid" of murder—the base of that pyramid consisting of all murders, and the apex consisting of a particular type crime of murder defined in minute detail. *Post*, at 715–718 (dissenting opinion). There is, however, no hint in our *Furman* jurisprudence of an attempt to determine what constitutes the critical line below the "tip of the pyramid," and to assess whether *either* the elements of the crime are alone sufficient to bring the statute above that line (in which case no aggravating factors whatever need be specified) *or* whether the aggravating factors are sufficient for that purpose. I read the cases (and the States, in enacting their post-*Furman* statutes, have certainly read them) as requiring aggravating factors to be specified *whenever* the sentencer is given discretion. It is a means of confining the sentencers' discretion—giving them something specific to look for rather than leaving them to wander at large among all aggravating circumstances. That produces a consistency of result which is unachievable—no matter how narrowly the crime is defined—if they are left to take into account any aggravating factor at all. We have, to be sure, held that the discretion-limiting aggravating factor can duplicate a factor already required by the definition of the crime, see *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), but in those circumstances the sentencer's discretion is *still* focused and confined. We have never allowed sentencers to be given complete discretion without a requisite finding of aggravating factors. If and when the Court redefines *Furman* to permit the latter, and to require an assessment (I cannot imagine on what basis) that a sufficiently narrow level of the "pyramid" of murder has been reached, I shall be prepared to reconsider my evaluation of *Woodson* and *Lockett*.

stitution permits condemnation *en masse*. The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard. That is *precisely* the issue that was involved in *Furman*, no more and no less. Having held, in *Furman*, that the aggravating factors to be sought in the individualized determination must be specified in advance, we are able to refer to the defendants who will qualify under those factors as a "class of death eligibles"—from among whom those actually to receive death will be selected on the basis of unspecified mitigating factors. But if we had held in *Lockett* that the *mitigating* factors to be sought in the individualized determination must be specified in advance, we would equally have been able to refer to the defendants who will qualify under those factors as a "class of mercy eligibles"—from among whom those actually to receive mercy will be selected on the basis of unspecified aggravating factors. In other words, classification *versus* individuation does not *explain* the opposite treatment of aggravating and mitigating factors; it is merely one way of *describing the result* of that opposite treatment. What is involved here is merely setting standards for individualized determinations, and the question remains why the Constitution demands that the aggravating standards and mitigating standards be accorded opposite treatment. It is impossible to understand why. Since the individualized determination is a unitary one (does this defendant deserve death for this crime?) once one says each sentencer must be able to answer "no" for whatever reason it deems morally sufficient (and indeed, for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say "yes." In fact, ran-

domness and "freakishness" are even more evident in a system that requires aggravating factors to be found in great detail, since it permits sentencers to accord different treatment, for whatever mitigating reasons they wish, not only to two different murderers, but to two murderers whose crimes have been found to be of similar gravity. It is difficult enough to justify the *Furman* requirement so long as the States are *permitted* to allow random mitigation; but to impose it while simultaneously *requiring* random mitigation is absurd. I agree with JUSTICE WHITE's observation that the *Lockett* rule represents a sheer "about-face" from *Furman*, an outright negation of the principle of guided discretion that brought us down the path of regulating capital sentencing procedure in the first place. *Lockett* v. *Ohio*, 438 U. S., at 622 (opinion concurring in part, dissenting in part, and concurring in judgments).

C

The simultaneous pursuit of contradictory objectives necessarily produces confusion. As THE CHIEF JUSTICE has pointed out, in elaborating our doctrine "the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed." *Lockett* v. *Ohio*, *supra*, at 629 (REHNQUIST, J., dissenting). Repeatedly over the past 20 years state legislatures and courts have adopted discretion-reducing procedures to satisfy the *Furman* principle, only to be told years later that their measures have run afoul of the *Lockett* principle. Having said in *Furman* that unconstrained discretion in capital sentencing was unacceptable, see *Furman* v. *Georgia*, 408 U. S., at 256–257 (Douglas, J., concurring); *id.*, at 309–310 (Stewart, J., concurring); *id.*, at 311–312 (WHITE, J., concurring), we later struck down mandatory schemes, adopted in response to *Furman*, because they constrained sentencing discretion. See *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Having sustained specific state sentencing schemes

in 1976 because they provided the constitutionally necessary degree of "guided discretion" in the form of objective sentencing criteria, see, *e. g.*, *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976), we later struck down those very schemes because they required the sentencer to confine itself to the factors contained in those objective criteria, see *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) (Florida); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (Texas). Having encouraged the States to adopt the "important additional safeguard against arbitrariness" of requiring specific jury findings supporting its sentencing decision, *Gregg* v. *Georgia*, 428 U. S., at 198 (joint opinion of Stewart, Powell, and STEVENS, JJ.), we later made such findings impossible as to mitigating circumstances (and thus meaningless as a whole) by prohibiting a requirement that the jury agree on mitigating circumstances, *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow.

In a jurisprudence containing the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained, a vast number of procedures support a plausible claim in one direction or the other. Conscientious counsel are obliged to make those claims, and conscientious judges to consider them. There has thus arisen, in capital cases, a permanent floodtide of stay applications and petitions for certiorari to review adverse judgments at each round of direct and collateral review, alleging novel defects in sentencing procedure arising out of some permutation of either *Furman* or *Lockett*. State courts, attempting to give effect to the contradictory principles in our jurisprudence and reluctant to condemn an offender without virtual certainty that no error has been committed, often suspend the normal rules of procedural bar to give ear to each new claim that

the sentencer's discretion was overconstrained or underconstrained. An adverse ruling typically gives rise to yet another round of federal habeas review—and by the time that is concluded we may well have announced yet another new rule that will justify yet another appeal to the state courts. The effects of the uncertainty and unpredictability are evident in this Court alone, even though we see only the tip of a mountainous iceberg. Since granting certiorari in *McKoy* v. *North Carolina*, *supra*, on February 21, 1989 (the first of this Term's capital cases to have certiorari granted), we have received over 350 petitions for certiorari in capital cases; 8 were granted, and 84 were held for the 9 cases granted for this Term; 37 were held for this case alone. Small wonder, then, that the statistics show a capital punishment system that has been approved, in many States, by the democratic vote of the people, that has theoretically been approved as constitutional by this Court, but that seems unable to function except as a parody of swift or even timely justice. As of May 1990 there were 2,327 convicted murderers on death row; only 123 have been executed since our 1972 *Furman* decision. NAACP Legal Defense and Educational Fund, Death Row, U. S. A. 1 (1990). Those executions that have been carried out have occurred an average of eight years after the commission of the capital crime. See E. Carnes & S. Stewart, Summary of Post-Furman Capital Punishment Data § VIII (unpublished report by Alabama Assistant Attorneys General on file with Harvard Law School Library, 1988), cited in Powell, Commentary, 102 Harv. L. Rev. 1013, 1038, n. 26 (1989).

In my view, it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based.

II

The Eighth Amendment, made applicable to the States by the Fourteenth Amendment, see *Robinson* v. *California*, 370 U. S. 660, 666 (1962), provides:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The requirement as to punishments stands in stark contrast to the requirement for bail and fines, which are invalid if they are "excessive." When punishments other than fines are involved, the Amendment explicitly requires a court to consider not only whether the penalty is severe or harsh, but also whether it is "unusual." If it is not, then the Eighth Amendment does not prohibit it, no matter how cruel a judge might think it to be. Moreover, the Eighth Amendment's prohibition is directed against cruel and unusual *punishments*. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. As THE CHIEF JUSTICE has observed, "[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed." *Gardner* v. *Florida*, 430 U. S. 349, 371 (1977) (REHNQUIST, J., dissenting). Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment "unusual."

Our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), was arguably supported by this text. As I have already described, see Part I–A, *supra*, the critical opinions of Justice Stewart and JUSTICE WHITE in that case rested on the ground that discretionary capital sentencing had made the death sentence such a random and infrequent event among capital offenders ("wanto[n] and freakis[h]," as Justice Stewart colorfully put it) that its imposition had become cruel and unusual. As far as I can discern (this is not the occasion to explore the subject), that is probably not what was meant by an "unusual punishment" in the Eighth Amendment—that is to say, the text did not originally prohibit a traditional form of punishment that is rarely imposed, as opposed to a form of punishment that is not traditional. But the phrase can bear

the former meaning. Moreover, since in most States, until the beginning of this century, the death penalty was mandatory for the convictions for which it was prescribed, see H. Bedau, The Death Penalty in America 10–11 (3d ed. 1982); W. Bowers, Executions in America 8 (1974), it cannot be said that the *Furman* interpretation of the phrase is contradicted by the clear references to a permissible death penalty in the Constitution, see U. S. Const., Amdt. 5; U. S. Const., Amdt. 14, § 1. I am therefore willing to adhere to the precedent established by our *Furman* line of cases, and to hold that when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to establish in advance, and convey to the sentencer, a governing standard. See *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

The *Woodson-Lockett* line of cases, however, is another matter. As far as I can discern, that bears no relation whatever to the text of the Eighth Amendment. The mandatory imposition of death—without sentencing discretion—for a crime which States have traditionally punished with death cannot possibly violate the Eighth Amendment, because it will not be "cruel" (neither absolutely nor for the particular crime) and it will not be "unusual" (neither in the sense of being a type of penalty that is not traditional nor in the sense of being rarely or "freakishly" imposed). It is quite immaterial that most States have abandoned the practice of automatically sentencing to death all offenders guilty of a capital crime, in favor of a separate procedure in which the sentencer is given the opportunity to consider the appropriateness of death in the individual case, see *Woodson* v. *North Carolina*, 428 U. S., at 294–295 (plurality opinion); still less is it relevant that mandatory capital sentencing is (or is alleged to be) out of touch

with "'contemporary community values'" regarding the administration of justice, *id.*, at 295 (citation omitted).

I am aware of the argument, see *id.*, at 302–303; *Roberts* v. *Louisiana*, 428 U. S., at 333–335 (plurality opinion), that mandatory capital sentencing schemes may suffer from the same defects that characterize absolutely discretionary schemes. In mandatory systems, the argument goes, juries frequently acquit offenders whom they find guilty but believe do not deserve the death penalty for their crime; and because this "jury nullification" occurs without the benefit of any guidance or standards from the State, the result is the same "arbitrary and capricious imposition of death sentences" struck down in *Furman*. One obvious problem with this argument is that it proves too much, invalidating *Furman* at the same time that it validates *Woodson*. If juries will ignore their instructions in determining guilt in a mandatory capital sentencing scheme, there is no reason to think they will not similarly chafe at the "'clear and objective standards' . . . provid[ing] 'specific and detailed guidance,'" *Godfrey* v. *Georgia*, *supra*, at 428 (footnotes omitted), that *Furman* requires. The *Furman* approach must be preferred, since it is facially implausible that the risk of arbitrariness arising from juries' ignoring their instructions is greater than the risk of arbitrariness from giving them no instructions at all. The theory of "unusualness" adopted in *Furman* is tenuous enough when used to invalidate explicitly conferred standardless sentencing discretion; I am unwilling to extend that theory to situations in which the sentencer is *denied* that discretion, on the basis of a conjecture (found nowhere else in the law) that juries systematically disregard their oaths.

Despite the fact that I think *Woodson* and *Lockett* find no proper basis in the Constitution, they have some claim to my adherence because of the doctrine of *stare decisis*. I do not reject that claim lightly, but I must reject it here. My initial and my fundamental problem, as I have described it in detail above, is not that *Woodson* and *Lockett* are wrong,

but that *Woodson* and *Lockett* are rationally irreconcilable with *Furman*. It is that which led me into the inquiry whether either they or *Furman* was wrong. I would not know how to apply them—or, more precisely, how to apply both them and *Furman*—if I wanted to. I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman*. *Stare decisis* cannot command the impossible. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.

The objectives of the doctrine of *stare decisis* are not furthered by adhering to *Woodson-Lockett* in any event. The doctrine exists for the purpose of introducing certainty and stability into the law and protecting the expectations of individuals and institutions that have acted in reliance on existing rules. As I have described, the *Woodson-Lockett* principle has frustrated this very purpose from the outset—contradicting the basic thrust of much of our death penalty jurisprudence, laying traps for unwary States, and generating a fundamental uncertainty in the law that shows no signs of ending or even diminishing.

I cannot adhere to a principle so lacking in support in constitutional text and so plainly unworthy of respect under *stare decisis*. Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.

III

I turn, finally, to petitioner's Eighth Amendment claims in the present case.

With respect to the *Furman* claim, I agree with the Court's analysis and conclusion, and join those portions of its opinion. The aggravating circumstance found to exist in this case, that the murder was committed in an "especially heinous, cruel or depraved" manner—cruelty being defined as involving the infliction of mental anguish or physical abuse, and depravity defined as involving the relishing of the murder or the victim's suffering—defines with reasonable specificity certain elements that distinguish the death-eligible offense from other murders. They are precise enough, in my view, both to guide the sentencer and to enable review of the sentence.

As to petitioner's claim that in two respects the Arizona procedure deprived the sentencer of discretion to consider all mitigating circumstances: For the reasons stated above I do not believe that claim, if correct, states an Eighth Amendment violation.

I therefore concur in part and concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.*

The Court's most cavalier application today of longstanding Eighth Amendment doctrines developed over the course of two decades of careful and sustained inquiry, when added to the host of other recent examples of crabbed application of doctrine in the death penalty context, see, *e. g.*, *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990); *Boyde* v. *California*, 494 U. S. 370 (1990); cf. *Saffle* v. *Parks*, 494 U. S. 484 (1990); *Sawyer* v. *Smith*, *ante*, p. 227, suggests that this Court is losing sight of its responsibility to ensure that the ultimate criminal sanction is meted out only in accordance with constitutional principle. While I join JUSTICE BLACKMUN's dissenting opinions in today's decisions, I also adhere to my

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*[This opinion applies also to No. 89-189, *Lewis* v. *Jeffers*, *post*, p. 764.]

view that the death penalty is in all circumstances a cruel and unusual punishment:

> "The fatal constitutional infirmity in the punishment of death is that it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity.' As such it is a penalty that 'subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause].' I therefore would hold, on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause. 'Justice of this kind is obviously no less shocking than the crime itself, and the new "official" murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first.'" *Gregg* v. *Georgia*, 428 U. S. 153, 230–231 (1976) (dissenting opinion) (citations and footnote omitted).

See also *Furman* v. *Georgia*, 408 U. S. 238, 257–306 (1972) (concurring opinion).

Even if I did not believe that the death penalty is wholly inconsistent with the constitutional principle of human dignity, I would agree that the concern for human dignity lying at the core of the Eighth Amendment requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of

> a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.).

Thus "a system of capital punishment at once [must be] consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982).*

In the past, "this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Id.*, at 118 (O'CONNOR, J., concurring). But today's decisions reflect, if anything, the opposing concern that States ought to be able to execute pris-

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*JUSTICE SCALIA's separate opinion dismissing the settled principle underlying *Lockett* v. *Ohio*, 438 U. S. 586 (1978), based on the assertion that this doctrinal principle cannot be reconciled with that underlying *Furman* v. *Georgia*, 408 U. S. 238 (1972), reflects a misdescription and apparent misunderstanding of our doctrine. JUSTICE SCALIA's concern that the *Lockett* principle is not commanded by the explicit text of the Eighth Amendment has long been rejected by this Court; it is well established that the Eighth Amendment's proscription of cruel and unusual punishments "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion); see *Weems* v. *United States*, 217 U. S. 349, 378 (1910). The *Lockett* and *Furman* principles speak to different concerns underlying our notion of civilized punishment; the *Lockett* rule flows primarily from the Amendment's core concern for human dignity, see *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), whereas the *Furman* principle reflects the understanding that the Amendment commands that punishment not be meted out in a wholly arbitrary and irrational manner. 428 U. S., at 303. Our cases have applied these principles together to "insis[t] that capital punishment be imposed fairly, *and* with reasonable consistency, or not at all." *Eddings* v. *Oklahoma*, 455 U. S., at 112 (emphasis added); see, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 319, 326–328 (1989). See generally *post*, at 714–719 (STEVENS, J., dissenting).

oners with as little interference as possible from our established Eighth Amendment doctrine.

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

In my view, two Arizona statutory provisions, pertinent here, run afoul of the established Eighth Amendment principle that a capital defendant is entitled to an individualized sentencing determination which involves the consideration of all relevant mitigating evidence. The first is the requirement that the sentencer may consider *only* those mitigating circumstances proved by a preponderance of the evidence. The second is the provision that the defendant bears the burden of establishing mitigating circumstances "sufficiently substantial to call for leniency." I also conclude that Arizona's "heinous, cruel or depraved" aggravating circumstance, as construed by the Arizona Supreme Court, provides no meaningful guidance to the sentencing authority and, as a consequence, is unconstitutional.

I therefore dissent from the Court's affirmance of Jeffrey Alan Walton's sentence of death.

I

During the past 15 years, this Court's death penalty jurisprudence consistently has stressed the importance of an individualized-sentencing process, one that permits "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion). Such a procedure is required because "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*, at 304. A plurality of this Court stated in

Lockett v. *Ohio*, 438 U. S. 586, 604 (1978), that a capital 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 that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) In *Eddings* v. *Oklahoma*, 455 U. S. 104, 114–115 (1982), a majority held that "[t]he sentencer, and the [state appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[1] The Court, moreover, has insisted that the substance as well as the form of *Lockett* must be respected. See *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence").

From those holdings two closely related principles emerge. The first is that the "qualitative difference" between death and all other penalties necessitates a greater degree of "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S., at 305 (plurality opinion). The second is that the particularized sentencing procedure mandated by the Eighth Amendment requires that the sentencer be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion). Only if the defendant is allowed an unrestricted opportunity to present relevant mitigating evidence will a capital sentencing procedure be deemed sufficiently reliable to satisfy constitutional standards. The Court said in *Eddings* that "the rule in *Lockett*

[1] The Court in *Eddings* further instructed that on remand "the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 U. S., at 117.

recognizes that a consistency produced by ignoring individual differences is a false consistency." 455 U. S., at 112.

The Court today upholds an Arizona statute which (a) excludes from the sentencer's consideration all mitigating circumstances that the defendant has failed to prove by a preponderance of the evidence, and (b) places upon the capital defendant the burden of demonstrating that the mitigating circumstances so proved are "sufficiently substantial to call for leniency." The plurality makes no effort to explain how these provisions are consistent with the Eighth Amendment principles announced in *Woodson*, *Lockett*, and their progeny.[2] Indeed, the plurality's analysis of these issues in-

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[2] The plurality does assert, however, that its analysis is consistent with *Lockett* and its progeny. See *ante*, at 649–650. In contrast, JUSTICE SCALIA, who provides the fifth vote for affirmance, expresses no view on the question whether the Arizona statute comports with the standards announced in the Court's prior decisions. He argues, instead, that any violation of *Lockett* is immaterial because *Lockett* should be overruled. Eight Members of the Court agree that *Lockett* remains good law, and I shall not attempt today a detailed exposition of this Court's Eighth Amendment jurisprudence. I do wish, however, to make two brief observations:

First, JUSTICE SCALIA's argument is not new—as his citation to then-JUSTICE REHNQUIST's dissent in *Lockett* demonstrates. See *ante*, at 667. The rule that a capital sentencer must be allowed to consider all relevant mitigating evidence has been vigorously opposed, intensely debated, and eventually accepted by all Members of this Court as a common starting point for analysis in individual cases. See, *e. g.*, *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) (SCALIA, J., writing for a unanimous Court). This history suggests not only that considerations of *stare decisis* support continued application of the *Lockett* rule. It indicates as well that this Court's Eighth Amendment jurisprudence is not so patently irrational that it should be abruptly discarded.

My second observation relates to the integrity of this Court's adjudicative process. The validity of *Lockett* has been presumed throughout this case, and the arguments raised by JUSTICE SCALIA have not been addressed in petitioner's brief or argument. It is disturbing that the decisive vote in a capital case should turn on a single Justice's rejection of a line of authority that both parties to this controversy, and eight Members of this Court, have accepted.

cludes virtually no discussion of capital cases, and those that the majority does discuss are demonstrably inapposite. Rather, the plurality relies on "analogous" cases that do not involve the death penalty. Its analysis thereby ignores what I had thought to be settled principles regarding the distinctive nature of capital sentencing.

A

The Arizona capital sentencing statute flatly provides: "[T]he burden of establishing the existence of the [mitigating] circumstances included in subsection G of this section is on the defendant." Ariz. Rev. Stat. Ann. § 13–703(C) (1989). The Arizona Supreme Court has construed the statute to require that any mitigating circumstances must be proved by a preponderance of the evidence. See, *e. g.*, *State* v. *McMurtrey*, 143 Ariz. 71, 73, 691 P. 2d 1099, 1101 (1984). There can be no doubt that this provision of Arizona law excludes from the sentencer's consideration relevant mitigating evidence that might affect the determination whether the death penalty is appropriate. Exclusion of that evidence is unsupported by this Court's decisions and serves no legitimate state interest.

The plurality does not analyze this case within the framework established by our Eighth Amendment decisions. Rather, the plurality relies almost exclusively on noncapital cases upholding the State's right to place upon the defendant the burden of proving an affirmative defense. See *ante*, at 650. Reliance on these cases is misplaced, however, since those decisions rest upon a premise that is wholly inapplicable in the capital sentencing context. In *Patterson* v. *New York*, 432 U. S. 197 (1977), the Court explained the justification in a noncapital case for allowing the burden of persuasion as to affirmative defenses to be placed upon the defendant rather than the State:

> "The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or un-

> dertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.
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> ". . . [I]n each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. *If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty.* To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." *Id.*, at 207–209 (emphasis added).

The Court's decision thus rested upon an argument that "the greater power includes the lesser": since the State constitutionally could decline to recognize the defense *at all*, it could take the lesser step of placing the burden of proof upon the defendant. That reasoning is simply inapposite when a capital defendant introduces mitigating evidence, since the State lacks the greater power to exclude the evidence entirely.[3]

But it makes no sense to analyze petitioner's claim of *Lockett* error by drawing on "analogous" cases outside the sphere of capital sentencing. In developing the requirement

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[3] This is not the first time a Member of this Court has recognized the connection between the State's greater power to eliminate all consideration of mitigating evidence and its lesser power to place the burden of proof on the defendant. See *Lockett* v. *Ohio*, 438 U. S. 586, 633 (1978) (REHNQUIST, J., concurring in part and dissenting in part) ("Because I continue to believe that the Constitution is not offended by the State's refusal to consider mitigating factors at all, there can be no infirmity in shifting the burden of persuasion to the defendant when it chooses to consider them").

of individualized capital sentencing (with unlimited presentation of relevant mitigating evidence), this Court has not purported to rely on principles applicable to criminal prosecutions generally. Instead, the Court's Eighth Amendment jurisprudence explicitly has proceeded from the premise "that death is a punishment different from all other sanctions in kind rather than degree." *Woodson* v. *North Carolina*, 428 U. S., at 303–304 (plurality opinion).[4] To suggest that the principles announced in *Lockett* and *Eddings* are applicable only insofar as they are consistent with the constitutional rules governing noncapital cases is to deprive those decisions of all significance.

Application of the preponderance standard in this context is especially problematic in light of the fact that the "existence" of a mitigating factor frequently is not a factual issue to which a "yes" or "no" answer can be given. See *Stebbing* v. *Maryland*, 469 U. S. 900, 902–904 (1984) (MARSHALL, J., dissenting from denial of certiorari). The statute, for example, lists as a first mitigating circumstance the fact that "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired . . . ." Ariz. Rev. Stat. Ann. § 13–703(G)(1) (1989). Petitioner offered evidence of childhood sexual abuse. Presumably, no individual who suffers such treatment is wholly unaffected; at the same time, it is rare that such an individual is so deeply traumatized that his impairment furnishes a complete defense for his actions. The question whether an individual's capacity to behave lawfully is "impaired" is one of degree, not an either/or propo-

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[4] The plurality in *Lockett* stated: "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases." *Id.*, at 604–605.

sition. The preponderance standard, however, encourages the sentencer to conclude that unless some vaguely defined threshold of "significance" has been reached, the evidence of abuse and consequent impairment cannot be considered *at all.*

Indeed, it appears that the Arizona Supreme Court has applied the statute in just this fashion. See, *e. g.*, *State* v. *Wallace*, 151 Ariz. 362, 369, 728 P. 2d 232, 239 (1986) ("[W]e find that neither defendant's 'difficult earlier years' nor his use of 'various drugs' so affected his capacity to conform to the requirements of law that they constitute mitigating factors under § 13–703(G)(1)"), cert. denied, 483 U. S. 1011 (1987); *State* v. *Rossi*, 146 Ariz. 359, 367, 706 P. 2d 371, 379 (1985) (intoxication or duress is not a mitigating circumstance unless it is substantial); *State* v. *Woratzeck*, 134 Ariz. 452, 458, 657 P. 2d 865, 871 (1982) (same); *State* v. *Nash*, 143 Ariz. 392, 406, 694 P. 2d 222, 236 (State acknowledged some degree of mental impairment but argued that "it was not significant enough to be a mitigating circumstance"), cert. denied, 471 U. S. 1143 (1985). The Arizona Supreme Court has not simply held that duress or impairment which falls below the threshold should be given reduced weight at the final stage of the sentencing process, when aggravating and mitigating circumstances are balanced. Rather, it has held that duress or impairment which falls below the threshold is not a mitigating factor. It is therefore misleading, in many instances, to characterize an Arizona court's rejection of proffered mitigating evidence as a determination that the evidence should not be credited. The trial judge instead may be acting upon the belief that a defendant's impairment, though proved, is not "significant" within the meaning of the statute. Thus, under Arizona law, a sentencing judge is entitled to give *no* weight to mitigating evidence on the ground that the evidence is *not mitigating enough.* Under the guise of a burden of proof,

the statute provides that some mitigating evidence is not to be considered at all.[5]

Even when the trial judge's rejection of a particular mitigating circumstance is based on credibility determinations, application of the preponderance standard is unwarranted. Mitigating evidence that fails to meet this standard is not so unreliable that it has no proper place in the sentencing decision: Decisions as to punishment, like decisions as to guilt or innocence, will often be based on the *cumulative* effect of several pieces of evidence, no one of which by itself is fully persuasive. The problems with the preponderance standard are compounded when the defendant presents several possible mitigating factors. A trial judge might be 49% convinced as to each of 10 mitigating circumstances; yet he would be forced to conclude, as a matter of law, that there was no mitigation to weigh against the aggravating factors.

The Arizona Supreme Court has articulated two closely related justifications for placing upon the capital defendant the burden of proving that a mitigating circumstance exists. The court has asserted that "[f]acts which would tend to show mitigation are peculiarly within the knowledge of a defendant," *State* v. *Smith*, 125 Ariz. 412, 416, 610 P. 2d 46, 50 (1980), and that "[t]o require the State to negate every mitigating circumstance would place an impermissible burden on the State," *State* v. *Watson*, 120 Ariz. 441, 447, 586 P. 2d

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[5] One might ask what would happen if the defendant argued that he had proved the mitigating circumstance of "moderate impairment." Presumably the Arizona Supreme Court would respond that no such mitigating factor is recognized under Arizona law. In prior decisions indicating that certain proffered evidence of impairment or duress would not constitute a mitigating factor, that court has relied on the language of the Arizona statute, which requires that impairment be "significant" and duress "substantial." See, *e. g.*, *State* v. *Rossi*, 146 Ariz. 359, 366–367, 706 P. 2d 371, 378–379 (1985). Rejection of mitigating evidence on the ground that it does not support a mitigating circumstance *as defined in the statute*, however, cannot be reconciled with *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), in which this Court held that a capital defendant cannot be restricted to proof of statutory mitigating factors.

1253, 1259 (1978), cert. denied, 440 U. S. 924 (1979). Until today, this Court has never identified a state interest which outweighs the capital defendant's right to unrestricted presentation of mitigating evidence. Even if such an interest could exist, however, the interests advanced by the State in support of the preponderance standard do not withstand scrutiny.

The State's justifications are not without force when a criminal defendant offers an affirmative defense in a trial to determine guilt or innocence. A jury's decision as to an affirmative defense *is* a binary choice: either the defense is accepted or it is not. Since the jury's acceptance of the defense automatically results in an acquittal (or in conviction on a lesser charge), the State may suffer real prejudice if the defense is established on the basis of minimally persuasive evidence which the State has no practical opportunity to rebut—especially if it is difficult to anticipate the defenses that a particular individual may offer. In contrast, if a capital sentencer believes that certain mitigating evidence has *some* persuasive value, but does not meet the preponderance standard, the sentencer simply may give that evidence reduced weight—weight proportional to its persuasiveness—at the final balancing stage.[6] No legitimate interest is served

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[6] See *Eddings* v. *Oklahoma*, 455 U. S. 104, 114–115 (1982) ("The sentencer, and the [state appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration").

As the Arizona Supreme Court has recognized, the determination that an aggravating or mitigating factor exists does not require that the factor be given any particular weight. "The statute does not require that the number of aggravating circumstances be weighed against the number of mitigating circumstances. One mitigating circumstance, for example, may be 'sufficiently substantial' to outweigh two aggravating circumstances. The converse is also true—one aggravating circumstance could be so substantial that two or more mitigating circumstances would not be 'sufficiently substantial to call for leniency. A. R. S. § 13–454(D).'" *State* v. *Brookover*, 124 Ariz. 38, 42, 601 P. 2d 1322, 1326 (1979).

by forbidding the sentencer to give such evidence any effect at all.

The Arizona rule at issue here falls well within the prohibition announced in *Lockett* and its progeny. The statute defines a wide range of relevant mitigating evidence—evidence with some degree of persuasiveness which has not been proved by a preponderance—that *cannot* be given effect by the capital sentencer. That rule finds no support in this Court's precedents, and it serves no legitimate governmental interest. I therefore conclude that the Arizona death penalty statute, as construed by the Supreme Court of Arizona, impermissibly limits the sentencer's consideration of relevant mitigating evidence, and thereby violates the Eighth Amendment.[7]

B

I also believe that the Constitution forbids the State of Arizona to place upon the capital defendant the burden of proving mitigating circumstances that are "sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13–703(E) (1989). Once an aggravating circumstance has been established, the Arizona statute mandates that death is to be deemed the appropriate penalty unless the defendant proves otherwise. That statutory provision, in my view, establishes a "presumption of death"[8] in violation of the Eighth Amendment.

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[7] Nor is Arizona's decision to place the burden of proving mitigation on the defendant saved by the fact that the State is required to prove aggravating circumstances beyond a reasonable doubt. See *McCleskey* v. *Kemp*, 481 U. S. 279, 304 (1987) ("In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence") (emphasis in original).

[8] See *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1041 (CA9 1988) (en banc), cert. pending, No. 88–1553. See also *Jackson* v. *Dugger*, 837 F. 2d 1469, 1474 (CA11), cert. denied, 486 U. S. 1026 (1988).

The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed "sufficiently substantial to call for leniency" only if the mitigating factors "outweigh" those in aggravation.[9] That court has sustained the requirement on the ground that "[w]hen the issue of guilt is settled and only the question of punishment remains, due process is not offended by requiring the already guilty defendant to carry the burden of showing why he should receive leniency." *State* v. *Watson*, 120 Ariz., at 447, 586 P. 2d, at 1259. If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a "determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S., at 305 (plurality opinion).

The plurality takes a hard-line approach and makes little effort to ground its holding on our Eighth Amendment jurisprudence. In support of its position, the plurality cites only two very recent capital cases, *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), and *Boyde* v. *California*, 494 U. S. 370 (1990). Reliance even on these precedents is misplaced. The statutes upheld in those cases provided that the death penalty would be imposed "only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." *Blystone*, 494 U. S., at 305. In neither *Boyde* nor *Blystone* did the challenged statute require a capi-

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[9] See, *e. g.*, *State* v. *McCall*, 160 Ariz. 119, 125, 770 P. 2d 1165, 1171 (1989); *State* v. *Mauro*, 159 Ariz. 186, 208, 766 P. 2d 59, 81 (1988); *State* v. *Moorman*, 154 Ariz. 578, 587, 744 P. 2d 679, 688 (1987); *State* v. *LaGrand*, 153 Ariz. 21, 37, 734 P. 2d 563, 579, cert. denied, 484 U. S. 872 (1987); *State* v. *McMurtrey*, 151 Ariz. 105, 110, 726 P. 2d 202, 207 (1986), cert. denied, 480 U. S. 911 (1987).

tal sentence when aggravating and mitigating factors are evenly balanced. Those decisions simply do not speak to the issue posed by the Arizona statute: whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is *not* appropriate.

The plurality does not attempt to explain why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced.[10] Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Ante*, at 650. One searches in vain for any hint of a limiting principle. May a State require that the death penalty be imposed whenever an aggravating factor is established and mitigating circumstances do not "*substantially* outweigh" those in aggravation? May a state statute provide that a death sentence is presumptively appropriate whenever an aggravating circumstance is proved, and that the presumption can be rebutted only by a showing that mitigating circumstances are "extraordinarily great"? These formulations would appear to satisfy the plurality's test: viz., that the State is required to establish an aggravating circumstance, and no mitigating evidence is excluded from the sentencer's consideration.[11] But the right to present mitigating

[10] The State's asserted interest in ensuring that only "reliable" evidence is considered at the final balancing stage of course provides no basis for a requirement that death be imposed whenever the mitigating evidence found to be reliable evenly balances the aggravating circumstances.

[11] The fact that the presumption of death is triggered only by the finding of an aggravating circumstance does not save the statute. See *Sumner* v. *Shuman*, 483 U. S. 66, 78 (1987) (proof of an aggravating factor "do[es] not provide an adequate basis on which to determine whether the death sen-

evidence is rendered all but meaningless if the rules that guide the sentencer's deliberations virtually ensure that the mitigating evidence will not change the outcome.[12]

Like the plurality's analysis of the requirement that mitigating circumstances be proved by a preponderance of the evidence, its approval of this provision appears to rest upon an analogy between mitigating evidence in capital sentencing and affirmative defenses in noncapital cases. In noncapital cases, of course, the States are given broad latitude to sacrifice precision for predictability by imposing determinate sentences and restricting the defendant's ability to present evidence in mitigation or excuse. If the States were similarly free to make capital punishment mandatory for specified crimes, and to prohibit the introduction of mitigating evidence or declare such evidence to be irrelevant, the plurality's reasoning today would be unassailable. There then could be no objection to a sentencing scheme which permitted a defendant to argue that the death penalty was inappropriate in his case, but placed upon his shoulders the burden of persuading the sentencer. This Court, however, repeatedly has recognized that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion), and that in capital cases "the punishment should be directly related to the personal culpability of the defendant," *Penry* v. *Lynaugh*, 492 U. S., at 327. I see no way that these principles can be squared with

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tence is the appropriate sanction in any particular case"; capital defendant is still entitled to individualized consideration of mitigating evidence).

[12] See *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence"); *Franklin* v. *Lynaugh*, 487 U. S. 164, 185 (1988) (O'CONNOR, J., concurring in judgment) ("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").

a capital sentencing scheme which provides that doubtful cases should be resolved in favor of a sentence of death. I therefore conclude that the Constitution bars Arizona from placing upon a capital defendant the burden of proving that mitigating circumstances are "sufficiently substantial to call for leniency."

II

In *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), we considered Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. The plurality concluded: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.*, at 428–429. Two Terms ago, in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), the Court unanimously struck down an Oklahoma death sentence based in part upon that State's "especially heinous, atrocious, or cruel" aggravating circumstance. The Court noted that "the language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*." *Id.*, at 363–364.

The Arizona statute at issue today lists as an aggravating circumstance the conclusion that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. Ann. § 13–703(F)(6) (1989) (the (F)(6) circumstance). The Arizona Supreme Court consistently has held that "[t]hese terms are considered disjunctive; the presence of any one of three factors is an aggravating circumstance." *State* v. *Beaty*, 158 Ariz. 232, 242, 762 P. 2d 519, 529 (1988), cert. denied, 491 U. S. 910 (1989). At the sentencing phase in the present case, the State relied primarily on medical evidence detailing the injuries that the victim Powell suffered when he regained consciousness after the

shooting.[13] The trial judge's sentencing order stated that he found that Walton had "committed the offense in an extremely heinous, cruel or depraved manner," App. 56, but did not specify the basis for that finding. In its "independent review" of the capital sentence, the Arizona Supreme Court held that the (F)(6) circumstance was not supported by evidence of Powell's suffering after the shooting, since Walton could not have foreseen that Powell would survive his wound. The court found, however, that the murder was especially cruel since "Powell suffered great mental anguish both during the car ride when his fate was uncertain and in his final march into the desert when his fate had become certain." 159 Ariz. 571, 587, 769 P. 2d 1017, 1033 (1989). The court also indicated that a finding of depravity would be supported by Walton's comment some hours after the shooting that he had "never seen a man pee in his pants before." *Ibid.*

In sustaining Walton's sentence of death, the majority offers two principal grounds upon which, it says, *Godfrey* and *Maynard* may be distinguished. First, the majority points out that capital sentencing in Arizona is conducted by a trial judge who is presumed to be aware of any limiting construction announced by the State Supreme Court. *Ante*, at 653. Second, the majority notes that the Arizona Supreme Court itself "purport[ed] to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." *Ibid.* In my view, neither of these factors supports the Court's decision to affirm petitioner's death sentence.

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[13] Defense counsel objected to the introduction of this testimony on the ground that Walton could not have foreseen Powell's suffering after the shooting, since Walton reasonably believed that Powell was dead. The trial judge overruled the objection on the ground that "the testimony that I understand he's going to testify to certainly goes to cruelty. . . ." Tr. 233 (Jan. 26, 1987).

A

Unlike a jury, a sentencing judge is presumed to know the law as stated in the controlling opinions of the State Supreme Court. Even if the aggravating circumstance is vague on its face, the sentence will be valid if the judge's discretion has been suitably channeled by the "instructions" provided by the appellate court's construction of the statute. The trial judge's familiarity with the State Supreme Court's opinions, however, will serve to narrow his discretion only if that body of case law articulates a construction of the aggravating circumstance that is coherent and consistent, and that meaningfully limits the range of homicides to which the aggravating factor will apply.[14] One therefore would expect the majority to analyze Arizona Supreme Court decisions issued prior to the imposition of petitioner's sentence (Jan. 27, 1987), in order to determine whether the judge who sentenced Walton to death can be presumed to have acted on the basis of a constitutionally sufficient limiting construction of the aggravating factor. The Court, however, cites no Arizona cases at all, justifying the omission as a refusal to second-guess the State Supreme Court's proportionality review. *Ante*, at 655–656. The Court thus distinguishes *Godfrey* and *Maynard* on the ground that Arizona sentencing judges are presumed to read and be guided by the opinions of the Arizona Supreme Court, yet insists, as a matter of principle, that it is barred from determining whether those opinions furnish con-

[14] The Arizona Supreme Court stated: "[T]he trial court's finding of cruelty is supported by the mental torment of the victim prior to the shooting rather than the events which took place afterwards." 159 Ariz. 571, 587, 769 P. 2d 1017, 1033 (1989). The trial judge, however, made no "finding of cruelty": he found more generally that Walton "committed the offense in an extremely heinous, cruel or depraved manner." The trial judge's sentence therefore can stand only if all three of the statutory terms have been given constitutionally sufficient limiting constructions.

stitutionally adequate guidance. This, it seems to me, is strange and unusual reasoning indeed.[15]

Had the majority examined the Arizona Supreme Court's application of the "especially heinous, cruel or depraved" aggravating circumstance, it would have been hard pressed to conclude that the state court has placed meaningful limitations on the scope of the (F)(6) factor. The Arizona Supreme Court attempted to define the statutory terms in *State* v. *Knapp*, 114 Ariz. 531, 562 P. 2d 704 (1977), cert. denied, 435 U. S. 908 (1978). The court there stated: "The words 'heinous, cruel or depraved' have meanings that are clear to a person of average intelligence and understanding." 114 Ariz., at 543, 562 P. 2d, at 716. The court then offered definitions culled from Webster's Third New International Dictionary: "heinous" was defined as "hatefully or shockingly evil: grossly bad"; "cruel" as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic"; and "depraved" as "marked by debasement, corruption, perversion or deterioration." *Ibid.*[16] The court explained: "What our

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[15] The majority relies on our holding in *Pulley* v. *Harris*, 465 U. S. 37, 43 (1984), in arguing that proportionality review is not constitutionally required. *Ante*, at 655–656. That reliance is misplaced. In *Pulley* the Court held that, so long as *other* safeguards at the initial sentencing proceeding adequately limit the sentencer's discretion, the Constitution does not require the additional protection of proportionality review by an appellate court. See 465 U. S., at 44–54. *Pulley* is simply irrelevant when the adequacy of the initial sentencing is itself the point at issue.

[16] These definitions are strikingly similar to the jury instructions given in *Maynard*, in which the Oklahoma jury was told that "the term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1488 (CA10 1987). The majority acknowledges, albeit obliquely, that those instructions were unconstitutionally vague. See *ante*, at 652–653. The Tenth Circuit's assessment of the Oklahoma jury instructions is equally applicable to the definitions used in *Knapp:* "Vague terms do not suddenly become clear when they are de-

legislature intended to include as an aggravating circumstance was a killing wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm." *Ibid.*

In *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983), the Arizona Supreme Court reviewed its prior decisions construing the (F)(6) factor. The court explained that "cruelty involves the pain and distress visited upon the victims, and that heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions." 135 Ariz., at 51, 659 P. 2d, at 10.[17] The court also listed five factors that, in prior cases, had supported a finding that a particular killing was especially heinous or depraved. These factors were (1) "the apparent relishing of the murder by the killer," (2) "the infliction of gratuitous violence on the victim," (3) "the needless mutilation of the victim," (4) "the senselessness of the crime," and (5) "the helplessness of the victim." *Id.*, at 52, 659 P. 2d, at 11. The court did not disavow the *Knapp* definitions; to the contrary, it cited those definitions with approval. 135 Ariz., at 51, 659 P. 2d, at 10. Nor did the court hold that a murder could be deemed especially heinous or depraved *only* when one of these five factors was present. Rather, the court stated: "Where no circumstances, *such as the specific factors discussed above*, separate the crime from the 'norm' of first degree murders, we will reverse a finding that the crime was committed in an 'especially heinous, cruel, or depraved manner.'" *Id.*, at 53, 659 P. 2d, at 12 (emphasis added).

The principles announced in *Gretzler* have failed to place meaningful limitations on the application of the (F)(6) ag-

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fined by reference to other vague terms." *Cartwright* v. *Maynard*, 822 F. 2d, at 1489.

[17] The court also noted that "our concept of cruelty involves not only physical pain, but also 'mental . . . distress visited upon the victims.'" 135 Ariz., at 51, 659 P. 2d, at 10, quoting *State* v. *Clark*, 126 Ariz. 428, 436, 616 P. 2d 888, 896, cert. denied, 449 U. S. 1067 (1980).

gravating circumstance. Since its decision in *Gretzler*, the Arizona Supreme Court has continued to identify new factors which support a finding that a particular murder was heinous or depraved. The court, for example, has held that heinousness or depravity was shown in part by the age of the victim, see *State* v. *Wallace*, 151 Ariz., at 368, 728 P. 2d, at 238 ("[T]he fact that defendant killed two children, with whom he admittedly had no dispute and who posed no danger to him, is additional evidence of his 'shockingly evil state of mind'"); *State* v. *Zaragoza*, 135 Ariz. 63, 69, 659 P. 2d 22, 28 ("The victim in this case was 78 years old"), cert. denied, 462 U. S. 1124 (1983); by the fact the murder was committed to eliminate a witness, see *State* v. *Correll*, 148 Ariz. 468, 481, 715 P. 2d 721, 734 (1986); *State* v. *Gillies*, 142 Ariz. 564, 570, 691 P. 2d 655, 661 (1984), cert. denied, 470 U. S. 1059 (1985); *State* v. *Smith*, 141 Ariz. 510, 511–512, 687 P. 2d 1265, 1266–1267 (1984); by the fact the victim had been kind to the killer, *State* v. *Fisher*, 141 Ariz. 227, 252, 686 P. 2d 750, 775, cert. denied, 469 U. S. 1066 (1984); by the fact the killer used "special bullets . . . designed to inflict greater tissue damage," *State* v. *Rossi*, 146 Ariz., at 365, 706 P. 2d, at 377, or "intentionally and repeatedly fir[ed] a high-powered, destructive weapon at the victim," *State* v. *Chaney*, 141 Ariz. 295, 313, 686 P. 2d 1265, 1283 (1984); by the fact "the victim was bound to an extent far greater than was necessary to achieve" the purpose of preventing her escape, *State* v. *Villafuerte*, 142 Ariz. 323, 331, 690 P. 2d 42, 50 (1984), cert. denied, 469 U. S. 1230 (1985); or by the killer's "total disregard for human life," *State* v. *Correll*, 148 Ariz., at 481, 715 P. 2d, at 734. The Arizona Supreme Court has not purported to announce necessary conditions for a finding of heinousness or depravity. Instead, the court has observed: "Our previous cases have approved findings of heinous or depraved conduct where the perpetrator acted with gratuitous violence, relished the killing *or in some other way* acted in such a fashion that his acts set him apart from the 'norm' of first degree murderers."

State v. *Johnson*, 147 Ariz. 395, 401, 710 P. 2d 1050, 1056 (1985) (emphasis added).

Indeed, there would appear to be few first-degree murders which the Arizona Supreme Court would *not* define as especially heinous or depraved—and those murders which *do* fall outside this aggravating circumstance are likely to be covered by some other aggravating factor. Thus, the court will find heinousness and depravity on the basis of "gratuitous violence" if the murderer uses more force than necessary to kill the victim, see *State* v. *Summerlin*, 138 Ariz. 426, 436, 675 P. 2d 686, 696 (1983); *State* v. *Ceja*, 126 Ariz. 35, 40, 612 P. 2d 491, 496 (1980), but the murder will be deemed cruel if the killer uses insufficient force and the victim consequently dies a lingering death, see *State* v. *Chaney*, 141 Ariz., at 312, 686 P. 2d, at 1282. A determination that a particular murder is "senseless" will support a finding of depravity; but a murder to eliminate a witness is also depraved, a murder for pecuniary gain is covered by a separate aggravating circumstance,[18] and evidence showing that the defendant killed out of hatred for the victim or a desire for revenge may be used to buttress the court's conclusion that the killer "relished" the crime.

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[18] See Ariz. Rev. Stat. Ann. § 13–703(F)(5) (1989). Indeed, the Arizona Supreme Court has been willing to find that a particular murder was committed *both* for an unworthy purpose and for no purpose at all. In *State* v. *Tison*, 129 Ariz. 526, 633 P. 2d 335 (1981), cert. denied, 459 U. S. 882 (1982), the Arizona Supreme Court found two aggravating circumstances: (1) the murders were committed for pecuniary gain, since the object of the killings was to obtain an automobile, *id.*, at 542, 633 P. 2d, at 351, and (2) the murders were senseless, and therefore especially heinous and depraved, in part because the victims could not have impeded the theft of the car and the killings therefore did not further the defendants' plan, *id.*, at 543, 633 P. 2d, at 352. See also *State* v. *Correll*, 148 Ariz. 468, 479, 715 P. 2d 721, 732 (1986) (pecuniary gain circumstance was established by the fact that the defendant and an accomplice "very carefully executed the armed robbery, and the murders were part of the scheme of robbery"); *id.*, at 481, 715 P. 2d, at 734 ((F)(6) factor was proved because "depravity is indicated by the senselessness of the murders in that the murders were unnecessary to accomplish the robbery").

See *State* v. *Jeffers*, 135 Ariz. 404, 430, 661 P. 2d 1105, 1131, cert. denied, 464 U. S. 865 (1983).[19] In *State* v. *Wallace*, 151 Ariz., at 368, 728 P. 2d, at 238, the court's determination that the crime was "senseless" (and therefore heinous and depraved) was based in part on the fact that the defendant "steadfastly maintains there was no reason or justification for what he did"—this in a case where the defendant argued that his remorse for the crime constituted a mitigating factor.

I must also conclude that the Arizona Supreme Court's construction of "cruelty" has become so broad that it imposes no meaningful limits on the sentencer's discretion. The court in *State* v. *Knapp*, 114 Ariz., at 543, 562 P. 2d, at 716, used a dictionary definition to regard "'cruel'" as "'disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.'" This might have provided the starting point for a limiting construction that would have meaningfully distinguished the most egregious murders. This Court in *Maynard* expressed apparent approval of a construction that would limit the aggravating circumstance to murders involving "torture or serious physical abuse." 486 U. S., at 364; accord, *Godfrey* v. *Georgia*, 446 U. S., at 431 (plurality opinion). And I have no quarrel with the proposition that a murder which is preceded by the deliberate infliction of gratuitous suffering is more blameworthy than one which is not.

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[19] The Arizona Supreme Court has identified other particularly reprehensible motives which, in its view, will support a finding of heinousness or depravity. See *State* v. *Martinez-Villareal*, 145 Ariz. 441, 451, 702 P. 2d 670, 680 (murder to demonstrate "manliness" reflects "a manifest disregard for the fundamental principles upon which our society is based"), cert. denied, 474 U. S. 975 (1985); *State* v. *McCall*, 139 Ariz. 147, 162, 677 P. 2d 920, 935 (1983) (finding supported in part by the fact that the mutilation of the victims' bodies "was designed to be a 'message' to warn other people"), cert. denied, 467 U. S. 1220 (1984). Taken together, the state court's decisions reflect the indisputable fact that there is no legitimate reason to commit murder, but they provide no principled basis for identifying the most blameworthy killings.

The Arizona Supreme Court's later decisions, however, made it clear that the murder which is "especially cruel" is the norm rather than the exception. The application of this circumstance has been expanded to cover any murder in which the victim is shown to have experienced fear or uncertainty as to his ultimate fate.[20] The Arizona Supreme Court has not required that the defendant must have deliberately delayed or protracted the killing *for the purpose* of causing the victim mental anguish. Nor has the court required that the period of fear or uncertainty be of extended duration: The court has made findings of cruelty in cases where that period was brief.[21] Indeed, in explaining the sorts of murder that would *not* be especially cruel, the Arizona Supreme Court has repeatedly referred to killings in which the victim was not conscious, see, *e. g.*, *State* v. *Beaty*, 158 Ariz., at 242, 762 P. 2d, at 529 ("[T]o suffer pain or distress, the victim must be conscious at the time the offense is committed. If the evidence is inconclusive on consciousness, the factor of cruelty cannot exist"), cert. denied, 491 U. S. 910 (1989),[22] and has explained that the victim of an "especially cruel" killing is "to be contrasted with the individual who is killed instantly without knowing what happened." *State* v. *Gillies*, 142 Ariz. 564, 570, 691 P. 2d 655, 661 (1984), cert. denied, 470 U. S. 1059 (1985). I do not believe that an aggravating factor

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[20] See, *e. g.*, *State* v. *Bracy*, 145 Ariz. 520, 537, 703 P. 2d 464, 481 (1985), cert. denied, 474 U. S. 1110 (1986); *State* v. *Carriger*, 143 Ariz. 142, 160, 692 P. 2d 991, 1009 (1984), cert. denied, 471 U. S. 1111 (1985); *State* v. *Correll*, 148 Ariz., at 480, 715 P. 2d, at 733.

[21] See *State* v. *Rossi*, 146 Ariz., at 365, 706 P. 2d, at 377 ("Before defendant fired the fatal shot, the victim leaned against his bedroom wall and pleaded with defendant, stating 'You have my money, you shot me, what more do you want?' This evinces the victim's mental anguish").

[22] See also *State* v. *Villafuerte*, 142 Ariz. 323, 331, 690 P. 2d 42, 50 (1984), cert. denied, 469 U. S. 1230 (1985); *State* v. *Harding*, 137 Ariz. 278, 294, 670 P. 2d 383, 399 (1983), cert. denied, 465 U. S. 1013 (1984); *State* v. *Zaragoza*, 135 Ariz. 63, 69, 659 P. 2d 22, 28, cert. denied, 462 U. S. 1124 (1983).

which requires only that the victim be conscious and aware of his danger for some measurable period before the killing occurs can be said to provide a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U. S., at 433 (plurality opinion). And I am entirely baffled by the majority's assertion that this construction of the aggravating circumstance is "virtually identical," *ante*, at 655, to a requirement of torture or serious physical abuse.[23]

The majority is correct in asserting that, in the absence of evidence to the contrary, the trial judge who sentenced petitioner to death must be presumed to have been aware of the manner in which these statutory terms had been construed by the Arizona Supreme Court. That judge's familiarity with the applicable precedents, however, could not possibly have served to guide or channel his sentencing discretion. The entire body of Arizona case law, like the bare words of the statute, provided "no principled way to distinguish this case" from other homicides where capital sentences were not imposed. Under this Court's decisions in *Godfrey* and *Maynard*, the standards by which the trial court sentenced Walton to death were constitutionally deficient.

B

Relying on *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), the majority also contends that "a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined . . . .

[23] The State, focusing on the fear and uncertainty experienced by Powell prior to the shooting, asserts: "It is without question that the victim suffered an excruciatingly 'cruel' death," and suggests that Powell's mental anguish was equivalent to "torture." Brief for Respondent 48–49. I do not minimize Thomas Powell's suffering, but it bears noting that the State of Arizona seeks to confine Jeffrey Walton in its penitentiary, set a date for his execution, and put him to death. It seems strange for the State to suggest that an individual has been "tortured" when he is made to contemplate the prospect of his own demise.

[T]he Arizona Supreme Court has sought to give substance to the operative terms, and we find that its construction meets constitutional requirements." *Ante*, at 654. The Court thus holds that, even if the trial-level sentencing procedure failed to satisfy the Eighth Amendment, Walton's sentence nevertheless may stand because the appellate court, applying a satisfactory limiting construction, independently determined that the murder was especially cruel. For three independent reasons, I cannot accept that conclusion.

(1) If the (F)(6) factor and the prior decisions of the Arizona Supreme Court failed to provide sufficient guidance to the trial judge, the appellate court's conclusion that this murder fell within some narrow definition of "cruel" could not eliminate the possibility that the trial court, in balancing aggravating and mitigating circumstances, had relied on factors lying outside this narrow definition. Affirmance of Walton's death sentence depends not only on the Arizona Supreme Court's determination that this murder was especially cruel, but also upon its conclusion that the mitigating factors did not outweigh those in aggravation. I adhere to the view, expressed in the separate opinion in *Clemons*, 494 U. S., at 756, which three other Justices joined, that an appellate court is incapable of finding and balancing aggravating and mitigating factors in a manner that is sufficiently reliable to satisfy the Eighth Amendment.[24] Indeed, the Arizona Supreme Court's treatment of the record in this case hardly provides support for those Members of this Court—a bare majority—who now would entrust the task of capital sentencing to an appellate tribunal. The state court's conclusion that the murder was especially cruel was based in large part

[24] The discussion of appellate reweighing in *Clemons* technically is dictum: The Court vacated Clemons' death sentence but stated that on remand the Mississippi Supreme Court might reweigh the valid aggravating and mitigating circumstances or apply a limiting construction of the challenged aggravating factor if it concluded that under state law it had the power to do so. 494 U. S., at 750–752.

on its assertions that Powell "was so clearly terrified by the time they stopped that [one of the assailants] tried to reassure him that they would not hurt him" and that during the final march into the desert the victim "begged the defendant not to kill him." 159 Ariz., at 587, 769 P. 2d, at 1033. The court's discussion includes no citations to the record (which furnishes frail support for the court's characterization of the events), and appears to be based primarily on a misreading of the State's appellate brief.[25] Given the institutional limitations of appellate courts generally, and the questionable treatment of the facts by the Arizona Supreme Court in this case, I cannot agree that the appellate sentencing here was sufficiently reliable to meet the standards of the Eighth Amendment.[26]

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[25] The Arizona Supreme Court's first assertion is supported only by the following passage from the testimony of Sharold Ramsey:

"Q. How was [Powell] acting after you pulled up at the pullout and they got out of the car?

"A. He was scared.

"Q. How do you know?

"A. I don't remember. I just told him not to be scared because he wouldn't be hurt. . . ." App. 24.

The statement that Powell "begged the defendant not to kill him" appears to be based entirely on Walton's statement during his taped interrogation that "the guy told Rob [one of Walton's accomplices], he goes, don't hurt me, I don't tell anybody, ((inaudible))." Tr. 82 (Dec. 15, 1986, p.m.).

In its brief to the Arizona Supreme Court, the State asserted, without record citation: "During the ride, Powell begged his abductors to spare him and they could keep his money and car." Appellee's Answering Brief in No. CR 87-0022-AP, p. 50. That assertion was made more or less in passing: the State's argument on cruelty focused on Powell's mental and physical suffering *after* the shooting. The Arizona Supreme Court's opinion asserts that Powell begged for his life when he and Walton were alone in the desert (rather than during the car ride beforehand). There is not one line of testimony that supports the court's statement.

[26] The trial judge in this case found that Walton rather than Hoover had fired the fatal shot—an issue on which the evidence was conflicting and on which the jury was apparently unable to agree. See 159 Ariz., at 592–593, 769 P. 2d, at 1038–1039 (concurring opinion). In its brief to the Arizona

(2) In *Clemons*, this Court stated that, insofar as the Federal Constitution is concerned, a state appellate court may determine for itself whether a capital sentence is warranted when the trial-level sentencing proceeding has been tainted by constitutional error. Whether the supreme court of a particular State possesses that power, however, is a matter of state law.[27] The Arizona Supreme Court has taken obviously inconsistent positions on the question whether trial-level error in capital sentencing necessitates a remand, or whether the error may be cured by the appellate court's independent review. Compare *State* v. *Wallace*, 151 Ariz., at 369, 728 P. 2d, at 239 ("As we have set aside the finding of pecuniary gain, we must now allow the trial court another opportunity to exercise its sentencing discretion and reweigh the remaining aggravating and mitigating factors"); *State* v. *Rossi*, 146 Ariz., at 368, 706 P. 2d, at 380 ("Because we believe the trial judge used the wrong standard for determining and applying mitigating factors, we must vacate defendant's death sentence and remand for resentencing"); *State* v. *McMurtrey*, 143 Ariz. 71, 73, 691 P. 2d 1099, 1101 (1984) ("Because the trial judge imposed upon the defendant a more onerous burden of proof in determining the existence of mitigating circumstances, the matter will have to be remanded for resentencing"); *State* v. *Gillies*, 135 Ariz. 500, 516, 662 P.

Supreme Court, the State argued that this finding should be reviewed deferentially on the ground that "[a]s the trial court is better situated to assess the impact of the evidence, its decision should not be overturned absent abuse of that discretion." Appellee's Answering Brief in No. 87–0022–AP, p. 48. The Arizona Supreme Court did not purport to make an independent determination on this point: It stated only that "we find substantial evidence to support the trial judge's finding that the defendant killed the victim." 159 Ariz., at 586, 769 P. 2d, at 1032.

[27] See *Clemons*, 494 U. S., at 754 ("Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible").

2d 1007, 1023 (1983) (court remanded for resentencing after three of four aggravating circumstances found by the trial judge were invalidated on appeal), with *State* v. *Rockwell*, 161 Ariz. 5, 15–16, 775 P. 2d 1069, 1079–1080 (1989) (court invalidated two of three aggravating circumstances and concluded that the mitigating evidence outweighed the remaining aggravating factor); *State* v. *Poland*, 144 Ariz. 388, 407, 698 P. 2d 183, 202 (1985) ("The finding that the murders were committed in an 'especially heinous, cruel or depraved manner' is set aside, but the findings as to the other aggravating circumstances are affirmed. No mitigating circumstances sufficiently substantial to call for leniency have been shown"); *State* v. *James*, 141 Ariz. 141, 148, 685 P. 2d 1293, 1300 (court struck down one aggravating factor but upheld the death sentence on the ground that "[t]here is [another] aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency"), cert. denied, 469 U. S. 990 (1984); *State* v. *Blazak*, 131 Ariz. 598, 604, 643 P. 2d 694, 700 (one aggravating factor invalidated, but death sentence upheld because "[e]ven in the absence of this aggravating circumstance, there are still enough aggravating circumstances that cannot be overcome by the mitigating circumstances"), cert. denied, 459 U. S. 882 (1982).[28] It simply is not clear whether the Arizona Supreme Court regards itself as having the power to uphold a capital sentence on the basis of its own comparison of aggravating and mitigating circumstances when the sentencing judge has relied in part upon an invalid aggravating factor.

In this case, as in all capital cases, the Arizona Supreme Court performed an "independent review" of the trial-level

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[28] See also *State* v. *Smith*, 146 Ariz. 491, 504, 707 P. 2d 289, 302 (1985) ("Our elimination of some aggravating factors *in the absence of mitigating circumstances* does not mandate a remand to the trial court for resentencing") (emphasis added) (citing cases). Where mitigating factors are absent, affirmance of the death sentence does not require reweighing and is more properly characterized as harmless-error analysis.

sentencing process. The Arizona Supreme Court consistently has maintained: "Unlike appellate review of non-capital crimes, our duty on review of the death penalty is to conduct an independent examination of the record to determine whether the death penalty was properly imposed." *State* v. *Schad*, 129 Ariz. 557, 573, 633 P. 2d 366, 382 (1981), cert. denied, 455 U. S. 983 (1982). The independent review performed by the Arizona Supreme Court in capital cases, however, is quite different from appellate "reweighing" as that term is used in *Clemons*. The Arizona court's review does not proceed from the premise that errors in the trial-level sentencing process can be cured by the State Supreme Court's determination that death is the appropriate penalty. Rather, that review historically has been explained as an additional level of protection for the defendant, a means of ensuring that a trial judge's sentence of death is subjected to rigorous scrutiny. See *State* v. *Richmond*, 114 Ariz. 186, 196, 560 P. 2d 41, 51 (1976) ("The gravity of the death penalty requires that we painstakingly examine the record to determine whether it has been erroneously imposed"), cert. denied, 433 U. S. 915 (1977). Under Arizona law, the trial court is the sentencer, and the appellate court's review is intended to ensure that trial-level functions were properly carried out. Indeed, the Arizona Supreme Court has resisted analogies between its own independent review and the initial trial-level sentencing process: "While we have an independent duty of review, we perform it as an appellate court, not as a trial court. . . . We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process . . . ." *State* v. *Rumsey*, 136 Ariz. 166, 173, 665 P. 2d 48, 55 (1983).[29] To-

[29] In affirming the judgment of the Arizona Supreme Court in that case, this Court stated that "the availability of appellate review, including reweighing of aggravating and mitigating circumstances, [does not] make the appellate process part of a single continuing sentencing proceeding. The

day's majority indicates, however, that the Arizona Supreme Court's independent review may serve as a *substitute* for a constitutionally adequate trial-level sentencing proceeding, despite the fact that the State Supreme Court did not believe that any trial-level error had occurred and regarded itself as *affirming* the sentencing decision of the lower court.

Whether or not the Arizona Supreme Court possesses the power to "reweigh" evidence in order to cure trial-level error, it is clear that the court did not purport to exercise that power in this case. The court did not suggest that the trial judge's finding of the (F)(6) circumstance was constitutionally suspect. The Arizona Supreme Court made independent determinations as to aggravating and mitigating circumstances, but these findings were plainly intended to *supplement* rather than to replace the findings of the trial court. That this is a distinction with a difference should be clear to the present majority from this Court's opinion in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). In *Caldwell* we invalidated a capital sentence imposed by a jury which had been incorrectly informed that its verdict was only a "recommendation." We stated 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. The same reasoning should apply here. Just as a jury's sentence of death may not stand if the jury believed that it was merely *recommending* capital punishment, the Arizona Supreme Court's independent determination that death is appropriate cannot cure trial-level error if the appellate court believed in-

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Supreme Court of Arizona noted that its role is strictly that of an appellate court, not a trial court. Indeed, no appeal need be taken if life imprisonment is imposed, *and the appellate reweighing can work only to the defendant's advantage.*" *Arizona* v. *Rumsey*, 467 U. S. 203, 210 (1984) (emphasis added). We also referred to the trial judge as "the sole decisionmaker in the proceeding." *Id.*, at 211.

correctly that it was simply *affirming* a constitutionally valid sentence imposed by the trial judge.

Thus, even if I could accept the majority's conclusion that appellate resentencing can cure constitutional defects in the trial-level procedure, I could not agree that the Arizona Supreme Court has purported to exercise that power here. To conclude that Walton's death sentence may stand, despite constitutional defects in the trial-level sentencing process, it is not enough for the majority to say that the Constitution permits a state appellate court to reweigh valid aggravating and mitigating factors. The majority must also be prepared to assert with reasonable assurance that the Arizona Supreme Court would have chosen to affirm the death sentence on the basis of its own reweighing if it had recognized that the trial-level procedure was defective. Given the Arizona court's inconsistent treatment of the reweighing issue, no such assertion is possible. In holding that the appellate court's independent review can save the sentence even if the trial judge received insufficient guidance, the majority affirms a decision that the Arizona Supreme Court never made.

(3) Even if I believed that appellate resentencing could cure trial-level error, and that the Arizona Supreme Court can properly be regarded as the sentencer in this case, I would still conclude that petitioner's sentence must be vacated. The (F)(6) aggravating factor, as construed by the State Supreme Court, sweeps so broadly that it includes within its reach virtually every homicide. The appellate court's application of the statutory language simply provides no meaningful basis on which a defendant such as Walton can be singled out for death.

Indeed, my conclusion that the sentence imposed by the appellate court is invalid follows almost necessarily from my belief that the trial-level sentencing was constitutionally flawed.[30] The defective nature of the trial court's sentence

[30] The one difference is that the trial judge found only that the murder was committed "in an extremely heinous, cruel or depraved manner,"

did not stem from the judge's failure to abide by limitations announced by the Arizona Supreme Court. Rather, the trial-level sentencing procedure was defective because, even assuming that the trial judge correctly applied the relevant precedents, those decisions had failed to articulate a constitutionally sufficient narrowing construction of the statutory language. In the two years between the trial court's imposition of sentence and its own affirmance, the Arizona Supreme Court did not purport to narrow the scope of the (F)(6) aggravating factor. It therefore is difficult to see how any trial-level error could have been cured by the appellate court's application of the *same* legal rules that the trial judge is presumed to have followed.

The majority concedes, as it must, that the statutory language is unconstitutionally vague under *Godfrey* and *Maynard*. The majority therefore recognizes that the validity of the (F)(6) factor depends upon the construction given it by the Arizona Supreme Court. I do not see how the adequacy of that construction can be determined other than through examination of the body of state-court precedents—an examination that the majority conspicuously declines to undertake. Because the Arizona Supreme Court has utterly failed to place meaningful limits on the application of this aggravating factor, a sentence based in part upon the (F)(6) circumstance should not stand.[31]

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while the appellate court specified that the murder was "cruel." If the Arizona Supreme Court's prior decisions had placed meaningful limits on the concept of "cruelty," that difference might be significant. In fact, however, the state court's construction of "cruelty" has placed no significant constraints on the sentencer's discretion—whether the sentencer is the trial judge or the Arizona Supreme Court itself.

[31] The breadth of the (F)(6) circumstance is particularly unfortunate in light of the statutory requirement that the defendant, in order to avoid the death penalty, must demonstrate mitigating factors "sufficiently substantial to call for leniency." The presumption of death is triggered whenever an aggravating circumstance is found; the Arizona Supreme Court's expan-

III

Earlier this Term the very same majority of this Court severely restricted the regime of federal habeas corpus that had previously helped to safeguard the constitutional rights of criminal defendants, including those accused of capital crimes. See *Butler* v. *McKellar*, 494 U. S. 407 (1990); *Saffle* v. *Parks*, 494 U. S. 484 (1990). Today this majority serves notice that capital defendants no longer should expect from this Court on direct review a considered examination of their constitutional claims. In adjudicating claims that will mean life or death for convicted inmates in Arizona and elsewhere, the majority makes only the most perfunctory effort to reconcile its holding with this Court's prior Eighth Amendment jurisprudence. Nor does the majority display any recognition that a decision concerning the constitutionality of a State's capital punishment scheme may require an understanding of the manner in which that scheme actually operates.

Perhaps the current majority has grown weary of explicating what some Members no doubt choose to regard as hypertechnical rules that currently govern the administration of the death penalty. Certainly it is to be hoped that States will scrupulously protect the constitutional rights of capital defendants even without the prospect of meaningful federal oversight. Good wishes, however, are no substitute for this Court's careful review. Today's decision is either an abdication of the Court's constitutional role, or it is a silent repudiation of previously settled legal principles.

I dissent.

JUSTICE STEVENS, dissenting.

While I join JUSTICE BLACKMUN's dissent, I write separately to dissent from the Court's holding in Part II and to comment on JUSTICE SCALIA's opinion.

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sive construction of the (F)(6) factor ensures that an aggravating circumstance plausibly can be discovered in virtually any murder.

I

The Court holds in Part II of its opinion that a person is not entitled to a jury determination of facts that must be established before the death penalty may be imposed. I am convinced that the Sixth Amendment requires the opposite conclusion.

Arizona Rev. Stat. Ann. § 13–1105(C) (1989) provides that first-degree murder, which includes both premeditated murder and felony murder, is "punishable by death or life imprisonment as provided by § 13–703." Section 13–703(B) requires, after guilt of first-degree murder is established, that a judge conduct a hearing to determine if any statutory aggravating or mitigating circumstances exist. The State bears the burden of proving the existence of any aggravating circumstance by evidence admissible under the Arizona Rules of Evidence. § 13–703(C). Section 13–703(E) then provides, as the Arizona Supreme Court has explained: "Where none of the statutory aggravating circumstances are found to be present, our statute prohibits the death penalty. Where one or more statutory aggravating circumstance is found, and no mitigation exists, the statute requires the death penalty. Where both aggravating and mitigating circumstances are found in a given case, the trial judge, and then this court on review, must determine whether the mitigating circumstances are 'sufficiently substantial to call for leniency.'" *State* v. *Gretzler*, 135 Ariz. 42, 55, 659 P. 2d 1, 13 (citations omitted), cert. denied, 461 U. S. 971 (1983). Thus, under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved.[1]

[1] Although Arizona's aggravating circumstances are not "separate penalties or offenses," *Poland* v. *Arizona*, 476 U. S. 147, 156 (1986) (double jeopardy challenge), they operate as statutory "elements" of capital murder under Arizona law because in their absence, that sentence is unavailable under §§ 13–1105 and 13–703. Cf. *McMillan* v. *Pennsylvania*, 477

In this case, the sentencing judge found two aggravating circumstances: that petitioner committed the offense "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" and that he committed it "in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. Ann. §§ 13–703(F)(5), (F)(6) (1989).[2] At issue is the narrow question whether these findings about petitioner's commission of the offense are, under Arizona law, elements of a capital crime and therefore must be determined by a jury.

If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear. By that time,

> "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the

U. S. 79, 88 (1986) (5-year minimum term required upon finding by sentencing court was "a penalty within the range already available to it without the special finding"); *Cabana* v. *Bullock*, 474 U. S. 376, 385 (1986) (requiring a finding of intent to comply with the Eighth Amendment does not establish any new element of the *State's definition* of a capital offense).

[2] This Court has long distinguished a jury's determination of "whether a defendant is guilty of having engaged in certain criminal conduct" from a sentencing judge's consideration of "the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U. S. 241, 246–247 (1949). Both of the aggravating circumstances in this case concern the offense itself, not the offender. Indeed, the Arizona courts' findings of aggravation rested entirely on evidence that had been presented to the jury during the guilt phase of the trial; the Arizona Supreme Court disregarded the only testimony about aggravation offered at the sentencing hearing as irrelevant. Tr. (Jan. 26–27, 1987); 159 Ariz. 571, 587, 769 P. 2d 1017, 1033 (1989) (testimony about victim *after* shooting did not bear on cruelty). Cf. *Spaziano* v. *Florida*, 468 U. S. 447, 452 (1984) (after a Florida jury recommended life, sentencing judge found defendant's felony record was an aggravating factor); *Hildwin* v. *Florida*, 490 U. S. 638, 639 (1989) *(per curiam)* (after a Florida jury recommended death, sentencing judge found defendant's felony record and status as a prisoner at the time of the crime were aggravating factors).

offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.* Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."[3]

Similarly, if this question had arisen in 1968, when this Court held the guarantee of trial by jury in criminal prosecutions binding on the States, I do not doubt that petitioner again would have prevailed. JUSTICE WHITE's eloquent opinion for the Court in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), was faithful to the history and meaning of the Sixth Amendment:

"The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and

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[3] White, Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial, 65 Notre Dame L. Rev. 1, 10–11 (1989) (footnote omitted; emphasis added). The right to a jury trial in criminal matters was most strongly guarded because "'in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the Crown, in suits between the king and the subject, than in disputes between one individual and another.'" *Id.*, at 10 (quoting 4 W. Blackstone, Commentaries 343 (1769)). For a view of earlier practices, see generally Green, The Jury and the English Law of Homicide, 1200–1600, 74 Mich. L. Rev. 413 (1976).

Bill of Rights of 1689. In the 18th century Blackstone could write:

"'Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion.'

"Jury trial came to America with English colonists, and received strong support from them.

. . . . . .

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Pro-

> viding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.*, at 151–152, 155–156 (footnotes omitted).

Since *Duncan*, this Court has held that a death sentence under Florida law may be imposed by a judge, rather than a jury, *Spaziano* v. *Florida*, 468 U. S. 447 (1984), and has held that a judge may make a factual determination that mandates imposition of a minimum sentence within the penalty range of certain noncapital offenses, *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986). By stretching the limits of sentencing determinations that are made by judges exposed to "the voice of higher authority," these decisions have encroached upon the factfinding function that has so long been entrusted to the jury.[4] Further distorting the sentencing function to

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[4] *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Although the 18th-century English ruler no longer bears upon our judges, today the "voice of higher authority" to which elected judges too often appear to listen is that of the many voters who generally favor capital punishment but who have far less information about a particular trial than the jurors who have sifted patiently through the details of the relevant and admissible evidence. How else do we account for the disturbing propensity of elected judges to impose the death sentence time after time notwithstanding a jury's recommendation of life? I have been advised that in Florida, where the jury provides an advisory sentence before the judge imposes sentence in a capital case, Fla. Stat. § 921.141 (1989), judges imposed death over a jury recommendation of life in 125 of the 617 death sentences entered between December 1972 and December 1989. See also Radelet, Rejecting

encompass findings of factual elements necessary to establish a capital offense is the unhappy product of the gradual "increase and spread" of these precedents, "to the utter disuse of juries in questions of the most momentous concern."[5] Even if the unfortunate decisions in *Spaziano* and *McMillan* fell just one step short of the stride the Court takes today, it is not too late to change our course and follow the wise and inspiring voice that spoke for the Court in *Duncan* v. *Louisiana*.

II

JUSTICE SCALIA announces in a separate opinion that henceforth he will not regard *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), and other cases adopting their reasoning as binding precedent. The major premise for this rejection of our capital sentencing jurisprudence is his professed inability to reconcile those cases with the central holding in *Furman* v. *Georgia*, 408 U. S. 238 (1972).[6] Although

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the Jury: The Imposition of the Death Penalty in Florida, 18 U. C. D. L. Rev. 1409 (1985) (judges are more likely than juries to favor the imposition of a death sentence).

[5] "So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern." 4 W. Blackstone, Commentaries 343–344 (1769).

[6] *Furman* has been characterized as mandating that "where discretion is afforded a sentencing body on a matter so grave as the determination of

there are other flaws in JUSTICE SCALIA's opinion,[7] it is at least appropriate to explain why his major premise is simply wrong.

The cases that JUSTICE SCALIA categorically rejects today rest on the theory that the risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When *Furman* was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping, and first-degree murder in that class. As the opinions in *Furman* observed, in that large class of cases race and other irrelevant factors unquestionably played an unacceptable role in determining which defendants would die and which would live.

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whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.).

[7] For example, JUSTICE SCALIA incorrectly assumes that our holdings in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), rest entirely on the view that mandatory death penalty statutes pose the same risk of arbitrariness that supported the Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *ante*, at 671–672. In fact, that consideration was only one of the three grounds for invalidating the North Carolina and Louisiana mandatory statutes. See *Woodson*, 428 U. S., at 288–305 (plurality opinion). JUSTICE SCALIA ironically overlooks a more traditional reason supporting our conclusion in *Woodson*, the growing societal consensus against mandatory imposition of the death penalty:

"The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative enactments—both point conclusively to the repudiation of automatic death sentences." *Id.*, at 292–293.

We further held that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*, at 304.

However, the size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.

The elaborate empirical study of the administration of Georgia's capital sentencing statute that the Court considered in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), further illustrates the validity of this theory. In my opinion in that case I observed:

> "One of the lessons of the Baldus study is that there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated." *Id.*, at 367 (dissenting opinion).

The Georgia Supreme Court itself understood the concept that JUSTICE SCALIA apparently has missed. In *Zant* v. *Stephens*, 462 U. S. 862 (1983), we quoted the following excerpt from its opinion analogizing the law governing homicides in Georgia to a pyramid:

> "'All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base of the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.
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> "'The first plane of division above the base separates from all homicide cases those which fall into the category

of murder. This plane is established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide. In deciding whether a given case falls above or below this plane, the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act.

"'The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. The function of the factfinder is again limited to making a determination of whether certain facts have been established. Except where there is treason or aircraft hijacking, a given case may not move above this second plane unless at least one statutory aggravating circumstance exists. Code Ann. § 27–2534.1(c).

"'The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment. Code Ann. § 27–2503 and § 27–2534.1. There is a final limitation on the imposition of the death penalty resting in the automatic appeal procedure: This court determines whether the penalty of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Code Ann. § 27–2537. Performance of this function may cause this court to remove a case from the death penalty category but can never have the opposite result.

"'The purpose of the statutory aggravating circumstances is to limit to a large degree, but not completely, the factfinder's discretion. Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. *Waters* v. *State*, 248 Ga. 355, 369, 283 S. E. 2d 238 (1981); *Hawes* v. *State*, 240 Ga. 327, 334, 240 S. E. 2d 833 (1977); *Fleming* v. *State*, 240 Ga. 142, 240 S. E. 2d 37 (1977). In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.

"'A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine, in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed.' 250 Ga. 97, 99–100, 297 S. E. 2d 1, 3–4 (1982)." *Id.*, at 870–872.

JUSTICE SCALIA ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.

Perhaps a rule that allows the specific facts of particular cases to make the difference between life and death—a rule that is consistent with the common-law tradition of case-by-case adjudication—provides less certainty than legislative guidelines that mandate the death penalty whenever specified conditions are met. Such guidelines would fit nicely in a Napoleonic Code drafted in accord with the continental approach to the formulation of legal rules. However, this Nation's long experience with mandatory death sentences—a history recounted at length in our opinion in *Woodson* and entirely ignored by JUSTICE SCALIA today—has led us to reject such rules. I remain convinced that the approach adopted by this Court in *Weems* v. *United States*, 217 U. S. 349 (1910), and in *Trop* v. *Dulles*, 356 U. S. 86 (1958), followed by Justice Stewart, Justice Powell, and myself in 1976, and thereafter repeatedly endorsed by this Court, is not only wiser, but far more just, than the reactionary position espoused by JUSTICE SCALIA today.

UNITED STATES *v.* KOKINDA ET AL.

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

No. 88–2031. Argued February 26, 1990—Decided June 27, 1990

Respondents, members of a political advocacy group, set up a table on a sidewalk near the entrance to a United States Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature on a variety of political issues. The sidewalk is the sole means by which customers may travel from the parking lot to the post office building and lies entirely on Postal Service property. When respondents refused to leave the premises, they were arrested and subsequently convicted by a Federal Magistrate of violating, *inter alia*, 39 CFR § 232.1(h)(1), which prohibits solicitation on postal premises. The District Court affirmed the convictions. It rejected respondents' argument that § 232.1(h)(1) violated the First Amendment, holding that the postal sidewalk was not a public forum and that the ban on solicitation is reasonable. The Court of Appeals reversed. Finding that the sidewalk is a public forum and analyzing the regulation as a time, place, and manner restriction, it determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest.

Held: The judgment is reversed.

866 F. 2d 699, reversed.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA, concluded that the regulation, as applied, does not violate the First Amendment. Pp. 725–737.

(a) Although solicitation is a recognized form of speech protected by the First Amendment, the Government may regulate such activity on its property to an extent determined by the nature of the relevant forum. Speech activity on governmental property that has been traditionally open to the public for expressive activity or has been expressly dedicated by the Government to speech activity is subject to strict scrutiny. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45. However, where the property is not a traditional public forum and the Government has not dedicated its property to First Amendment activity, such regulation is examined only for reasonableness. *Id.*, at 46. Pp. 725–727.

(b) Section 232.1(h)(1) must be analyzed under the standards applicable to nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Ibid.* The postal sidewalk is not a traditional public forum. The fact that the sidewalk resembles the municipal sidewalk across the parking lot from the post office is irrelevant to forum analysis. See *Greer* v. *Spock*, 424 U. S. 828. The sidewalk was constructed solely to provide for the passage of individuals engaged in postal business, not as a public passageway. Nor has the Postal Service expressly dedicated its sidewalk to any expressive activity. Postal property has only been dedicated to the posting of public notices on designated bulletin boards. A practice of allowing individuals and groups to leaflet, speak, and picket on postal premises and a regulation prohibiting disruptive conduct do not add up to such dedication. Even conceding that the forum has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, regulation of the reserved nonpublic uses would still require application of the reasonableness test. Pp. 727–730.

(c) It is reasonable for the Postal Service to prohibit solicitation where it has determined that the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. The categorical ban is based on the Service's long, real-world experience with solicitation, which has shown that, because of continual demands from a wide variety of groups, administering a program of permits and approvals had distracted postal facility managers from their primary jobs. Whether or not the Service permits other forms of speech, it is not unreasonable for it to prohibit solicitation on the ground that it inherently disrupts business by impeding the normal flow of traffic. See *Heffron* v. *International Society* for *Krishna Consciousness, Inc.*, 452 U. S. 640, 653. Confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. Even if more narrowly tailored regulations could be promulgated, the Service is only required to promulgate reasonable regulations, not the most reasonable or the only reasonable regulation possible. Clearly, the regulation does not discriminate on the basis of content or viewpoint. The Service's concern about losing customers because of the potentially unpleasant situation created by solicitation *per se* does not reveal an effort to discourage one viewpoint and advance another. Pp. 731–737.

JUSTICE KENNEDY, agreeing that the regulation does not violate the First Amendment, concluded that it is unnecessary to determine whether the sidewalk is a nonpublic forum, since the regulation meets the traditional standards applied to time, place, and manner restrictions of protected expression. See *Clark* v. *Community for Creative Non-*

Violence, 468 U. S. 288, 293. The regulation expressly permits respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for immediate payments on the premises. The Government has a significant interest in protecting the integrity of the purposes to which it has dedicated its property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, its judgment that in-person solicitation should be treated differently from alternative forms of solicitation and expression should not be rejected. Pp. 738–739.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 737. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, and in which BLACKMUN, J., joined as to Part I, *post*, p. 740.

Deputy Solicitor General Roberts argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Thomas E. Booth*.

Jay Alan Sekulow argued the cause for respondents. With him on the briefs was *James M. Henderson, Sr.**

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

We are called upon in this case to determine whether a United States Postal Service regulation that prohibits

*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro;* for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for Free Speech Advocates by *Thomas Patrick Monaghan;* for the National Committee of the Libertarian Party et al. by *Frank M. Dunbaugh;* for the International Society for Krishna Consciousness of California, Inc., by *David M. Liberman;* for Newport News Daily Press et al. by *Alice Neff Lucan*, *Richard P. Holme*, *Lawrence J. Aldrich*, *Boisfeuillet Jones, Jr.*, *Alexander Wellford*, and *David C. Kohler;* and for Project for Public Spaces, Inc., by *Andrew J. Ekonomou*.

"[s]oliciting alms and contributions" on postal premises violates the First Amendment. We hold the regulation valid as applied.

I

The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows:

> "[T]he Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose." App. to Pet. for Cert. 24a.

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. The record does not indicate the substance of the complaints with one exception. One individual complained "because she knew the Girl Scouts were not allowed to sell cookies on federal property." 866 F. 2d 699, 705 (CA4 1989). The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspec-

tors arrested respondents, seizing their table as well as their literature and other belongings.

Respondents were tried before a United States Magistrate in the District of Maryland and convicted of violating 39 CFR § 232.1(h)(1) (1989), which provides in relevant part:

> "Soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited."

Respondent Kokinda was fined $50 and sentenced to 10 days' imprisonment; respondent Pearl was fined $100 and received a 30-day suspended sentence under that provision.

Respondents appealed their convictions to the District Court, asserting that application of § 232.1(h)(1) violated the First Amendment. The District Court affirmed their convictions, holding that the postal sidewalk was not a public forum and that the Postal Service's ban on solicitation is reasonable.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed. 866 F. 2d 699 (1989). The Court of Appeals held that the postal sidewalk is a traditional public forum and analyzed the regulation as a time, place, and manner regulation. The court determined that the Government has no significant interest in banning solicitation and that the regulation is not narrowly tailored to accomplish the asserted governmental interest.

The United States' petition for rehearing and a suggestion for rehearing en banc were denied. Because the decision below conflicts with other decisions by the Courts of Appeals, see *United States* v. *Belsky*, 799 F. 2d 1485 (CA11 1986); *United States* v. *Bjerke*, 796 F. 2d 643 (CA3 1986), we granted certiorari. 493 U. S. 807 (1989).

II

Solicitation is a recognized form of speech protected by the First Amendment. See *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 629 (1980); *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 788–789, (1988). Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

The Government's ownership of property does not automatically open that property to the public. *United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114, 129 (1981). It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, . . . but, rather, as proprietor, to manage [its] internal operation[s] . . . ." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896 (1961). That distinction was reflected in the plurality opinion in *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974), which upheld a ban on political advertisements in city transit vehicles:

> "Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles." *Id.*, at 303.

The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action

is valid in these circumstances unless it is unreasonable, or, as was said in *Lehman*, "arbitrary, capricious, or invidious." *Ibid.* In *Lehman*, the plurality concluded that the ban on political advertisements (combined with the allowance of other advertisements) was permissible under this standard:

> "Users [of the transit system] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Id.*, at 304.

Since *Lehman*, "the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 800 (1985). In *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), the Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property. Regulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny. *Id.*, at 45. Regulation of speech on property that the Government has expressly dedicated to speech activity is also

examined under strict scrutiny. *Ibid.* But regulation of speech activity where the Government has not dedicated its property to First Amendment activity is examined only for reasonableness. *Id.*, at 46.

Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis. If they did, then *Greer* v. *Spock*, 424 U. S. 828 (1976), would have been decided differently. In that case, we held that even though a military base permitted free civilian access to certain unrestricted areas, the base was a nonpublic forum. The presence of sidewalks and streets within the base did not require a finding that it was a public forum. *Id.*, at 835–837.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. Unlike the public street described in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), which was "continually open, often uncongested, and constitute[d] not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people [could] enjoy the open air or the company of friends and neighbors in a relaxed environment," *id.*, at 651, the postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk referred to in *Perry*.

Nor is the right of access under consideration in this case the quintessential public sidewalk which we addressed in

Frisby v. *Schultz*, 487 U. S. 474 (1988) (residential sidewalk). The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city. The dissent would designate all sidewalks open to the public as public fora. See *post*, at 745 ("[T]hat the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum"). That, however, is not our settled doctrine. In *United States* v. *Grace*, 461 U. S. 171 (1983), we did not merely identify the area of land covered by the regulation as a sidewalk open to the public and therefore conclude that it was a public forum:

> "The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D. C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer* v. *Spock* . . . . In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N. J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave." *Id.*, at 179–180 (footnote omitted).

Grace instructs that the dissent is simply incorrect in asserting that every public sidewalk is a public forum. *Post*, at 745. As we recognized in *Grace*, the location and purpose

of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

The dissent's attempt to distinguish *Greer* is also unpersuasive. The dissent finds *Greer* "readily distinguishable" because the sidewalk in that case "was not truly 'open' to the public." *Post*, at 748, n. 5. This assertion is surprising in light of JUSTICE BRENNAN's description of the public access permitted in *Greer:*

> "No entrance to the Fort is manned by a sentry or blocked by any barrier. The reservation is crossed by 10 paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. A 1970 traffic survey indicated that 66,000 civilian and military vehicles per day entered and exited the Fort. Indeed, the reservation is so open as to create a danger of muggings after payday and a problem with prostitution." 424 U. S., at 851 (dissenting opinion).

In *Greer* we held that the power of the Fort's commanding officer summarily to exclude civilians from the area of his command demonstrated that "[t]he notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false." *Id.*, at 838. It is the latter inquiry that has animated our traditional public forum analysis, and that we apply today. Postal entryways, like the walkways at issue in *Greer*, may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment.

The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. See 39 CFR § 232.1(o) (1989). No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, see Reply Brief for United States 12; 43 Fed. Reg. 38824 (1978), but a regulation prohibiting disruption, 39 CFR § 232(1)(e) (1989), and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "[t]he government does not create a public forum by . . . *permitting* limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U. S., at 802 (emphasis added); see also *Perry*, 460 U. S., at 47 ("[S]elective access does not transform government property into a public forum"). Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under *Perry*, regulation of the reserved nonpublic uses would still require application of the reasonableness test. See *Cornelius*, *supra*, at 804–806.

Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, *supra*, at 46. Indeed, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, *supra*, at 806. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable;* it need not be the most reasonable or the only reasonable limitation." 473 U. S., at 808.

III

The history of regulation of solicitation in post offices demonstrates the reasonableness of the provision here at issue. The Postal Service has been regulating solicitation at least since 1958. Before enactment of the 1970 Postal Reorganization Act, Pub. L. 91–375, 84 Stat. 720, 39 U. S. C. § 201 *et seq.*, the Post Office Department's internal guidelines "strictly prohibited" the "[s]oliciting [of] subscriptions, canvassing for the sale of any article, or making collections . . . in buildings operated by the Post Office Department, or on the grounds or sidewalks within the lot lines" of postal premises. Postal Service Manual, Facilities Transmittal Letter 8, Buildings Operation: Buildings Operated by the Post Office Department § 622.8 (July 1958). The Department prohibited all forms of solicitation until 1963, at which time it created an exception to its categorical ban on solicitation to enable certain "established national health, welfare, and veterans' organizations" to conduct fund drives "at or within" postal premises with the local postmaster's permission, and at his discretion. See Facilities Transmittal Letter 53, Buildings Operation: Buildings Operated by the Post Office Department § 622.8 (July 1963). The general prohibition on solicitation was enlarged in 1972 to include "[s]oliciting alms and contributions or collecting private debts on postal premises." 37 Fed. Reg. 24347 (1972), codified at 39 CFR § 232.6(h)(1) (1973).

Soon after the 1972 amendment to the regulation, the Service expanded the exemption to encompass "[n]ational organizations which are wholly nonprofit in nature and which are devoted to charitable or philanthropic purposes" and "[l]ocal charitable and other nonprofit organizations," 39 CFR §§ 232.6(h)(2), (3) (1974), and to permit these organizations to "request use of lobby space for annual or special fund raising campaigns, providing they do not interfere with the transaction of postal business or require expenditures by the Postal Service or the use of its employees or equip-

ment." 38 Fed. Reg. 27824–27825 (1973), codified at 39 CFR § 232.16(h)(2) (1974). Finally, in 1978, the Service promulgated the regulation at issue here. After 15 years of providing various exceptions to its rule against solicitation, the Service concluded that a categorical ban on solicitation was necessary, because the "Postal Service lacks the resources to enforce such regulation in the tens of thousands of post offices throughout the nation. In addition, such regulation would be, of necessity, so restrictive as to be tantamount to prohibition, and so complex as to be unadministrable." 43 Fed. Reg. 38824 (1978).

"[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved." *Heffron*, 452 U. S., at 650–651. The purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system. See 39 U. S. C. §§ 403(a), 403(b)(1); H. R. Rep. No. 91–1104, pp. 1, 5, 11–12, 17, 19 (1970). Congress has made clear that "it wished the Postal Service to be run more like a business than had its predecessor, the Post Office Department." *Franchise Tax Board of California* v. *United States Postal Service*, 467 U. S. 512, 519–520, and n. 13 (1984). Congress has directed the Service to become a self-sustaining service industry and to "seek out the needs and desires of its present and potential customers—the American public" and to provide services in a manner "responsive" to the "needs of the American people." H. R. Rep. No. 91–1104, *supra*, at 19–20. The Postal Service has been entrusted with this mission at a time when the mail service market is becoming much more competitive. It is with this mission in mind that we must examine the regulation at issue.

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business. We

agree. "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor." 43 Fed. Reg. 38824 (1978).

The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, 39 CFR § 232.1(h) (1989), does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that § 232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism in this regard seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. See *post*, at 760 (criticizing "inconsistent treatment"). That claim, however, is more properly addressed under the equal protection component of the Fifth Amendment. In any event, it is anomalous that the Service's allowance of some avenues of speech would be relied upon as evidence that it is impermissibly suppressing other speech. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of *solicitation* on postal sidewalks *unreasonable?*

Whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. So-

licitation impedes the normal flow of traffic. See *Heffron*, *supra*, at 653. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. See Record, Exh. 5 (credit card receipt); see also *United States* v. *Belsky*, 799 F. 2d 1485, 1489 (CA11 1986) ("Soliciting funds is an inherently more intrusive and complicated activity than is distributing literature"). As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. Solicitors can achieve their goal only by "stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature" or other items. *Heffron*, *supra*, at 653 (upholding stringent restrictions on the location of sales and solicitation activity). JUSTICE BLACKMUN noted this distinction in his opinion concurring in part and dissenting in part to *Heffron:*

> "The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead, the recipient is free to read the message at a later time. . . . [S]ales and the collection of solicited funds not only require the fairgoer to stop, but also 'engender additional confusion . . . because they involve acts of exchanging articles for money, fumbling for and dropping money, making change, etc.'" 452 U. S., at 665 (citation omitted).

This description of the disruption and delay caused by solicitation rings of "common-sense," *ibid.*, which is sufficient

in this Court to uphold a regulation under reasonableness review.

The Postal Service's judgment is based on its long experience with solicitation. It has learned from this experience that because of a continual demand from a wide range of groups for permission to conduct fundraising or vending on postal premises, postal facility managers were distracted from their primary jobs by the need to expend considerable time and energy fielding competing demands for space and administering a program of permits and approvals. See Tr. of Oral Arg. 9 ("The Postal Service concluded after an experience with limited solicitation that there wasn't enough room for everybody who wanted to solicit on postal property and further concluded that allowing limited solicitation carried with it more problems than it was worth"). Thus, the Service found that "even the limited activities permitted by [its] program . . . produced highly unsatisfactory results." 42 Fed. Reg. 63911 (1977). It is on the basis of this real-world experience that the Postal Service enacted the regulation at issue in this case. The Service also enacted regulations barring deposit or display of written materials except on authorized bulletin boards "to regain space for the effective display of postal materials and the efficient transaction of postal business, eliminate safety hazards, reduce maintenance costs, and improve the appearance of exterior and public-use areas on postal premises." 43 Fed. Reg. 38824 (1978); see 39 CFR § 232.1(o) (1989). In short, the Postal Service has prohibited the use of its property and resources where the intrusion creates significant interference with Congress' mandate to ensure the most effective and efficient distribution of the mails. This is hardly unreasonable.

The dissent concludes that the Service's administrative concerns are unreasonable, largely because of the existence of less restrictive alternatives to the regulations at issue. See *post*, at 761–763. Even if more narrowly tailored regulations could be promulgated, however, the Postal Service is

only required to adopt *reasonable* regulations, not "the most reasonable or the only reasonable" regulation possible. *Cornelius*, 473 U. S., at 808.

The dissent also would strike the regulation on the ground that the Postal Service enacted it because solicitation "would be likely to produce hostile reactions and to cause people to avoid post offices." 43 Fed. Reg. 38824 (1978). The dissent reads into the Postal Service's realistic concern with losing postal business because of the uncomfortable atmosphere created by aggressive solicitation an intent to suppress certain views. See *post*, at 754. But the Postal Service has never intimated that it intends to suppress the views of any "disfavored or unpopular political advocacy group." *Ibid.* It is the inherent nature of solicitation itself, a content-neutral ground, that the Service justifiably relies upon when it concludes that solicitation is disruptive of its business. The regulation is premised on the Service's long experience, on the fact that solicitation is inherently more disruptive than the other speech activities it permits, and on the Service's empirically based conclusion that a case-by-case approach to regulation of solicitation is unworkable.

Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "[n]othing suggests the Postal Service intended to discourage one viewpoint and advance another. . . . By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.'" *Monterey County Democratic Central Committee* v. *United States Postal Service*, 812 F. 2d 1194, 1198–1199 (CA9 1987) (citation omitted). The Service's concern about losing customers because of the potentially unpleasant situation created by solicitation *per se* does not reveal "an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U. S., at 45–46.

It is clear that this regulation passes constitutional muster under the Court's usual test for reasonableness. See *Lehman*, 418 U. S., at 303; *Cornelius*, *supra*, at 808. Accordingly, we conclude, as have the Courts of Appeals for the Third and Eleventh Circuits, that the Postal Service's regulation of solicitation is reasonable as applied. See *United States* v. *Belsky*, 799 F. 2d 1485 (CA11 1986); *United States* v. *Bjerke*, 796 F. 2d 643 (CA3 1986).

The judgment of the Court of Appeals is

Reversed.

JUSTICE KENNEDY, concurring in the judgment.

I agree that the postal regulation reviewed here does not violate the First Amendment. Because my analysis differs in essential respects from that in JUSTICE O'CONNOR's opinion, a separate statement of my views is required.

Many of those who use postal facilities do so from necessity, not choice. They must go to a post office to conduct their business and personal correspondence, carrying cash for stamps or money orders. While it is legitimate for the Postal Service to ensure convenient and unimpeded access for postal patrons, the public's use of postal property for communicative purposes means that the surrounding walkways may be an appropriate place for the exercise of vital rights of expression. As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place. It is true that the uses of the adjacent public buildings and the needs of its patrons are an important part of a balance, but there remains a powerful argument that, because of the wide range of activities that the Government permits to take place on this postal sidewalk, it is more than a nonpublic forum.

This is so even though the Government may intend to impose some limitations on the forum's use. If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the

case. See, *e. g.*, *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 819–820 (1985) (BLACKMUN, J., dissenting). While it is proper to weigh the need to maintain the dignity and purpose of a public building, see *United States* v. *Grace*, 461 U. S. 171, 182 (1983), or to impose special security requirements, see *Adderley* v. *Florida*, 385 U. S. 39 (1966), other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended. Viewed in this light, the demand for recognition of heightened First Amendment protection has more force here than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as was thought true with teachers' mailboxes in *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), or the Combined Federal Campaign in *Cornelius*, *supra*.

It is not necessary, however, to make a precise determination whether this sidewalk and others like it are public or nonpublic forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984).

"[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward* v. *Rock Against Racism*, 491 U. S. 781, 791 (1989) (quoting *Clark*, *supra*, at 293). The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in

political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises. See Brief for United States 39.

Just as the government has a significant interest in preventing "visual blight" in its cities, *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 810 (1984), in "maintaining [public] parks . . . in an attractive and intact condition," *Clark*, *supra*, at 296, and in "avoiding congestion and maintaining the orderly movement" of persons using a public forum, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 652 (1981), so the Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, I cannot reject its judgment that in-person solicitation deserves different treatment from alternative forms of solicitation and expression. Cf. *id.*, at 665 (BLACKMUN, J., concurring in part and dissenting in part). The same judgment has been made for the classic public forums in our Nation's capital. The solicitation of money is banned in the District of Columbia on the Mall and other parks under the control of the National Park Service. See 36 CFR § 7.96(h) (1989).

The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their views, including the solicitation of financial support. For these reasons, I agree with JUSTICE O'CONNOR that the Postal Service regulation is consistent with the protections of the First Amendment, and concur in the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join and with whom JUSTICE BLACKMUN joins as to Part I, dissenting.

Today the Court holds that a United States Postal Service regulation prohibiting persons from "[s]oliciting alms and contributions" on postal premises does not violate the First Amendment as applied to members of a political advocacy group who solicited contributions from a sidewalk outside the entrance to a post office. A plurality finds that the sidewalk is not a public forum and that the Postal Service regulation is valid because it is "reasonable." JUSTICE KENNEDY concludes that although the sidewalk might well be a public forum, the regulation is permissible as applied because it is a content-neutral time, place, or manner restriction on protected speech.

Neither of these conclusions is justified. I think it clear that the sidewalk in question is a "public forum" and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one. For these reasons, I respectfully dissent.

I

A

The plurality begins its analysis with the determination that the sidewalk in question is not a "public forum." See *ante*, at 727–728. Our decisions in recent years have identified three categories of forums in which expression might take place on government property: (1) traditional, "quintessential public forums"—"places which by long tradition or by government fiat have been devoted to assembly and debate,"

such as "streets and parks"; (2) "limited-purpose" or state-created semipublic forums opened "for use by the public as a place for expressive activity," such as university meeting facilities or school board meetings; and (3) nonpublic forums or public property "which is not by tradition or designation a forum for public communication." *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983); see also *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 572–573 (1987). Ironically, these public forum categories—originally conceived of as a way of *preserving* First Amendment rights, see Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1—have been used in some of our recent decisions as a means of upholding restrictions on speech. See, *e. g.*, *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U. S. 260 (1988); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788 (1985); *United States* v. *Albertini*, 472 U. S. 675 (1985); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789 (1984); *Minnesota State Bd. for Community Colleges* v. *Knight*, 465 U. S. 271 (1984); *Perry Education Assn., supra; United States Postal Service* v. *Council of Greenburgh Civic Assns.*, 453 U. S. 114 (1981); but see *United States* v. *Grace*, 461 U. S. 171 (1983); *Widmar* v. *Vincent*, 454 U. S. 263 (1981). I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand. See *Perry Education Assn., supra*, at 62–63, n. 6 (dissenting opinion); *Council of Greenburgh Civic Assns., supra*, at 136, 140 (opinion concurring in judgment); *Greer* v. *Spock*, 424 U. S. 828, 859–860 (1976) (dissenting opinion). Indeed, the Court's contemporary use of public forum doctrine has been roundly criticized by commentators.[1]

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[1] See, *e. g.*, L. Tribe, American Constitutional Law 993 (2d ed. 1988) ("[A]n excessive focus on the public character of some forums, coupled with inadequate attention to the precise details of the restrictions on expres-

Today's decision confirms my doubts about the manner in which we have been using public forum analysis. Although the plurality recognizes that public sidewalks are, as a general matter, public forums, see *ante*, at 728, the plurality insists, with logic that is both strained and formalistic, that the specific sidewalk at issue is not a public forum. This conclusion is unsupportable. "[S]treets, sidewalks, and parks, are considered, without more, to be 'public forums.'" "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." *United States* v. *Grace*, *supra*, at 177, 180. It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the gov-

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sion, can leave speech inadequately protected in some cases, while unduly hampering state and local authorities in others") (footnotes omitted); Dienes, The Trashing of the Public Forum: Problems in First Amendment Analysis, 55 Geo. Wash. L. Rev. 109, 110 (1986) ("[C]onceptual approaches such as that embodied in the nonpublic-forum doctrine simply yield an inadequate jurisprudence of labels"); Farber & Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 Va. L. Rev. 1219, 1234 (1984) ("Classification of public places as various types of forums has only confused judicial opinions by diverting attention from the real first amendment issues involved in the cases"); Post, Between Governance and Management: The History and Theory of the Public Forum, 34 UCLA L. Rev. 1713, 1715–1716 (1987) ("The doctrine has in fact become a serious obstacle not only to sensitive first amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property. It has received nearly universal condemnation from commentators"); Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 93 (1987) (current public forum analysis is plagued by a "myopic focus on formalistic labels" that "serves only to distract attention from the real stakes").

ernment. No doctrinal pigeonholing, complex formula, or multipart test can obscure this evident conclusion.

1

The plurality maintains that the postal sidewalk is not a traditional public forum because it "was constructed solely to provide for the passage of individuals engaged in postal business" and "leads only from the parking area to the front door of the post office." *Ante*, at 727. This reasoning is flawed.

Quintessential examples of a "public forum" are those open spaces—streets, parks, and sidewalks—to which the public generally has unconditional access and which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *Committee for Industrial Organizations*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations. As a result, expressive activity is compatible with the normal use of a public forum and can be accommodated simply by applying the communication-neutral rules used to regulate other, non-speech-related conduct on the premises. See *Grayned* v. *City of Rockford*, 408 U. S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time"). For the most part, on streets and sidewalks, including the single-purpose sidewalk at issue here, communication between citizens can be permitted according to the principle that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional

right to express his views in an orderly fashion." *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943).[2]

The wooden distinctions drawn today by the plurality have no basis in our prior cases and, furthermore, are in apparent contradiction to the plurality's admission that "[t]he mere physical characteristics of the property cannot dictate forum analysis." *Ante*, at 727. It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, *why* the sidewalk was built is not salient.

Nor is it important that the sidewalk runs only between the parking lot and post office entrance. The existence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare. In *Boos* v. *Barry*, 485 U. S. 312 (1988), for example, JUSTICE O'CONNOR concluded that the public sidewalks within 500

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[2] There may be important differences between cases in which citizens have a legal right to be present on government property and those in which "citizens claim a right to enter government property for the particular purpose of speaking." Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 48 (1986), cited in *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 573 (1987). In the former class of cases—into which the instant case falls—the Court has recognized that when citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. See *Jamison* v. *Texas*, 318 U. S., at 416; see also Post, *supra*, at 1717, 1765–1767, 1773–1775, 1781–1784.

feet of the embassies of the Governments of the Soviet Union and Nicaragua in Washington, D. C. are public forums without considering the factors found in today's opinion. See *id.*, at 318. In *Frisby* v. *Schultz*, 487 U. S. 474 (1988), JUSTICE O'CONNOR acknowledged that "'time out of mind' public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Id.*, at 480 (citation omitted). She explained that "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.' *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.*" *Id.*, at 480–481 (emphasis added; citations omitted). JUSTICE O'CONNOR further wrote that "a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood" or because it is "physical[ly] narro[w]." *Id.*, at 480.

The architectural idiosyncrasies of the Bowie Post Office are thus not determinative of the question whether the public area around it constitutes a public forum. Rather, that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum. As the Court of Appeals observed: "It ill behooves us to undertake too intricate a task of designation, holding this sidewalk public and that one not. . . . [S]uch labeling loses sight of the fact that most sidewalks are designed as outdoor public thoroughfares and that citizens should not be left to wonder at which ones they will be permitted to speak and which ones not." 866 F. 2d 699, 702 (CA4 1989).[3]

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[3] To its credit, the plurality does not rely—as a ground for finding that the sidewalk at issue is not a public forum—on the fact that at the Bowie

The cases that formed the foundation of public forum doctrine did not engage in the type of fact-specific inquiry undertaken by the plurality today. In *Cox* v. *Louisiana*, 379 U. S. 536, 553–558 (1965), for example, we reversed a civil rights leader's conviction for obstructing a public passage after he organized a protest on a municipal sidewalk across the street from the Baton Rouge courthouse. We did not consider whether the sidewalk was constructed to facilitate protests (an unlikely possibility), or whether the sidewalk was a "public thoroughfare" rather than one providing access to only a limited number of locations. Similarly, in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), we reversed the convictions of civil rights demonstrators who had assembled on the grounds of the South Carolina State House, "an area of two city blocks open to the general public," *id.*, at 230, without inquiring whether the State had dedicated the statehouse grounds for such expressive activities. In *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 152 (1969), we did not suggest that our constitutional analysis hinged on whether the sidewalk march had occurred on Main Street or on a dead-end street leading only to a single public building. See also *Carey* v. *Brown*, 447 U. S. 455, 460 (1980); *Grayned* v. *City of Rockford*, 408 U. S. 104, 120–121 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972).

Whatever the proper application of public forum doctrine to novel situations like fundraising drives in the federal workplace, see *Cornelius* v. *NAACP Legal Defense & Edu-*

Post Office a parking lot separates the sidewalk from a nearby highway. The Court of Appeals supplied the ready answer to such an argument:

"If 'the mere presence of a parking area between the street and a sidewalk limits our scrutiny of speech-related regulations to the standard for nonpublic fora, we issue an open invitation for government architects and landscapers to surround public buildings with modern-day moats.' The First Amendment is not consigned to the mercies of architectural chicanery, nor may a federal agency, simply by designating a sidewalk its own, spare itself the inconvenience of political protest and speech." 866 F. 2d, at 703 (citation omitted).

cational Fund, Inc., 473 U. S. 788 (1985), or the internal mail systems of public schools, see *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), we ought not unreflectively transfer principles of analysis developed in those specialized and difficult contexts to traditional forums such as streets, sidewalks, and parks.[4] See n. 2, *supra*. In

[4] This is not a case involving the Government's "'discretion and control over the management of its personnel and internal affairs.'" *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 805 (1985), quoting *Arnett* v. *Kennedy*, 416 U. S. 134, 168 (1974) (Powell, J., concurring in part); see also *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 896 (1961) (upholding authority of the commander of a military base to deny employment to a civilian cook without a hearing on the basis of security concerns). The instant case involves activities of ordinary citizens *outside* the post office, not the conduct of postal employees. I reject the plurality's implication that the "proprietary" nature of the post office somehow detracts from the *sidewalk's* status as a public forum. *Ante*, at 725. "[T]he government may not escape the reach of the First Amendment by asserting that it acts only in a *proprietary* capacity with respect to streets and parks." *Smith* v. *Goguen*, 415 U. S. 566, 594 (1974) (REHNQUIST, J., dissenting) (emphasis added). The sidewalk or street outside the White House is no different from one outside a post office or one outside a private store—despite the differences in what transpires inside. The plurality's statement that "[t]he purpose of the forum in this case is to accomplish the most efficient and effective postal delivery system," *ante*, at 732, confuses the sidewalk with the interior of the post office.

Furthermore, I would be wary of placing so much weight on the blurry concept of government *qua* "proprietor." See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 539–547 (1985); *Owen* v. *City of Independence*, 445 U. S. 622, 644–647 (1980). Certainly, the mere fact that postal operations are somehow *implicated* here cannot give the Government greater license to silence citizens in a public forum. Cf. *Rutan* v. *Republican Party of Illinois*, *ante*, at 70–71, n. 4. The fact that the government is acting as an employer or as a proprietor does not exempt it from the distinct requirements of the Equal Protection Clause, see, *e. g.*, *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 723–724 (1982); *Sugarman* v. *Dougall*, 413 U. S. 634, 641, 648–649 (1973); *Turner* v. *City of Memphis*, 369 U. S. 350, 353 (1962) *(per curiam)*, or the Due Process Clause, *Cleveland Bd. of Education* v. *Loudermill*, 470 U. S. 532, 538–545 (1985); *Perry* v. *Sindermann*, 408 U. S. 593, 599–603 (1972), or the Com-

doing so, the plurality dilutes the very core of the public forum doctrine. As JUSTICE KENNEDY notes, "the demand for recognition of heightened First Amendment protection has more force here than in those instances where the Government created a nontraditional forum to accommodate speech for a special purpose, as was thought true with teachers' mailboxes in *Perry Education Assn. [,supra]*, or the Combined Federal Campaign in *Cornelius*." *Ante*, at 738 (opinion concurring in judgment). We have never applied a "reasonableness" test to speech in a place where government property was open to the public.[5] Indeed, even in regulated

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merce Clause, see *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 87 (1984), or the Privileges and Immunities Clause of Article IV. See *United Building & Construction Trades Council of Camden County* v. *Mayor and Council of Camden*, 465 U. S. 208, 214–218 (1984).

The plurality's reliance on *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974) (plurality opinion), is also misplaced. That a city may protect a captive audience in the small, enclosed space of a municipal bus says little about the type of regulations that the Government may adopt in the context of an outdoor public sidewalk. Justice Douglas, who provided the fifth vote in *Lehman* in his opinion concurring in the judgment, saw a clear distinction between the two situations. "One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try *not* to listen." *Public Utilities Comm'n of District of Columbia* v. *Pollak*, 343 U. S. 451, 469 (1952) (Douglas, J., dissenting). Although the Government, within certain limits, may protect captive listeners against unwelcome intrusions, in public locations "we expect individuals simply to avoid speech they do not want to hear." *Frisby* v. *Schultz*, 487 U. S. 474, 484 (1988); cf. *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 210–211 (1975); *Cohen* v. *California*, 403 U. S. 15, 21–22 (1971).

[5] *Greer* v. *Spock*, 424 U. S. 828 (1976), is readily distinguishable because the Court in that case held, over my dissent, that a sidewalk on a *military base* was not truly "open" to the public and was therefore not a public forum. The Court reasoned that although the public was freely permitted to visit the base, the commanding officer's authority to exclude not only those engaged in expressive activity, but *anyone* deemed by him to be detrimental to the defense function, was "unquestioned." *Id.*, at 838. Cf. *Flower* v. *United States*, 407 U. S. 197, 198 (1972) *(per curiam)* (re-

environments where a public right of access nevertheless exists, we have applied a higher level of scrutiny to restrictions on speech than the plurality does today. See *Cohen* v. *California*, 403 U. S. 15, 22 (1971); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 509 (1969).

2

Even if I did not believe that the postal sidewalk is a "traditional" public forum within the meaning of our cases, I would find that it is a "limited-purpose" forum from which respondents may not be excluded absent a showing of a compelling interest to which any exclusion is narrowly tailored. We have recognized that even where a forum would not exist but for the decision of government to create it, the government's power to enforce exclusions from the forum is narrowly circumscribed if the government permits a wide range of expression to occur. See *Perry Education Assn.*, 460 U. S., at 45; see also *Widmar* v. *Vincent*, 454 U. S. 263, 267–268 (1981); *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175–176 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S.

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versing conviction for distributing leaflets on a military base where the "fort commander chose not to exclude the public from the street where petitioner was arrested" and where "'there [wa]s no sentry post or guard at either entrance or anywhere along the route'" and "'[t]raffic flow[ed] through the post on this and other streets 24 hours a day'") (citation omitted). Of course, I disagreed with the majority's assessment of the facts in *Greer*, as the plurality today points out. See *ante*, at 729. But that the Court in *Greer* engaged in a debate over the degree to which the sidewalk was open to the public demonstrates that the Court believed that a sidewalk generally accessible to the public—as in the instant case—is a public forum. At any rate, I do not believe that our decision in *Greer*, colored as it was by the special security concerns of a military base, see 424 U. S., at 837 ("[T]his Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable"); see also *Brown* v. *Glines*, 444 U. S. 348, 353–354 (1980) (discussing *Greer*), is helpful in identifying public forums outside the unique context of the military.

546, 555–558 (1975). In a limited-purpose forum, "the Government must permit wider access to the forum than it has otherwise intended." *Ante*, at 738 (KENNEDY, J., concurring in judgment).

The plurality acknowledges both that "the forum here has been dedicated to some First Amendment uses and thus is *not* a purely nonpublic forum," *ante*, at 730 (emphasis added), and that "the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission." *Ante*, at 733. These observations support a finding that the sidewalk is a limited-purpose forum, especially in light of the wide range of expressive activities that are permitted. The postal regulation forbids persons only from "[s]oliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises." 39 CFR § 232.1(h)(1) (1989). The Government thus invites labor picketing, soapbox oratory, distributing literature, holding political rallies, playing music, circulating petitions, or any other form of speech not specifically mentioned in the regulation.

The plurality concludes that the sidewalk is not a limited-purpose forum only by ignoring its earlier observations. The plurality maintains that "a practice of allowing some speech activities on postal property do[es] not add up to the dedication of postal property to speech activities," *ante*, at 730, and concludes that the Postal Service may close off postal premises to solicitors even though it has opened the forum to virtually every other type of speech. The plurality's conclusion is unsound.

The plurality has collapsed the distinction between exclusions that help define the contours of the forum and those that are imposed *after* the forum is defined. Because the plurality finds that the prohibition on solicitation is part of the definition of the forum, it does not view the regulation as

operating on a public forum and hence subjects the postal regulation to only a "reasonableness" inquiry. If, however, the ban on solicitation were found to be an independent restriction on speech occurring in a limited public forum, it would be judged according to stricter scrutiny. See *Perry Education Assn.*, *supra*, at 45–46. The plurality's approach highlights the fact that there is only a semantic distinction between the two ways in which exclusions from a limited-purpose forum can be characterized, although the two options carry with them different standards of review. The plurality's logic, as JUSTICE BLACKMUN has noted in a previous case, would make restrictions on access to limited public forums self-justifying:

> "The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an 'open forum' for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, . . . no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum." *Cornelius*, 473 U. S., at 825 (dissenting opinion).

The plurality does not, and cannot, explain in the instant case why the postal regulation establishes a policy of "'[s]elective access,'" *ante*, at 730 (citation omitted), rather than constituting a separate restriction on speech in a limited public forum. Nor can the plurality explain how its reasoning is consistent with our past cases. In *Carey* v. *Brown*, 447 U. S. 455, 460 (1980), *Grayned* v. *Rockford*, 408 U. S., at 107, and *Police Department of Chicago* v. *Mosley*, 408 U. S.,

at 96, for example, we held that bans on picketing were invalid because they contained impermissible exemptions for labor picketing. We did not hold, as the plurality's position might suggest, that the bans were valid because the labor exemption was part of the forum's definition. Similarly, the restrictions at issue in *Southeastern Promotions, Ltd.* v. *Conrad*, *supra*, at 549, n. 4, and *Widmar* v. *Vincent*, 454 U. S. 263, 265–266, n. 3 (1981), could have been—but were not—used to show that the municipal theater and university meeting rooms, respectively, were not public forums because they practiced a policy of selective access.[6]

I would find that the postal sidewalk is a public forum, either of the "traditional" or "limited-purpose" variety.

B

Content-based restrictions on speech occurring in either a public forum or in a limited-purpose public forum are invalid unless they are narrowly drawn to serve a compelling interest. See *Perry Education Assn.*, 460 U. S., at 45. Government "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." *Ibid.* I do not think the postal regulation can pass muster under either standard. Although I agree that the Govern-

[6] I am encouraged by the apparent fact that a majority of the Court does not adhere to the plurality's reasoning on this point. JUSTICE KENNEDY's citation to JUSTICE BLACKMUN's *Cornelius* dissent, see *ante*, at 738 (opinion concurring in judgment), citing *Cornelius*, 473 U. S., at 819–820, suggests that JUSTICE KENNEDY believes that access depends upon "the nature of the forum and the nature of the expressive activity" and whether "the activity [would be] compatible with normal uses of the property," *id.*, at 820, not upon whether the government explicitly permits access. See *ante*, at 737–738 ("If our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case") (KENNEDY, J., concurring in judgment).

ment has an interest in preventing the obstruction of post office entrances and the disruption of postal functions, there is no indication that respondents interfered with postal business in any way. The Court of Appeals found:

> "The record in this case reveals no evidence of a significant government interest best served by the ban on solicitation in a public forum. There is no evidence that Kokinda and Pearl's solicitation obstructed or impeded postal customers. [Respondents] were not charged with obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. There is nothing to suggest that they harassed, threatened, or physically detained unwilling listeners." 866 F. 2d, at 704 (citation omitted).

I agree with the Court of Appeals that the postal regulation is invalid as applied in this case because it "prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown." *Id.*, at 705–706.

JUSTICE KENNEDY contends that the postal regulation may be upheld as a content-neutral time, place, or manner regulation. But the regulation is not content neutral; indeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says, "Please contribute $10," he is subject to criminal prosecution. His punishment depends entirely on what he says.

The plurality suggests that the regulation is not based on the content of speech, regardless of the terms of the restric-

tion, because the proffered governmental *interest* is unrelated to the communicative impact of expression. See *ante*, at 736 (discussing "[t]he Service's concern about losing customers because of the potentially unpleasant situation created by solicitation"). This reasoning is flawed. Any restriction on speech, the application of which turns on the substance of the speech, is content based no matter what the Government's interest may be. See *Boos*, 485 U. S., at 335–338 (BRENNAN, J., concurring in part and concurring in judgment). In any event, the Government interest in this case is related to the suppression of expression because the evil at which the postal regulation is aimed—by the admission of both the Postal Service, see 43 Fed. Reg. 38824 (1978), and the plurality, see *ante*, at 736—is the danger that solicitors might annoy postal customers and discourage them from patronizing postal offices. But solicitors do not purportedly irk customers by speaking unusually loudly or uncomfortably close to their subjects. Rather, the fear is that solicitation is bothersome because of its *content:* The post office is concerned that being asked for money may be embarrassing or annoying to some people, particularly when the speaker is a member of a disfavored or unpopular political advocacy group. For example, the Government makes much of the 40 or 50 customer complaints received at the Bowie Post Office while respondents solicited the public. See Brief for United States 35–36, and n. 11. But the record does not demonstrate that the complaints related to any difficulty in obtaining access to the post office. "For all we know, the complaints may have been generated by the hearers' disagreement with the message of the National Democratic Policy Committee or their disapproval of the appearance or affiliation of the speakers." 866 F. 2d, at 705. Although the Service's paternalism may be well intended, it is axiomatic that a listener's reaction to speech is not a content-neutral basis for regulation. Cf. *United States* v. *Eichman*, 496 U. S. 310, 315–318 (1990); *Texas* v. *Johnson*, 491 U. S. 397,

408–410 (1989). Speech is not subject to regulation "'simply because it may embarrass others or coerce them into action.'" *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988), quoting *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 910 (1982).

In addition, the postal regulation is not a permissible time, place, or manner rule because its prohibition on solicitation is absolute and not "narrowly tailored," *Perry Education Assn.*, 460 U. S., at 45, to the Government's interest in avoiding disruption. Rather, the regulation is based on the Postal Service's generalized judgment that solicitation is more likely to be disruptive than are other types of speech. The postal regulation is a "time, place, or manner" rule only in the novel sense that it permits no *manner* of solicitation at any *time* or at any *place* in the forum.[7] It is conceivable that in some instances solicitation might cause a crowd to form and block a post office entrance because an individual who decides to respond must "reach for a wallet, search it for money, write a check, or produce a credit card," *ante*, at 734, but the Postal Service has failed to document that this in fact has *ever* occurred, let alone that it would be more than an occasional problem. The record in the instant case demonstrates that solicitation certainly does not invariably disrupt postal functions. The plurality's trumpeting of Postal Service "real-world experience" as a valid basis for the regulation, *ante*, at 735, is entirely unjustified, given that the Service's

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[7] JUSTICE KENNEDY's suggestion, *ante*, at 738–739 (opinion concurring in judgment), that respondents could distribute literature asking for financial support—perhaps requesting that contributions be mailed to a particular address—is unhelpful because JUSTICE KENNEDY has simply identified another way that respondents could raise funds short of solicitation. Such an alternative is indeed open to respondents, but in choosing it they would forfeit the unique advantages of in-person solicitation recognized by JUSTICE O'CONNOR: "In a face-to-face encounter there is a greater opportunity for the exchange of ideas and the propagation of views than is available [through written] literature [that is] merely informative." *Cornelius*, 473 U. S., at 798.

experience is limited to solicitation *in postal lobbies*. The Postal Service has never found solicitation on *exterior* sidewalks to pose a danger to postal operations.[8]

When government seeks to prohibit categorically an entire class of expression, it bears, at the very least, a heavy burden of justification. See *Schad* v. *Mount Ephraim*, 452 U. S. 61, 67, 72–74 (1981) (the "exclusion of a broad category

[8] The Postal Service explained when it promulgated its regulations that:

"Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor. Such confrontations, *if occurring in the confines of a small post office lobby, at a post office writing desk or service window, or in a queue at a service window*—places from which the individual cannot escape if he or she wishes to transact postal business—would be likely to produce hostile reactions and to cause people to avoid post offices." 43 Fed. Reg. 38824 (1978) (emphasis added).

The concern expressed was limited to solicitation *inside* postal lobbies. See *ibid.* ("The use of *lobby space* for such activity has been highly unsatisfactory") (emphasis added); see also *United States* v. *Bjerke*, 796 F. 2d 643, 650 (CA3 1986). The fact that "most post office lobbies . . . are too small to accommodate nonpostal public activities without disturbing postal employees in the performance of their duties and impeding the public in transacting postal business," 42 Fed. Reg. 63911 (1977); see also 43 Fed. Reg. 38824 (1978), says nothing about the sidewalks outside. The confined space of a lobby may well warrant measures that are not permissible elsewhere.

I do not think it appropriate to imagine for ourselves the possible ways in which solicitation on outside sidewalks might be disruptive. The Postal Service, the agency with "long experience" in this regard, *ante*, at 735, has been silent on the matter, except insofar as the Government has attempted to present *post hoc* rationalizations for the regulation long after its promulgation. See *ibid.* (citing Tr. of Oral Arg. 9). By analogy, were this a straightforward administrative law case, the failure of the Postal Service to document any danger of disruption from solicitation on outside sidewalks would be the end of the matter. See *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 653–654 (1990); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 419 (1971); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87 (1943).

of protected expression" demands heightened scrutiny and evidence supporting the need for complete exclusion).[9] I find that the Postal Service has not met this burden and that the postal regulation prohibiting an entire category of expression based on a broad assessment of its likely effects cannot qualify as a valid time, place, or manner regulation because such a prohibition "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U. S. 781, 799 (1989). "'A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.'" *Id.*, at 800, quoting *Frisby*, 487 U. S., at 485. In other contexts we have stressed that problems associated with solicitation must be addressed through "measures less intrusive than a direct prohibition on solicitation." *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 637 (1980); see also *Riley* v. *National Federation of Blind of North Carolina, Inc.*, 487 U. S. 781, 795 (1988). Thus, in *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), we upheld as a valid time, place, or manner regulation a rule requiring that solicitation in a public fairground take place only at assigned booths. We rejected the claim that the rule was a "total ban" because we found that it permitted groups "to solicit funds and distribute and sell literature from within the fairgrounds, albeit from a fixed location." *Id.*, at 655, n. 16. The postal regulation, by contrast, prohibits solicitation altogether.

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[9] Indeed, we have noted that "[i]n a public forum, by definition, *all* parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to *a single class of speakers*, a single viewpoint, or a single subject." *Perry Education Assn.*, 460 U. S., at 55 (emphasis added). Thus, in *United States* v. *Grace*, 461 U. S. 171, 177 (1983), we contrasted "time, place, and manner regulations" with "[a]dditional restrictions such as an absolute prohibition on a particular type of expression." The latter, we said, "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Ibid.*

In short, the Postal Service has made no attempt to justify its complete exclusion of solicitation from all locations on postal property, including exterior sidewalks. The plurality's conclusion that a complete ban on solicitation is warranted rests on speculation regarding the possibility of disruption that is both inappropriate and unsupported. As I have commented previously, "[n]o doubt a plausible argument could be made that the political gatherings of some parties are more likely than others to attract large crowds causing congestion, that picketing for certain causes is more likely than other picketing to cause visual clutter, or that speakers delivering a particular message are more likely than others to attract an unruly audience. . . . [But] governments [must] regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce these effects." *Boos* v. *Barry*, 485 U. S., at 335 (opinion concurring in part and concurring in judgment). The First Amendment demands that the Postal Service prohibit solicitation only when it actually threatens legitimate government interests; "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).

Indeed, a great irony of this case is that the Postal Service has already promulgated legitimate time, place, and manner regulations that fully protect its interests in preventing disruption of postal operations. The postal regulations governing conduct on postal premises are codified in Part 232 of the Code of Federal Regulations (Conduct on Postal Property). Postal Service rules prohibit individuals from obstructing post office entrances, disturbing postal employees in the performance of their duties, or impeding the public in the transaction of postal business. Section 232.1(e), for example, provides that:

> "Disorderly conduct, or conduct which creates loud and unusual noise, or which obstructs the usual use of en-

> trances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited." 39 CFR § 232.1(e) (1989).

Similarly, § 232.1(k)(2) forbids "[t]he blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on [postal] property." See also § 232.1(c) (prohibition on "creating any hazard to persons or things"). Thus, although the postal regulation at issue here—§ 232.1(h)(1)—bans solicitation altogether, postal regulations restrict other forms of expression only when they actually disrupt postal operations. There is no reason why the rules prohibiting disruptive conduct cannot be used to address the governmental interest in this case, and hence there is no need for a categorical exclusion of solicitation from sidewalks on postal property.

II

Even if I did not believe that the sidewalk outside the Bowie Post Office was a public forum, I nevertheless could not agree with the plurality that the postal regulation at issue today is reasonable as applied to respondents. The Postal Service does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag burning.[10] A solicitor who asks for funds and offers literature for sale outside the entrance to a post office is no more likely to block access than is a leafleteer who stands in the same place or a speaker who sets up his soapbox there. In fact, solicitors

[10] I note that one of the prosecutions at issue in *United States* v. *Eichman*, 496 U. S. 310 (1990), involved a flag burning that occurred on a sidewalk in front of a post office. See *United States* v. *Haggerty*, 731 F. Supp. 415, 416 (WD Wash. 1990).

may be quite unlikely to attract much of an audience, because public requests for money are often ignored. Certainly, solicitors are less likely to draw a crowd, and thus to disrupt postal functions, than are eloquent orators or persons distributing popular magazines for free. Under the regulation, a group may stage a political rally to call attention to the problem of drug abuse[11] and draw hundreds or even thousands of persons to the area just outside the entrance to the post office, because there is no general prohibition on large gatherings on postal premises.[12] But since there *is* a categorical ban on solicitation, the group would be unable to ask a single member of the public for a contribution to advance its cause.

This inconsistent treatment renders the prohibition on solicitation unreasonable. The Postal Service undeniably has a legitimate interest in avoiding disruption of its postal facilities and ensuring that its buildings remain accessible to the public. But the Government interest in preventing disruption of post office business or harassment of postal patrons is addressed by the direct prohibitions on such conduct in existing postal rules, see *supra*, at 758–759, and the Service has not explained satisfactorily why these provisions are inadequate to deal with any disruption caused by solicitation.

The plurality suggests that the irksome nature of solicitation supports the reasonableness of the postal regulation. Even were the Postal Service's desire to prevent the annoyance of customers a legitimate basis for regulation,[13] such an

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[11] The regulation subjects to a categorical ban only "campaigning for election to any public office." 39 CFR § 232.1(h)(1) (1989). A rally concerning a particular issue rather than a candidate is not covered.

[12] The organizers of such a rally might well be prosecuted for obstructing the entrance of the post office under § 232.1(e) or § 232.1(k)(2) if the gathering in fact caused a disruption. But that is precisely the point: *Other* regulations, *not* § 232.1(h)(1), protect the Postal Service's asserted interest.

[13] The Postal Service's desire to protect customers from speech with which they might disagree would not be a valid basis for regulation even were the sidewalk a nonpublic forum. While we have held that speech in a nonpublic forum may be regulated so as to prevent disruption of the forum,

interest could not justify the blanket ban on solicitation alone. Many expressive activities permitted by § 232.1(h)(1) likely would trigger the same reactions in the audience. Pamphleteers might distribute embarrassing or disturbing handbills, and soapbox orators might shout caustic invectives at postal patrons as they walk past, yet those activities are not subject to a categorical prohibition. Indeed, the Postal Service permits other types of speech that demand an immediate response from the listener, such as inviting passersby to sign a petition to place an initiative proposal on the ballot. See *Meyer* v. *Grant*, 486 U. S. 414 (1988). The notion that solicitation is "inherently" more invasive of the public's peace of mind is untenable.

The Government contends that any attempt to regulate solicitation on a case-by-case basis according to the general "disruption" regulation would be "unadministrable" because the Service "lacks the resources to enforce such regulation in the tens of thousands of post offices throughout the nation." 43 Fed. Reg. 38824 (1978). But the Government's interest in bright-line rules is hardly creditable, given that the Postal Service has chosen to adopt categorical restrictions on speech only with respect to solicitation. If such application of the general disturbance and obstruction rules contained in §§ 232.1(e) and 232.1(k)(2) is "administrable" with respect to other types of speech, I fail to understand how a case-by-case inquiry suddenly becomes impracticable in the context of solicitation.[14]

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see *Cornelius*, 473 U. S., at 811, a restriction cannot be premised on the mere fact that some members of the public might disapprove of a speaker's message or means of delivery. Such expression "is still protected speech even in a nonpublic forum." *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S., at 576.

[14] The Postal Service has decided to require local postmasters to make case-by-case assessments regarding a whole range of expression and other conduct on postal premises, belying the Government's claim that such an approach would be "unadministrable" with respect to solicitation. Postal regulations provide, for example, that photographs "for news . . . pur-

Moreover, even were the Postal Service's administrability concerns real, the Service could quite easily design categorical rules governing solicitation that would both obviate the need for administrative discretion and yet fall far short of a total ban. The Service could formulate, for example, reasonable restrictions on the size and placement of tables, on solicitation during peak postal hours, on the use of parking spaces by nonpostal customers, or on the number of persons who may engage in solicitation at the same time and place. Although the Government would not be required to choose the least restrictive alternative were the plurality correct in its view that the sidewalk is a nonpublic forum, these other ap-

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poses" may be taken "in entrances, lobbies, foyers, corridors, or auditoriums when used for public meetings." 39 CFR § 232.1(i) (1989). Local postmasters obviously must decide on a case-by-case basis how to cope with the disruption posed by camera equipment, cables, and the presence of news media personnel. Moreover, the regulation explicitly vests discretion in local post office officials with respect to photographs for other than news purposes: "Other photographs may be taken only with the permission of the local postmaster or installation head." Similarly, § 232.1(o) grants local officials discretion to make case-by-case judgments concerning the appropriateness of displaying community notices and other materials of public interest on postal bulletin boards:

"The Postal Service has no intention to discontinue . . . that valuable service [of providing a place for the display of public notices and announcements] to local communities. The adopted regulation contains, as did the proposed rule, language insuring that the authority of postmasters to allow the placement in post offices of bulletin boards for the display of public notices and announcements, will continue as before. Thus, both [§ 232.1(h)(1)(ii) and § 232.1(o)(1)] contain language excepting from their coverage, 'posting notices on bulletin boards as authorized in § 243.2(a) of this chapter.'

"The reference[d] section authorizes both public and employee bulletin boards. Postmasters are not required to provide bulletin board space for nongovernmental public announcements; but they are encouraged by postal policy to provide such space for the display of notices of public assemblies and judicial sales, official election notices issued by State or local government, and similar announcements so long as there is sufficient space for the effective display of scheduled postal materials and other Federal Government notices." 43 Fed. Reg. 38824–38825 (1978).

proaches to the problem of disruption are so obvious that the no-solicitation regulation can scarcely be considered a reasonable way of addressing the Service's asserted interest in avoiding case-by-case determinations.

III

Some postal patrons may thank the Court for sparing them the inconvenience of having to encounter solicitors with whose views they do not agree. And postal officials can rest assured in the knowledge that they can silence an entire category of expression without having to apply the existing postal regulations governing disruptive conduct or having to craft more narrow time, place, or manner rules. Perhaps only three groups of people will be saddened by today's decision. The first includes solicitors, who, in a farce of the public forum doctrine, will henceforth be permitted at postal locations to solicit the public only from such inhospitable locations as the busy four-lane highway that runs in front of the Bowie Post Office. The next to be disappointed will be those members of the public who would prefer not to be deprived of the views of solicitors at postal locations. The last group, unfortunately, includes all of us who are conscious of the importance of the First Amendment.

I respectfully dissent.

LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JEFFERS

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

No. 89–189. Argued February 21, 1990—Decided June 27, 1990

In affirming respondent Jeffers' first-degree murder conviction and death sentence, the Arizona Supreme Court, *inter alia*, independently reviewed the evidence supporting the trial court's finding of the statutory aggravating circumstance that the crime was committed "in an especially heinous, cruel or depraved manner." The court noted its recent ruling that the infliction of gratuitous violence on the victim is among the factors to be considered in determining whether the murder was "especially heinous . . . or depraved," and found the presence of this factor in light of evidence that Jeffers had climbed on top of the dead victim and hit her in the face several times, causing additional wounds and bleeding. Noting further that the apparent relish with which the defendant commits the murder is another relevant factor under its decisions, the court concluded that Jeffers' relish for his crime was evidenced by testimony that, while he was beating the dead victim, he called her a "bitch" and a "dirty snitch" and stated, as each blow landed, that "[t]his one is for" someone on whom he felt she had informed. The Federal District Court denied Jeffers' habeas corpus petition. The Court of Appeals agreed with the District Court that the "especially heinous . . . or depraved" aggravating circumstance, as interpreted and narrowed by the State Supreme Court, was not void on its face, but vacated Jeffers' death sentence on the ground that the circumstance was unconstitutionally vague as applied to him.

Held:

1. The Court of Appeals erred in holding that Arizona's construction of the "especially heinous . . . or depraved" aggravating circumstance in this case contravened *Godfrey* v. *Georgia*, 446 U. S. 420, 428, and *Maynard* v. *Cartwright*, 486 U. S. 356, 364. There is no dispute here that the Arizona Supreme Court applied its narrowing construction to the facts of Jeffers' case. More important, the Court of Appeals noted that the circumstance, as construed by the state courts, was not unconstitutionally vague on its face. Even if it had not so held, Jeffers' claim that Arizona has not construed the circumstance in a constitutionally narrow manner is disposed of by *Walton* v. *Arizona*, *ante*, at 652–655, which upheld, against a vagueness challenge, the precise aggravating circumstance at issue here. Moreover, a claim identical to Jeffers' assertion that the aggravating circumstance may nevertheless be vague "as ap-

plied" to him was rejected in *Walton*, *ante*, at 655–656, which makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance and has applied that construction to the facts of the particular case, the fundamental constitutional requirement of channeling and limiting the capital sentencer's discretion has been satisfied. Pp. 773–780.

2. The Court of Appeals erred in conducting a *de novo*, case-by-case comparison of the facts of those cases with the facts of this case to decide Jeffers' as-applied challenge. That challenge reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of Jeffers' case. Because federal habeas corpus relief does not lie for errors of state law, federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. In making that determination, the appropriate standard of review is the "rational factfinder" standard of *Jackson* v. *Virginia*, 443 U. S. 307, 319, under which the federal court must view the evidence in the light most favorable to the prosecution to determine whether "*any* rational trier of fact could have found the elements of the crime beyond a reasonable doubt." Under the standard, a rational factfinder could have found that Jeffers both relished his crime and inflicted gratuitous violence, given the evidence of his conduct toward the victim's body. Pp. 780–784.

832 F. 2d 476, reversed 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 a dissenting opinion, in which MARSHALL, J., joined, *ante*, p. 674. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 784.

Gerald R. Grant, Assistant Attorney General of Arizona, argued the cause for petitioners. With him on the briefs were *Robert K. Corbin*, Attorney General, and *Jessica Gifford Funkhouser*.

James S. Liebman, by appointment of the Court, 493 U. S. 952, argued the cause for respondent. With him on the brief were *Donald S. Klein* and *Frank P. Leto*.*

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents issues pertaining to federal court review of a state court's determination that an offense was committed "in an especially heinous, cruel or depraved manner," Ariz. Rev. Stat. Ann. § 13–703(F)(6) (1989).

I

The relevant facts are undisputed. The evidence at trial showed that in May 1976, police arrested respondent Jimmie Wayne Jeffers and his girlfriend, Penelope Cheney, on state law charges of possession of narcotics and receipt of stolen property. Respondent posted bond for Cheney, but was unable to post bond for himself and remained in custody at the Pima County Jail. While in jail, respondent received reports that Cheney had been cooperating with police by providing the police with information about respondent and certain heroin transactions. Respondent wrote a note to another jail inmate offering him money if he would kill Cheney. The detention officer who was supposed to deliver the note read it and seized it.

In October 1976, respondent was released from jail on bond pending appeal of his convictions. About a week later, he met Doris Van Der Veer and began living with her at a motel in Tucson. Respondent subsequently invited Cheney to the motel in order to provide her with some heroin.

On the day of the murder, respondent told Van Der Veer that Cheney was coming over and that they wished to be alone. When Cheney arrived, respondent introduced her to Van Der Veer, who then excused herself. After about 2½ hours, Van Der Veer returned to the motel room and knocked on the door. Respondent admitted her, pointed a gun at her, and ordered her to sit in a chair and be quiet.

Upon entering the motel room, Van Der Veer saw Cheney lying unconscious on the bed. Cheney appeared cyanotic. Respondent injected a fluid into Cheney's hand and told Van Der Veer that he had "given her enough shit to kill a horse

and this bitch won't die." Van Der Veer noticed foam coming from Cheney's mouth, which she recognized from her training as a nurse to be a sign of heroin overdose. Van Der Veer checked Cheney's condition and determined that she was still alive. Van Der Veer asked respondent if he was going to help Cheney, to which he responded, "No, I'm going to kill her."

Respondent then removed the belt from around Cheney's waist and began to choke her with it. He soon discarded the belt and choked her with his bare hands. Van Der Veer urged him to stop, saying Cheney would probably die anyway, but respondent replied, "No, I've seen her this way before and she's come out of it."

After strangling Cheney, respondent instructed Van Der Veer to check Cheney's pulse. Van Der Veer found no pulse and reported that Cheney was dead. Respondent then ordered Van Der Veer to inject more heroin into Cheney and to choke her while he took pictures. Van Der Veer complied. Respondent told Van Der Veer that he did this to have proof that she was an accomplice. Respondent then beat Cheney with his hands several times, calling her a "bitch" and a "dirty snitch" and stating, as each blow landed, that "[t]his one is for so and so [naming several names]." Respondent then dragged the body off the bed and placed it in the shower stall. After three days, when the body began to smell, respondent and Van Der Veer wrapped the body in newspaper and plastic garbage bags, placed it in a sleeping bag, and transported it to a secluded area, where they buried it in a shallow grave.

A jury convicted respondent of the first-degree murder of Cheney. After a sentencing hearing, the trial court found two aggravating circumstances and no mitigating factors. In accordance with the Arizona death penalty statute, Ariz. Rev. Stat. Ann. § 13–454 (Supp. 1973) (currently Ariz. Rev. Stat. Ann. § 13–703 (1989)), respondent was sentenced to death. App. 5–10.

On direct review of his conviction and sentence, the Arizona Supreme Court, following this Court's decision in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), vacated respondent's death sentence and remanded for resentencing. See *State* v. *Watson*, 120 Ariz. 441, 586 P. 2d 1253 (1978) (requiring the trial court to consider nonstatutory mitigating factors), cert. denied, 440 U. S. 924 (1979). At the second sentencing hearing, the trial court again found two aggravating circumstances beyond a reasonable doubt: that respondent had created a grave risk of death to another person (Van Der Veer) in the commission of the murder and that respondent committed the murder in an especially heinous, cruel, and depraved manner. See Ariz. Rev. Stat. Ann. §§ 13–703(F)(3) and (6) (1989).[1] The

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[1] Section 13–703(F) provides:

"F. Aggravating circumstances to be considered shall be the following:

"1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

"2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

"3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

"4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

"5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

"6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

"7. The defendant committed the offense while in the custody of the state department of corrections, a law enforcement agency or county or city jail.

"8. The defendant has been convicted of one or more homicides, as defined in § 13–1101, which were committed during the commission of the offense.

"9. The defendant was an adult at the time the offense was committed or was tried as an adult and the victim was under fifteen years of age.

"10. The murdered individual was an on duty peace officer who was killed in the course of performing his official duties and the defendant knew, or should have known, that the victim was a peace officer."

court found no mitigating factors and thereupon resentenced respondent to death.[2] App. 11–16.

On direct appeal, the Arizona Supreme Court affirmed the convictions and sentences. *State* v. *Jeffers*, 135 Ariz. 404, 661 P. 2d 1105, cert. denied, 464 U. S. 865 (1983). With regard to respondent's death sentence, the court stated that, under Arizona law, "this court independently reviews the facts that the trial court found established the presence or absence of aggravating and mitigating circumstances, and we determine for ourselves if the latter outweigh the former when we find both to be present." 135 Ariz., at 428, 661 P. 2d, at 1129 (citations omitted). Applying this standard, the court reversed the trial court's finding that respondent "knowingly created a grave risk of death to another person . . . in addition to the victim of the offense," Ariz. Rev. Stat. Ann. § 13–703(F)(3) (1989).

The court then reviewed the trial court's finding that respondent "committed the offense in an especially heinous, cruel or depraved manner," § 13–703(F)(6). The court noted that it had interpreted and applied this provision in light of the dictionary definitions of the words used:

> "The element of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions. 'Heinous' means 'hatefully or shockingly evil; grossly bad'; 'cruel' means 'disposed to inflict pain esp. in a wanton, insensate or vindictive manner; sadistic'; and 'de-

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[2] Arizona Rev. Stat. Ann. § 13–703(E) (1989) provides:

"E. In determining whether to impose a sentence of death or life imprisonment without possibility of release on any basis . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency."

> praved' means 'marked by debasement, corruption, perversion or deterioration.'" 135 Ariz., at 429, 661 P. 2d, at 1130 (citations omitted).

Independently reviewing the evidence, the court concluded that the State had failed to prove the element of cruelty beyond a reasonable doubt:

> "There was no evidence that the victim suffered any pain. It appears from the record that after the injection of heroin, the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not 'cruel' for purposes of A. R. S. § 13–703(F)(6)." *Id.*, at 429, 661 P. 2d, at 1130.

The court found, however, that "the events surrounding the murder itself support the trial court's finding that the murder was 'especially heinous . . . and depraved.'" *Id.*, at 430, 661 P. 2d, at 1131. The court noted that it had recently delineated factors to be considered in determining whether the offense was committed in a heinous or depraved manner and that the infliction of gratuitous violence on the victim was one factor. See *ibid.* (citing *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983), and *State* v. *Ceja*, 126 Ariz. 35, 612 P. 2d 491 (1980)). The court then observed that, in the instant case, "the defendant climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding." 135 Ariz., at 430, 661 P. 2d, at 1131. The court further noted that the apparent relish with which the defendant commits the murder was another factor. *Ibid.* (citing *State* v. *Bishop*, 127 Ariz. 531, 622 P. 2d 478 (1980)). Finding that "while Jeffers was beating the victim he called her 'a bitch and a dirty snitch' and with each striking blow said, 'This one is for so and so. [naming several names],'" the court concluded: "This evidences the relish with which [respondent] committed the murder. In light of these prior decisions and

the *Gretzler* considerations, we find that the remarks made by [respondent], while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner." 135 Ariz., at 430, 661 P. 2d, at 1131.

The court then rejected respondent's contention that the "especially heinous, cruel or depraved" aggravating circumstance, as construed and applied by the court, was unconstitutionally broad. Relying on its decision in *State* v. *Gretzler*, *supra*, the court held that "[e]ach element—cruel, heinous, and depraved—has been narrowly defined and construed . . . to meet constitutional standards." 135 Ariz., at 430, 661 P. 2d, at 1131. The court explained:

> "We have been insistent that the murder be *especially* cruel or *especially* depraved before [§ 13–703(F)(6)] would apply. We have clearly defined the terms and have delineated factors to guide us in determining if the crime was indeed committed in such a manner. . . . Further the case law reveals that § (F)(6) is not applicable to any and all murders, this court has narrowly limited its applicability to cases which stand apart from the norm." *Ibid.* (citations omitted).

Finally, based on its own review of the evidence, the court affirmed the trial court's determinations that no mitigating factors existed that were sufficiently substantial to call for leniency and that the factors in mitigation did not outweigh the aggravating circumstances. *Id.*, at 431–432, 661 P. 2d, at 1132–1133. The court concluded that respondent's death sentence was not disproportionate to the sentence imposed in similar cases and that "[w]e have reviewed the entire record pursuant to A. R. S. § 13–4035 and found no fundamental error. In our independent determination we found one aggravating factor—that the offense was committed in an especially heinous and depraved manner—and no mitigating factors sufficiently substantial to call for leniency." *Id.*, at 432, 661 P. 2d, at 1133.

Respondent then petitioned for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging, among other claims, that Arizona's interpretation of its "especially heinous . . . or depraved" aggravating circumstance was unconstitutionally overbroad and vague. The District Court reiterated that, under Arizona law, "[a] murder that is especially heinous and depraved includes the infliction of gratuitous violence upon the victim and the indication that the defendant committed the crime with relish." *Jeffers* v. *Ricketts*, 627 F. Supp. 1334, 1360 (Ariz. 1986) (citations omitted). The District Court then noted:

> "The evidence in this case indicates that the victim, Penny, had either taken or was injected by Jeffers with such a sufficiently large dose of heroin that she lost consciousness. Even after she lost consciousness, Jeffers injected her with more heroin. When this did not kill her, he attempted to strangle her with a belt and finally accomplished his intended purpose by strangulation with his hands. He then required the eyewitness, at gun point, to perform the same acts on the corpse while he took pictures. He then climbed on top of the corpse and inflicted blows to the face. While striking the corpse, he stated that each blow was for one of the persons that Jeffers believed Penny to have been responsible for their arrest due to narcotic trafficking activities with Jeffers. He then pulled the corpse across the floor to the shower where it remained for three days." *Ibid.*

Based on these facts, the court rejected respondent's vagueness and overbreadth challenge to the "especially heinous . . . or depraved" aggravating circumstance. *Ibid.*

A divided panel of the Court of Appeals for the Ninth Circuit vacated respondent's death sentence on the ground that the "especially heinous . . . or depraved" circumstance was unconstitutionally vague as applied to him. *Jeffers* v. *Ricketts*, 832 F. 2d 476, 482–486 (1987). As an initial matter, the Court of Appeals agreed with the District Court that the

subsection (F)(6) aggravating circumstance was not unconstitutionally vague on its face. *Id.*, at 482 (citing *Chaney* v. *Lewis*, 801 F. 2d 1191, 1194–1196 (CA9 1986), cert. denied, 481 U. S. 1023 (1987)).

The Court of Appeals then held, however, that "[w]hile *Chaney* establishes that the Arizona statute is not void on its face and is capable of constitutional application, it naturally does not answer the question whether the Arizona statute was constitutionally applied to Jeffers in this case." 832 F. 2d, at 482. Reviewing a number of Arizona Supreme Court cases defining and applying the "especially heinous . . . or depraved" circumstance, the Court of Appeals compared the facts of those cases to the facts of this case and concluded that "the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers." *Id.*, at 485. The Court of Appeals therefore struck down respondent's death sentence as arbitrary: "To apply the standard of especial heinousness and depravity to Jeffers' case when the facts do not permit it is arbitrary or capricious, and is therefore an unconstitutional application of the standard. . . . Arizona's existing standard . . . cannot be extended to Jeffers' case without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Id.*, at 486 (citing *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980)). The dissenting member of the panel maintained that "the majority [was] doing little more than second-guessing the Arizona Supreme Court's interpretation of facts that quite reasonably fit within the statutory definition of aggravating circumstances." 832 F. 2d, at 487.

We granted certiorari, *Ricketts* v. *Jeffers*, 493 U. S. 889 (1989), and now reverse.

II

Petitioners contend that this case presents the question whether a federal court may make a *de novo* review of the evidence supporting a state court's finding of a facially con-

stitutional aggravating circumstance. Respondent maintains that this case presents only the question whether the Court of Appeals correctly held that Arizona's construction of the subsection (F)(6) aggravating circumstance in this case contravened this Court's decisions in *Godfrey* v. *Georgia*, *supra*, and *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). We begin our analysis with respondent's contention.

A

Our capital punishment doctrine is rooted in the principle that "'[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed.'" *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (quoting *Furman* v. *Georgia*, 408 U. S. 238, 310 (1972) (Stewart, J., concurring)); see also *Furman*, *supra*, at 313 (WHITE, J., concurring) (invalidating capital punishment statute where "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not"). Accordingly, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, *supra*, at 189.

This principle requires a State to "channel the 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*, *supra*, at 428 (footnotes omitted). A State's definitions of its aggravating circumstances—those circumstances that make a criminal defendant "eligible" for the death penalty—therefore play a significant role in channeling the sentencer's discretion. The Court in *Gregg*, for example, held that Georgia's "outrageously or wantonly vile" aggravat-

ing circumstance, Ga. Code Ann. § 27–2534.1(b)(7) (Supp. 1975) ("outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"), was not unconstitutionally vague because the Georgia courts could give it a narrowing construction. See 428 U. S., at 201 (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Although "arguabl[y] . . . any murder involves depravity of mind or an aggravating battery," there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction"); see also *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (upholding Florida's "especially heinous, atrocious or cruel" aggravating circumstance, Fla. Stat. Ann. § 921.141(5)(h) (Supp. 1976–1977), on the ground that the Supreme Court of Florida had restricted the circumstance to include only "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim'").

In *Godfrey* v. *Georgia*, *supra*, however, a plurality of the Court held that although the Georgia Supreme Court had adopted a narrowing construction of Georgia's subsection (b)(7) aggravating circumstance, the death sentence at issue could not stand because no evidence existed that the state courts had applied the narrowing construction to the facts of that case. 446 U. S., at 432 ("The circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself" in the cases adopting the narrowing construction). Because the Georgia courts had not applied the narrowing construction, the plurality considered whether the Georgia Supreme Court, in affirming the death sentence, had nevertheless applied a constitutional construction of the subsection (b)(7) aggravating circumstance. *Id.*, at 432–433. The plurality concluded that the state court had not, because "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433.

We have reiterated the general principle that aggravating circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not. See *Spaziano* v. *Florida*, 468 U. S. 447, 460 (1984) ("If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder") (footnote omitted); see also *Barclay* v. *Florida*, 463 U. S. 939, 960 (1983) (STEVENS, J., concurring in judgment) ("A constant theme of our cases—from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently *Zant*—has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner"); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244–246 (1988).

Indeed, in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), we applied the teachings of *Godfrey* to hold that the Oklahoma courts had not construed Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance in a manner sufficient "to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." 486 U. S., at 364. We concluded that the Oklahoma court's "conclusion that on th[e] facts [of the case] the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." *Ibid.*

Respondent's reliance on *Godfrey* and *Cartwright*, however, does not yield the result he seeks. Unlike in *Godfrey*, there is no dispute in this case that the Arizona Supreme Court applied its narrowing construction of Arizona's subsec-

tion (F)(6) aggravating circumstance to the facts of respondent's case. See *State* v. *Jeffers*, 135 Ariz., at 429–430, 661 P. 2d, at 1130–1131. More important, the Court of Appeals noted that the subsection (F)(6) aggravating circumstance, as interpreted by the Arizona courts, was not unconstitutionally vague on its face. See 832 F. 2d, at 482 (citing *Chaney* v. *Lewis*, 801 F. 2d, at 1194–1196). "The Arizona Supreme Court appears to have sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions. The court has defined each of the factors set forth in section 13–703(F)(6). These definitions have been applied consistently." *Chaney*, *supra*, at 1195 (citations and quotations omitted).

Even had the Court of Appeals not so held, we resolved any doubt about the matter in *Walton* v. *Arizona*, *ante*, p. 639, where we upheld, against a vagueness challenge, the precise aggravating circumstance at issue in this case. See *ante*, at 652–655. Our holding in *Walton*, which disposes of respondent's claim that Arizona has not construed its subsection (F)(6) aggravating circumstance in a constitutionally narrow manner, bears repeating here:

> "Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. Nor can we fault the state court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing." *Ante*, at 655 (citation omitted).

Walton therefore squarely forecloses any argument that Arizona's subsection (F)(6) aggravating circumstance, as construed by the Arizona Supreme Court, fails to "channel the

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*, 446 U. S., at 428 (footnotes omitted).

The dissent's suggestion that our reliance on *Walton* is misplaced is without merit. We granted certiorari in *Walton* to decide "[w]hether Arizona's 'especially heinous, cruel or depraved' aggravating circumstance, as interpreted by the Arizona courts, fails to channel the sentencer's discretion as required by the Eighth Amendment," Brief for Petitioner in *Walton* v. *Arizona*, O. T. 1989, No. 88–7351, p. i, and our judgment in that case plainly rested on a negative answer to that question. See *ante*, at 652–656; *ante*, at 674 (SCALIA, J., concurring in part and concurring in judgment); see also *ante*, at 692–699 (BLACKMUN, J., dissenting) (discussing vagueness of the state courts' construction of the "especially heinous . . . or depraved" aggravating circumstance). We decline the dissent's apparent invitation to reconsider arguments addressed and rejected in a decision announced only today.

B

In light of the Court of Appeals' rejection of respondent's facial challenge, respondent defends the decision below on the ground that, even if Arizona has adopted a constitutionally narrow construction of its subsection (F)(6) aggravating circumstance, and even if the Arizona Supreme Court applied that narrowing construction to the facts of his case, the aggravating circumstance may nevertheless be vague "as applied" to him. We rejected an identical claim in *Walton*, however, and the conclusion we reached in *Walton* applies with equal force in this case:

> "Walton nevertheless contends that the heinous, cruel, or depraved factor has been applied in an arbitrary manner and, as applied, does not distinguish his case from cases in which the death sentence has not been imposed. In effect Walton challenges the proportionality review of

> the Arizona Supreme Court as erroneous and asks us to overturn it. This we decline to do, for we have just concluded that the challenged factor has been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. This being so, proportionality review is not constitutionally required, and we 'lawfully may presume that [Walton's] death sentence was not "wantonly and freakishly" imposed—and thus that the sentence is not disproportionate within any recognized meaning of the Eighth Amendment.' *McCleskey* v. *Kemp*, 481 U. S. 279, 306, 308 (1987); *Pulley* v. *Harris*, 465 U. S. 37, 43 (1984). Furthermore, the Arizona Supreme Court plainly undertook its proportionality review in good faith and found that Walton's sentence was proportional to the sentences imposed in cases similar to his. The Constitution does not require us to look behind that conclusion." *Ante*, at 655–656.

Our decision in *Walton* thus makes clear that if a State has adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the State has applied that construction to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty," *Cartwright*, 486 U. S., at 362, has been satisfied. Apart from its analysis of Arizona's subsection (F)(6) cases to determine whether the aggravating circumstance was facially valid—*i. e.*, whether the Arizona courts had given a sufficiently narrow limiting construction to the circumstance—the Court of Appeals in this case therefore erred in conducting a *de novo*, case-by-case comparison of the facts of those cases with the facts of the instant case. See *McCleskey* v. *Kemp*, 481 U. S. 279, 306–307 (1987) ("[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation by demonstrating that

other defendants who may be similarly situated did *not* receive the death penalty").

C

In light of our rejection of respondent's constitutional challenge to Arizona's "especially heinous . . . or depraved" aggravating circumstance, see *Walton*, respondent's contention—that the Arizona Supreme Court's application of its narrowing construction to the facts of his case nevertheless failed to distinguish his case from cases in which the court did not find the aggravating circumstance—reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of his case. Because federal habeas corpus relief does not lie for errors of state law, see, *e. g.*, *Pulley* v. *Harris*, 465 U. S. 37, 41 (1984); *Rose* v. *Hodges*, 423 U. S. 19, 21–22 (1975) *(per curiam)*, federal habeas review of a state court's application of a constitutionally narrowed aggravating circumstance is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. Cf. *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 642, 643 (1974) (absent a specific constitutional violation, federal habeas review of trial error is limited to whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process").

In making such a determination, respect for a state court's findings of fact and application of its own law counsels against the sort of *de novo* review undertaken by the Court of Appeals in this case. Cf. 832 F. 2d, at 484 ("Illumined . . . by the case examples furnished by the Arizona Supreme Court, [the "especially heinous . . . or depraved" standard] seems to call for conduct or attitudes more shocking than those exhibited by Jeffers"). Where the issue is solely whether a state court has properly found the existence of a constitutionally narrowed aggravating circumstance, we have never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess

its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language." *Godfrey*, 446 U. S., at 450 (WHITE, J., dissenting) (footnote omitted). See *Barclay*, 463 U. S., at 947 (plurality opinion) (review of state court findings of aggravating circumstances is "limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution"); *id.*, at 968 (STEVENS, J., concurring in judgment) ("It is not our role to reexamine the trial court's findings of fact, which have been affirmed by the Florida Supreme Court. Assuming those facts to be true, there is no federal constitutional infirmity in these two findings of statutory aggravating circumstances").

Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in *Jackson* v. *Virginia*, 443 U. S. 307 (1979). We held in *Jackson* that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of *In re Winship*, 397 U. S. 358 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U. S., at 319 (citation omitted); see also *id.*, at 324 ("We hold that in a challenge to a state criminal conviction brought under 28 U. S. C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:

> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Id.*, at 319 (footnote omitted).

These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances. Although aggravating circumstances are not "elements" of any offense, see *Walton*, *ante*, at 648–649, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty. Like findings of fact, state court findings of aggravating circumstances often require a sentencer to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, *supra*, at 319. See Ariz. Rev. Stat. Ann. § 13–703(F) (1989) (listing aggravating circumstances); cf. 28 U. S. C. § 2254(d) (federal courts in habeas corpus proceedings must generally accord a presumption of correctness to a state court's factual findings). The Arizona Supreme Court's narrowing construction of the subsection (F)(6) aggravating circumstance, for example, requires Arizona courts to determine whether the victim suffered physical pain or mental distress and to assess the mental state and attitude of the perpetrator as reflected by his words and actions. See, *e. g.*, *State* v. *Carriger*, 143 Ariz. 142, 160, 692 P. 2d 991, 1009 (1984) (discussing narrowing construction of "'cruel[ty]'" and "'heinous and depraved'"), cert. denied, 471 U. S. 1111 (1985). Even if a determination under Arizona's

narrowing construction could be characterized as a "mixed" question of law and fact, cf. *Sumner* v. *Mata*, 455 U. S. 591, 597 (1982) *(per curiam)* (declining to apply § 2254(d)'s presumption of correctness to mixed questions of law and fact), any such determination would nevertheless remain a question of state law, errors of which are not cognizable in federal habeas proceedings.

Moreover, a federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence, for the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case—including a *de novo* finding by an appellate court that a particular offense is "especially heinous . . . or depraved"—is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Indeed, respondent agrees that "a state court's 'especially heinous . . . or depraved' finding, *insofar as it is a matter of state law*, is reviewable by the federal courts only under the 'rational factfinder' rule of *Jackson* v. *Virginia*." Brief for Respondent 95–96 (emphasis added; footnote omitted).

Applying the *Jackson* standard in this case, we hold that a rational factfinder could have found that respondent both relished the crime and inflicted gratuitous violence on the victim. Given the evidence that "while Jeffers was beating the [dead] victim he called her 'a bitch and a dirty snitch' and with each striking blow said, 'This one is for so and so. [naming several names],'" *State* v. *Jeffers*, 135 Ariz., at 430, 661 P. 2d, at 1131, we think that the Arizona Supreme Court's finding that respondent had relished the killing is one that a rational factfinder could have made. Moreover, the Arizona Supreme Court's finding that respondent had inflicted gratu-

itous violence is rationally supported by the evidence that respondent "climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding," *ibid.* In light of the Arizona Supreme Court's narrowing construction of the "especially heinous . . . or depraved" aggravating circumstance, see *State* v. *Gretzler*, 135 Ariz., at 52–53, 659 P. 2d, at 11–12 (listing factors), the Arizona Supreme Court could reasonably have concluded that respondent committed the murder in an "especially heinous . . . or depraved manner."

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of JUSTICE BRENNAN, see *ante*, p. 674.]

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

Seeking habeas corpus relief in the United States Court of Appeals for the Ninth Circuit, respondent Jimmie Wayne Jeffers raised two challenges to Arizona's "especially heinous . . . or depraved" aggravating circumstance. Ariz. Rev. Stat. Ann. § 13–703(F)(6) (1989) ((F)(6) circumstance or factor).[1] First, Jeffers contended that the Arizona Supreme

[1] The (F)(6) circumstance applies when the sentencer finds that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner." In the present case, the Arizona Supreme Court found that cruelty had not been proved because "[t]here was no evidence that the victim suffered any pain." *State* v. *Jeffers*, 135 Ariz. 404, 429, 661 P. 2d 1105, 1130 (1983). The court did find that the murder was "heinous" and "depraved," and the adequacy of that finding is the issue in this case. The Arizona Supreme Court disagreed with the trial court's determination that Jeffers had "knowingly created a grave risk of death to another person or persons in addition to the victim of the offense," Ariz. Rev. Stat. Ann. § 13–703(F)(3) (1989). See 135 Ariz., at 428–429, 661 P. 2d, at 1129–1130. Consequently, Jeffers' sentence of death rests entirely on the (F)(6) factor.

Court has failed to articulate a constitutionally sufficient limiting construction of the (F)(6) circumstance. In the alternative, Jeffers argued that, even if a suitable limiting construction had been developed, its application to *his* case failed to satisfy constitutional requirements. The Court of Appeals, deeming itself bound by Circuit precedent, rejected respondent's first contention. *Jeffers* v. *Ricketts*, 832 F. 2d 476, 482 (1987), citing *Chaney* v. *Lewis*, 801 F. 2d 1191, 1194–1196 (CA9 1986), cert. denied, 481 U. S. 1023 (1987). With respect to the second contention, however, the court concluded that the standard enunciated by the Arizona Supreme Court "seems to call for conduct or attitudes more shocking than those exhibited by Jeffers," 832 F. 2d, at 484, and that "[b]ecause we conclude that the standard of heinousness and depravity delineated in prior Arizona cases cannot be applied in a principled manner to Jeffers, his death sentence must be struck down as arbitrary." *Id.*, at 485.

The State then filed a petition for rehearing and rehearing en banc. The panel indicated that its ruling on the rehearing petition would be deferred "'pending further decision of this court, sitting *en banc*, in *Adamson* v. *Ricketts*.'" Order of March 30, 1988, quoted in Brief for Respondent 21. Several months later the en banc court issued its decision in *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988), cert. pending, No. 88–1553. After exhaustive analysis of the relevant Arizona precedents, the en banc court concluded:

> "[T]he (F)(6) circumstance has not been given a sufficiently narrow construction by the Arizona Supreme Court such that its application will be kept within identifiable boundaries. Among the more than fifty cases in which an (F)(6) finding was appealed, we are unable to distinguish rationally those cases in which the Arizona Supreme Court upheld the finding from the few in which it did not. Because neither the legislative standard nor the case law has properly channeled decisionmaking on the imposition of the 'especially heinous, cruel or de-

praved' aggravating circumstance, we find that this circumstance has been arbitrarily and capriciously applied by the Arizona courts." *Id.*, at 1038.[2]

The Court of Appeals subsequently denied the State's request for rehearing in Jeffers' case.

As respondent in this Court, Jeffers defends the judgment of the Court of Appeals on the grounds that no satisfactory limiting construction of the (F)(6) circumstance can be derived from the Arizona precedents, and, alternatively, that if such a construction does exist, it was improperly applied in his case.[3] Jeffers' first claim is logically antecedent to the second; it raises an issue of greater general importance, and, given the decision of the en banc Court of Appeals in *Adamson*, it can hardly be regarded as insubstantial. The Court today, however, simply refuses to discuss the merits of respondent's broad challenge to the (F)(6) circumstance; in lieu of analysis, it relies on a single sentence of dictum in an opin-

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[2] Eleven judges sat on the en banc panel in *Adamson*. Seven judges concluded that none of the three terms ("heinous," "cruel," or "depraved") in the (F)(6) circumstance had been construed by the Arizona Supreme Court in a manner that satisfied constitutional requirements. 865 F. 2d, at 1036. The other four judges argued that the state court had announced a satisfactory construction of the word "cruel"; these four declined to express a view as to the adequacy of the Arizona Supreme Court's application of the terms "heinous" and "depraved." *Id.*, at 1058 (opinion concurring and dissenting).

[3] Petitioner contends that Jeffers is not entitled to argue in this Court that the Arizona Supreme Court has failed to articulate a constitutionally sufficient limiting construction of the (F)(6) circumstance. Petitioner argues that the point has been waived, since the Ninth Circuit panel ruled against respondent on this claim and Jeffers did not seek rehearing or cross-petition for certiorari. Reply Brief for Petitioner 4. The majority correctly (though silently) rejects this proposition. There is no basis for the suggestion that respondent should have sought rehearing at the Court of Appeals, or filed a cross-petition here, after he prevailed below. It is well established that respondent may defend the judgment of the Court of Appeals on any ground supported by the record. See, *e. g.*, *Smith* v. *Phillips*, 455 U. S. 209, 215, n. 6 (1982).

ion in another case issued today. Because I believe that Arizona's application of the (F)(6) factor cannot be squared with this Court's governing precedents—and because I regard the majority's approach as a parody of constitutional adjudication—I dissent.

I

This Court consistently has recognized that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983). The application to respondent of Arizona's (F)(6) circumstance can be sustained only if that aggravating factor provides a "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980) (plurality opinion). The majority does not contend that the statutory language, which requires only that the murder be "especially heinous . . . or depraved," is itself sufficiently precise to meet constitutional standards.[4] Rather, the Court refers repeatedly to a "narrowing construction" of the (F)(6) circumstance announced by the Arizona Supreme Court. See, *e. g.*, *ante*, at 776, 780, 783,

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[4] No such contention would be plausible. In *Godfrey* the plurality, considering Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance, concluded that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U. S., at 428–429. In *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), the Court considered Oklahoma's "especially heinous, atrocious, or cruel" aggravating factor. It unanimously concluded: "[T]he language of the Oklahoma aggravating circumstance at issue . . . gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*." *Id.*, at 363–364. The statutory language here is no more precise.

and 784. The Court nowhere states precisely what that narrowing construction is, nor does it examine other Arizona cases to see whether that construction has been consistently applied. The majority suggests, however, that the "narrowing construction" was announced by the Arizona Supreme Court in *State* v. *Gretzler*, 135 Ariz. 42, 659 P. 2d 1, cert. denied, 461 U. S. 971 (1983). See *ante*, at 784. Analysis of the Arizona Supreme Court's opinion in *Gretzler*, and of its relationship to prior Arizona capital cases, belies that characterization.

Prior to *Gretzler*, the Arizona Supreme Court's application of the (F)(6) circumstance was based principally on its decision in *State* v. *Knapp*, 114 Ariz. 531, 562 P. 2d 704 (1977), cert. denied, 435 U. S. 908 (1978), in which the court recited dictionary definitions of each of the statutory terms. "Heinous" was defined as "hatefully or shockingly evil; grossly bad"; "cruel" was defined as "disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic"; and "depraved" was defined as "marked by debasement, corruption, perversion or deterioration." 114 Ariz., at 543, 562 P. 2d, at 716. The court concluded: "What our legislature intended to include as an aggravating circumstance was a killing wherein additional circumstances of the nature enumerated above set the crime apart from the usual or the norm." *Ibid.*

The *Gretzler* court did not suggest that the *Knapp* definitions were insufficient to guide the sentencer's discretion or that further narrowing was required. To the contrary, the court quoted these definitions with approval and stated: "We believe that the statutory phrase 'especially heinous, cruel, or depraved' has been construed in a constitutionally narrow fashion, and has been properly applied in individual cases. A summary of the law which has been developing in the area supports this conclusion." 135 Ariz., at 50, 659 P. 2d, at 9. In explaining what kinds of murders properly would be regarded as "especially heinous . . . or depraved," the court

stated that "[i]n contrast to the emphasis upon the victim's suffering and feelings in the case of cruelty, the statutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions. Our cases have suggested specific factors which lead to a finding of heinousness or depravity." *Id.*, at 51, 659 P. 2d, at 10. Next, drawing on examples from prior Arizona cases, the court identified five factors the presence of which would indicate that a particular killing was "especially heinous . . . or depraved." These factors were (1) "the apparent relishing of the murder by the killer," (2) "the infliction of gratuitous violence on the victim," (3) "the needless mutilation of the victim," (4) "the senselessness of the crime," and (5) "the helplessness of the victim." *Id.*, at 52, 659 P. 2d, at 11. Finally, the court noted: "[W]here no circumstances, *such as the specific factors discussed above*, separate the crime from the 'norm' of first degree murders, we will reverse a finding that the crime was committed in an 'especially heinous, cruel, or depraved manner.'" *Id.*, at 53, 659 P. 2d, at 12 (emphasis added).

The Arizona Supreme Court's opinion in *Gretzler* obviously did *not* announce a "narrowing construction" of the (F)(6) circumstance. The court did not suggest that the standards previously applied were inadequate, or that further constraints on the sentencer's discretion were essential. Instead, the Arizona Supreme Court cited the *Knapp* definitions with approval and then gave *examples* of their application. No matter how vaguely defined an aggravating circumstance is, there will be a finite number of cases in which that circumstance has been applied. It hardly limits the application of that aggravating factor to list those prior decisions, or to provide illustrative examples from among them. I do not see how the Arizona Supreme Court's *description* of the manner in which a vague aggravating factor has been applied can be regarded as the establishment of a constitutionally sufficient narrowing construction.

Nor did the *Gretzler* court narrow the discretion of future sentencers simply by grouping its prior decisions into categories. The use of categories could serve to guide the sentencer *if* (a) the categories themselves are narrow enough that a significant number of homicides will not fall within any of them, and (b) the court indicates that a murder is covered by the aggravating circumstance *only* if it falls within one of the enumerated categories. The Arizona Supreme Court's decision in *Gretzler* satisfies neither of these criteria. Most first-degree murders will fall within at least one of the five categories listed in *Gretzler*—hardly a surprising result, since the *Gretzler* categories were simply descriptive of the prior period during which the *Knapp* definitions had governed the application of this aggravating factor. Since *Gretzler*, moreover, the Arizona Supreme Court has continued to identify additional circumstances that will support the conclusion that a particular murder is "especially heinous . . . or depraved." That fact is also unsurprising. The court in *Gretzler* did not purport to lay down rules for the future; it simply summarized prior case law and indicated that an (F)(6) finding would be proper when "circumstances, *such as the specific factors discussed above*, separate the crime from the 'norm' of first degree murders." 135 Ariz., at 53, 659 P. 2d, at 12 (emphasis added).

The majority does not contend that the *Knapp* definitions furnished constitutionally sufficient guidance to capital sentencers in Arizona prior to *Gretzler*. Just as a reasonable sentencer might conclude that every first-degree murder is "especially heinous, cruel or depraved," see n. 4, *supra*, a reasonable judge could surely believe that all such killings are "hatefully or shockingly evil" or "marked by debasement, corruption, perversion or deterioration."[5] Yet the majority

[5] In 1980, when respondent was sentenced to death by the trial judge, the Arizona Supreme Court had provided no guidance in the application of the (F)(6) circumstance beyond the definitions quoted in *State* v. *Knapp*, 114 Ariz. 531, 562 P. 2d 704 (1977). Respondent's trial-level sentencing

apparently concludes that the Arizona Supreme Court cured the constitutional infirmity by summarizing its prior decisions, reiterating with approval the constitutionally deficient construction relied on previously and pledging to follow the same approach in the future.[6]

The majority undertakes no close examination of *Gretzler* or of other Arizona cases, prior or subsequent. It makes no attempt to explain how the Arizona Supreme Court's construction of the terms "especially heinous . . . or depraved" can be said to satisfy the constitutional requirements announced in this Court's prior decisions. Indeed, the majority's conclusion that the Arizona court has satisfactorily limited the reach of the statutory language is supported by no analysis at all. The Court instead relies on the assertion that "we resolved any doubt about the matter in *Walton* v. *Arizona*, *ante*, p. 639, where we upheld, against a vagueness challenge, the precise aggravating circumstance at issue in this case." *Ante*, at 777.[7] The majority's claim that *Wal-*

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procedure was therefore conducted under an invalid scheme, and I would affirm the judgment below on that ground even if I believed that the Arizona Supreme Court had subsequently announced a valid limiting construction of this aggravating factor. See *Clemons* v. *Mississippi*, 494 U. S. 738, 762–772 (1990) (dissenting opinion).

[6] In describing the kinds of murders that will qualify as "especially heinous . . . or depraved," the Arizona Supreme Court has continued to employ the formulations relied upon in *Knapp*. See, *e. g.*, *State* v. *Fulminante*, 161 Ariz. 237, 254–255, 778 P. 2d 602, 619–620 (1988) (quoting *Knapp* definitions), cert. granted, 494 U. S. 1055 (1990); *State* v. *Beaty*, 158 Ariz. 232, 242, 762 P. 2d 519, 529 (1988) (same), cert. denied, 491 U. S. 910 (1989); *State* v. *Poland*, 144 Ariz. 388, 405, 698 P. 2d 183, 200 (1985) (same); *State* v. *Johnson*, 147 Ariz. 395, 401, 710 P. 2d 1050, 1056 (1985) ((F)(6) finding is appropriate in cases where the killer "acted in such a fashion that his acts set him apart from the 'norm' of first degree murderers").

[7] The majority also places peculiar emphasis on the Court of Appeals' conclusion that the (F)(6) aggravating factor, as construed by the Arizona Supreme Court, is not unconstitutionally vague. See *ante*, at 776–777. It is most unusual for this Court to show deference to the legal conclusion of a Court of Appeals, particularly a conclusion made in the decision under review. And it is simply perverse for this Court to rely upon a Court of

ton involves "the precise aggravating circumstance at issue in this case," however, fundamentally misrepresents the operation of the Arizona statute.

The Arizona Supreme Court consistently has asserted that the terms "heinous," "cruel," and "depraved" "are considered disjunctive; the presence of any one of three factors is an aggravating circumstance." *State* v. *Beaty*, 158 Ariz. 232, 242, 762 P. 2d 519, 529 (1988), cert. denied, 491 U. S. 910 (1989). It is therefore more accurate to characterize the (F)(6) circumstance as three aggravating factors than as one.[8] In *Walton*, the Arizona Supreme Court, in determining that the (F)(6) factor had been established, relied primarily on the conclusion that the murder was especially cruel. Although the court also indicated that the murder was especially depraved, it stated clearly that this conclusion was not necessary to its finding of the (F)(6) circumstance. See *State* v. *Walton*, 159 Ariz. 571, 587–588, 769 P. 2d 1017, 1033–1034 (1989) ("The clear evidence of cruelty is sufficient to sustain the trial judge's finding of that aggravating factor, but we believe that the evidence also supports the finding of depravity"). In affirming Jeffrey Walton's death sentence today, this Court also focuses its attention on the constitutional sufficiency of the Arizona Supreme Court's construction of "cruelty." The Court concludes:

Appeals decision for a proposition that is no longer good law within the Circuit. The majority inexplicably neglects to mention that the panel's conclusion on this point has been superseded by the decision of the en banc court in *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988), in which all seven judges who expressed a view on the question concluded that the Arizona Supreme Court had failed to articulate a constitutionally sufficient narrowing construction of the terms "heinous" and "depraved."

[8] It might be even more accurate to say that the (F)(6) aggravating circumstance includes two distinct concepts: (1) cruelty and (2) heinousness/depravity. The Arizona Supreme Court has made only the most superficial effort to explain the difference between a murder that is "heinous" and a murder that is "depraved." See *Adamson* v. *Ricketts*, 865 F. 2d, at 1034–1035, n. 38.

> "Recognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer. *Nor can we fault the state court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing.*" *Ante*, at 655 (emphasis added).

In the present case, however, the adequacy of the Arizona Supreme Court's construction of "cruelty" is not at issue. That court expressly found that Jeffers' crime was *not* "especially cruel"; its affirmance of the death sentence was based entirely on the conclusion that this murder was especially "heinous" and "depraved." In stating that Arizona has placed constitutionally sufficient limits on the State's "especially heinous . . . or depraved" aggravating factor, today's majority therefore is not in a position to rely, and cannot rely, on either the holding or the analysis of *Walton*. Rather, the majority relies *entirely* on the italicized sentence quoted above—the *only* sentence in the *Walton* opinion that discusses the Arizona Supreme Court's construction of the word "depraved." That sentence is wholly gratuitous: The Arizona Supreme Court's holding in *Walton*, and this Court's affirmance, do not depend upon a determination that Walton's crime was "especially . . . depraved." The opinion in *Walton*, moreover, makes no effort whatsoever to justify its suggestion that the state court's construction of "depravity" is sufficient to meet constitutional standards.

I think it is important that we be frank about what is happening here. The death penalty laws of many States establish aggravating circumstances similar to the one at issue in

this case.[9] Since the statutory language defining these factors does not provide constitutionally adequate guidance, the constitutionality of the aggravating circumstances necessarily depends on the construction given by the State's highest court. We have expressed apparent approval of a limiting construction requiring "torture or serious physical abuse." *Maynard* v. *Cartwright*, 486 U. S. 356, 365 (1988). This Court has not held that this is the only permissible construction of an aggravating circumstance of this kind, but prior to today we have never suggested that the aggravating factor can permissibly be construed in a manner that does not make reference to the suffering of the victim. The decision today will likely result in the execution of numerous inmates, in Arizona[10] and elsewhere, who would not otherwise be put

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[9] One commentator has stated: "Twenty-four states permit imposition of the death penalty based on a finding that the murder was, in some ill-defined way, worse than other murders. The states use a variety of terms to denote this aggravating circumstance, with most statutes containing, either alone or in some combination, the terms 'especially heinous, atrocious, or cruel,' 'depravity of mind,' or 'outrageously vile wanton or inhuman.' These aggravating circumstances . . . have generated more controversy than any other aggravating circumstance. Commentators have universally criticized them as vague, overbroad, and meaningless." Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard, 64 N. C. L. Rev. 941, 943–944 (1986) (footnotes omitted).

[10] In addition to the present case, on at least 12 occasions the Arizona Supreme Court has found that a particular murder was especially heinous and/or depraved but not especially cruel. See *State* v. *Ceja*, 126 Ariz. 35, 39–40, 612 P. 2d 491, 495–496 (1980); *State* v. *Clark*, 126 Ariz. 428, 436–437, 616 P. 2d 888, 896–897, cert. denied, 449 U. S. 1067 (1980); *State* v. *Bishop*, 127 Ariz. 531, 534, 622 P. 2d 478, 481 (1980); *State* v. *Tison*, 129 Ariz. 546, 555, 633 P. 2d 355, 364 (1981), cert. denied, 459 U. S. 882 (1982); *State* v. *Ortiz*, 131 Ariz. 195, 210, 639 P. 2d 1020, 1035 (1981), cert. denied, 456 U. S. 984 (1982); *State* v. *Woratzeck*, 134 Ariz. 452, 457, 657 P. 2d 865, 870 (1982); *State* v. *Zaragoza*, 135 Ariz. 63, 69, 659 P. 2d 22, 28, cert. denied, 462 U. S. 1124 (1983); *State* v. *Harding*, 137 Ariz. 278, 294, 670 P. 2d 383, 399 (1983), cert. denied, 465 U. S. 1013 (1984); *State* v. *Fisher*, 141 Ariz. 227, 252, 686 P. 2d 750, 775, cert. denied, 469 U. S. 1066 (1984); *State*

to death. Yet neither in this case nor in *Walton* has the Court articulated any argument in support of its decision. Nor has the majority undertaken any examination of the way in which this aggravating circumstance has been applied by the Arizona Supreme Court. Instead, the Court relies on a conspicuous bootstrap. Five Members have joined the majority opinion in *Walton*, which in a single sentence asserts without explanation that the majority cannot "fault" the Arizona Supreme Court's construction of the statutory term "depraved." In the present case the same five Members proclaim themselves to be bound by this scrap of dictum. In any context this would be a poor excuse for constitutional adjudication. In a capital case it is deeply disturbing.

It is to some degree understandable that the majority chooses to rely exclusively on the brief and passing dictum in *Walton*. Had the Court examined the range of homicides which the Arizona Supreme Court has held to be "especially heinous . . . or depraved," it could not plausibly have argued that the state court has placed meaningful limits on the application of this aggravating circumstance. My dissent in *Walton* explains in some detail the reasons for its conclusion that this aggravating factor, as defined by the Arizona Supreme Court, fails to satisfy constitutional requirements. The United States Court of Appeals for the Ninth Circuit, sitting en banc, after exhaustive analysis of the relevant state precedents, also concluded that the "especially heinous . . . or depraved" circumstance is unconstitutionally vague. See *Adamson* v. *Ricketts*, 865 F. 2d, at 1031–1039. There is no need to reiterate these arguments here. It is sufficient to

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v. *Villafuerte*, 142 Ariz. 323, 331, 690 P. 2d 42, 50 (1984), cert. denied, 469 U. S. 1230 (1985); *State* v. *Martinez-Villareal*, 145 Ariz. 441, 450–451, 702 P. 2d 670, 679–680, cert. denied, 474 U. S. 975 (1985); *State* v. *Wallace*, 151 Ariz. 362, 367–368, 728 P. 2d 232, 237–238 (1986), cert. denied, 483 U. S. 1011 (1987). In four cases besides the present one, that has been the only aggravating circumstance. See *State* v. *Ceja*, *supra*; *State* v. *Bishop*, *supra*; *State* v. *Villafuerte*, *supra*; *State* v. *Wallace*, *supra*.

note that neither this Court nor the Arizona Supreme Court has attempted to refute that analysis.

Indeed, the constitutional defects in the Arizona Supreme Court's application of the (F)(6) circumstance are illustrated by the state court's conclusion that respondent "relished" the murder, and that this factor supports a finding that the killing was "especially heinous . . . or depraved." The court based its conclusion on testimony indicating that respondent struck the victim several times after she appeared to be dead, that while striking her he called her a "bitch" and a "dirty snitch," and that with each striking blow he said, "This one is for ——," naming several of his friends on whom the victim had informed to the police. 135 Ariz., at 430, 661 P. 2d, at 1131. The Arizona Supreme Court did not explain precisely what it meant by saying that the respondent "relished" his crime. But the evidence does not suggest that Jeffers killed for the sake of killing or found some intrinsic pleasure in the act of murder. Rather, the evidence indicates that respondent killed out of hatred for a particular individual and a desire for revenge. There is a difference.

It may be that a State could rationally conclude that a murder committed out of personal hatred is more reprehensible than is a killing committed for other reasons.[11] But the State of Arizona cannot be said to have arrived at any such conclusion. The Arizona Supreme Court has also held that a murder is "especially heinous . . . or depraved" if it is committed to eliminate a witness, see *State* v. *Correll*, 148 Ariz. 468, 481, 715 P. 2d 721, 734 (1986); *State* v. *Gillies*, 142 Ariz. 564, 570, 691 P. 2d 655, 661 (1984), cert. denied, 470 U. S.

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[11] The identification of particularly blameworthy motives for murder would seem, however, to be more appropriately a task for the legislature than for the State's judiciary. See Rosen, 64 N. C. L. Rev., at 990–991. The codification of an aggravating factor as vaguely defined as the (F)(6) circumstance is in essence an act of legislative abdication, since it requires the state courts to make fundamental policy choices under the guise of "interpreting" the statute.

1059 (1985); *State* v. *Smith*, 141 Ariz. 510, 511–512, 687 P. 2d 1265, 1266–1267 (1984), or if it is "senseless," see *Gretzler*, 135 Ariz., at 52, 659 P. 2d, at 11–12; and the statute itself provides that it shall be an aggravating circumstance if the murder is committed for pecuniary gain. See Ariz. Rev. Stat. Ann. § 13–703(F)(5) (1989).[12] The Arizona Supreme Court has also identified other blameworthy motives which, in the court's view, suggest that a murder is "especially heinous . . . or depraved."[13] Taken together, the decisions of the Arizona Supreme Court hold that a murder will be deemed *especially* blameworthy if it is committed for virtually any reason, or for no reason at all.

The Arizona Supreme Court's decisions dealing with especially improper motives are symptomatic of a larger pattern in that court's construction of the (F)(6) circumstance. At least since *Gretzler*, the court has generally avoided the error of simply recounting the events surrounding a particular crime and then announcing, in conclusory fashion, that the murder was "especially heinous . . . or depraved." Rather, the court typically identifies specific factors to support its conclusion that the aggravating circumstance has been established. And if any one decision is examined in isolation, it may appear that the state court has narrowly construed the (F)(6) circumstance in a manner that satisfies constitutional requirements. The problem is that the Arizona

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[12] The Arizona Supreme Court has construed this aggravating factor as applying whenever "the expectation of financial gain was a cause of the murders." *State* v. *Clark*, 126 Ariz., at 436, 616 P. 2d, at 896. The court in *Clark* rejected the specially concurring justice's position, *id.*, at 437, 616 P. 2d, at 897, that this aggravating circumstance applied only to murders committed by hired killers.

[13] See *State* v. *Martinez-Villareal*, 145 Ariz., at 451, 702 P. 2d, at 680 (murder to demonstrate "manliness" reflects "a manifest disregard for the fundamental principles upon which our society is based"); *State* v. *McCall*, 139 Ariz. 147, 162, 677 P. 2d 920, 935 (1983) ((F)(6) finding supported in part by the fact that the mutilation of the victims' bodies "was designed to be a 'message' to warn other people"), cert. denied, 467 U. S. 1220 (1984).

Supreme Court has identified so many such factors, and has shown itself so willing to add new factors when a perceived need arises, that the body of its precedents places no meaningful limitations on the application of this aggravating circumstance.[14] The constitutional infirmity of the court's approach cannot be recognized through examination of any one opinion. It becomes very apparent upon examination of the relevant decisions taken as a whole. Unfortunately, the inquiry required for an informed assessment of the Arizona Supreme Court's application of this aggravating factor is one that this Court simply refuses to undertake.

II

The majority devotes most of its energy arguing that a federal habeas court, having concluded that a State has adopted

[14] A State might reasonably conclude that a murder is *especially* reprehensible if the victim is 10 years old (because a child is physically vulnerable and has most of his life ahead of him); or 75 years old (because of the respect traditionally accorded to the elderly); or 40 years old (because a person of that age is likely to have others dependent upon him for support). A cogent argument could also be made that the killing of a 21- or 55-year-old victim is especially blameworthy. But while none of these choices would be unreasonable, the State, with a statute of this kind, must choose. If the state court invoked first one argument and then the other, and ultimately found in virtually every case that the age of the victim made the murder "especially heinous . . . or depraved," the aggravating circumstance would be too broad.

Under the approach developed by the majority here and in *Walton*, however, the Arizona Supreme Court with impunity could apply its aggravating circumstance in just such a fashion. If the state court held that the youth of the victim made a particular murder "especially heinous . . . or depraved," this Court presumably would assert that such a construction narrowed the application of the aggravating factor in a manner that satisfied constitutional standards. And if the defendant cited decisions in which the same state court had held that other murders were "especially heinous . . . or depraved" because the victim was 21, 40, 55, or 75 years old, this Court apparently would refuse to read the cases on the ground that the defendant was not entitled to "'challeng[e] the proportionality review of the Arizona Supreme Court.'" See *ante*, at 778 (quoting *Walton*, *ante*, at 655).

a constitutionally sufficient limiting construction of an aggravating circumstance, largely should refrain from engaging in case-specific comparisons between the homicide under review and prior decisions in which the aggravating factor has been found. The Court concludes that since a rational factfinder could have determined that respondent "relished" the murder and engaged in "gratuitous violence," the death sentence must be allowed to stand. I concede that respondent's crime was not plainly distinguishable from the other murders that the Arizona Supreme Court has found to be "especially heinous . . . or depraved." Indeed, my conclusion could hardly be otherwise: having argued that the (F)(6) circumstance has been construed so broadly as to cover virtually every first-degree murder, I could scarcely contend that the court's finding in *this* case was bizarre or aberrational. I, however, do have some brief observations concerning the role of federal habeas courts in reviewing state-court findings of aggravating circumstances.

(1) I think that the majority is wrong in arguing that a state court's application of a valid aggravating circumstance involves a question of state law only. See *ante*, at 780. The statutory aggravating circumstances do perform the state-law function of determining who will be sentenced to death. But the aggravating factors also perform the distinct function of determining which murderers are *eligible* for the death penalty as a matter of federal law. See *Zant* v. *Stephens*, 462 U. S., at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"); *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988). That point is particularly clear in cases like the present one, where the (F)(6) circumstance is the *only* aggravating factor that the Arizona Supreme Court found to exist. If the state court erred in its determination that this aggravating circumstance had been proved, that error is of federal constitutional significance: The defendant who claims

that no aggravating factor has been established is contending that the Eighth Amendment (and not simply state law) prohibits his execution.[15]

(2) As the majority points out, under 28 U. S. C. § 2254(d) "federal courts in habeas corpus proceedings must *generally* accord a presumption of correctness to a state court's factual findings." *Ante*, at 782 (emphasis added). The presumption of correctness does not apply, however, if the habeas petitioner demonstrates "that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U. S. C. § 2254(d)(2).[16] In the present case the trial-level sentencing procedure was conducted under a clearly unconstitutional scheme. See n. 5, *supra*. The relevant factfinder is therefore the Arizona Supreme Court, as the majority appears to acknowledge. See *ante*, at 783 (arguing that "a federal court should adhere to the *Jackson* standard even when reviewing the decision of a state appellate court that has independently reviewed the evidence"). This Court has held that the general presumption of correctness mandated by 28 U. S. C. § 2254(d) is applicable to the factual findings of state appellate courts. *Sumner* v. *Mata*, 449 U. S. 539, 545–547 (1981). The Court has also recognized, however: "[T]here might be instances . . . in which the presumption would not apply to appellate factfinding . . . because appellate factfinding procedures were not 'adequate,' see 28 U. S. C. § 2254(d)(2). For example, the question . . . might in a given case turn on credibility determinations that

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[15] Similarly, the Eighth Amendment prohibits the imposition of a capital sentence unless the defendant is found to have killed, attempted to kill, or intended that a killing take place. *Enmund* v. *Florida*, 458 U. S. 782 (1982). It may be that the laws of many States require a similar finding. But the adequacy of the procedure by which that finding is made is a question of federal as well as state law.

[16] The presumption of correctness is also inapplicable if "the material facts were not adequately developed at the State court hearing," § 2254(d)(3), or if "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6).

could not be accurately made by an appellate court on the basis of a paper record." *Cabana* v. *Bullock*, 474 U. S. 376, 388, n. 5 (1986).

Indeed, in the present case the inadequacy of the Arizona Supreme Court's procedure goes beyond the fact that the court did not see the witnesses and was forced to rely upon a paper record. At the times of respondent's trial and sentencing hearing, and even when his appellate briefs were submitted and oral argument was conducted, respondent had no reason to believe that the sentencer would attach particular importance to its conclusion that the defendant had "relished" the killing and inflicted "gratuitous violence" on the victim after her death.[17] The Arizona Supreme Court's opinion in *Gretzler* was issued 18 days prior to its decision in Jeffers' case—far too late for Jeffers to submit evidence or argument regarding the presence of the *Gretzler* factors.

In the present case there appears to be no dispute regarding the primary facts underlying the Arizona Supreme Court's finding of the (F)(6) circumstance. That is, respondent apparently does not deny that he struck the victim after she was dead or that he cursed her while doing so. But if there were a conflict in the testimony regarding this point, I would not regard the Arizona Supreme Court's factfinding procedures as "adequate" to resolve that conflict.

(3) In determining that Jeffers "relished" his crime and inflicted "gratuitous violence" on the victim, the Arizona Supreme Court did not simply apply determinate standards to a new set of facts. Rather, the assertion that respondent "rel-

[17] The Arizona Supreme Court in *Gretzler* summarized prior Arizona decisions in support of its conclusion that the (F)(6) circumstance would be established if the murderer "relished" the killing or employed "gratuitous violence." But those prior decisions did not use the terms "relish" or "gratuitous violence"; for the most part, they simply recounted the facts of the case and then concluded that the murder was "especially cruel . . . or depraved." Prior to the decision in *Gretzler*, Jeffers had no notice that the *Gretzler* factors would be accorded any particular significance in determining whether the (F)(6) factor had been established.

ished" the killing of Penelope Cheney said as much about the court's understanding of the word "relish" as it did about Jeffers' state of mind at the time of the murder. Thus, despite the prior Ninth Circuit decision holding that the (F)(6) circumstance had been adequately narrowed, the federal court could not properly limit itself to the question whether a rational factfinder might conclude that Jeffers "relished" the killing or employed "gratuitous violence." Rather, the habeas court had both the right and the duty to ask whether the Arizona Supreme Court's construction of the (F)(6) circumstance remained adequate to satisfy the Constitution *in light of its application to the case at hand.* Thus, the habeas court's review in cases of this kind *necessarily* involves a comparison between the case under review and prior state-court decisions applying the aggravating factor—not as a means of determining whether the state court "incorrectly" applied its construction of the statutory terms, but as a means of determining whether the state court's application of its construction to the instant case expands the scope of the aggravating factor in such a way as to make a previously valid limiting construction unconstitutionally broad.

(4) Indeed, I think that a comparative approach is necessary no matter what standard of review the habeas court employs. Even if the state court's finding is reviewed under a "rational factfinder" standard, the majority is wrong to say that the Court of Appeals erred in comparing Jeffers' crime to other cases in which the (F)(6) factor was established. Words like "relish" may be somewhat more precise than are "heinous" and "depraved," but they still are of less than crystalline clarity. A court attempting to apply the *Jackson* standard must ask whether a rational factfinder could believe that Jeffers "relished" the crime *as that term has been construed by the Arizona Supreme Court.* If the Arizona Supreme Court had used the word "relish" to mean one thing in each of its other decisions, and something very different in Jeffers' case, its application to Jeffers would be

arbitrary—even if both meanings could be found in a given dictionary. If the Court of Appeals departed from the "rational factfinder" standard here, it was by requiring *too close* a correlation between this case and others, not simply by employing a comparative approach.

Suppose, for example, that the Arizona Supreme Court had consistently construed the (F)(6) circumstance as requiring "physical abuse," but had found that standard satisfied only in cases where the killer subjected the victim to prolonged, severe physical suffering. Presumably that construction would be valid. See *Maynard* v. *Cartwright*, 486 U. S., at 365. Suppose that the court in a subsequent case found that the (F)(6) factor had been proved when the defendant slapped the victim once and then shot him dead. The defendant, on federal habeas, could raise two related but distinct challenges. First, the defendant might argue that no reasonable factfinder could conclude that a single slap constituted "physical abuse" *as that term had previously been construed by the Arizona Supreme Court.* (This would amount to a contention that the state court had misapplied its own rule.) Alternatively, the defendant might argue that "physical abuse" could no longer be deemed an adequate limiting construction if that phrase was construed as including a single slap. However the challenge was framed, though, the habeas court could not limit itself to the question whether a rational factfinder could conclude that the slap fell within *some* plausible definition of "physical abuse."

III

The majority's discussion of the way in which a federal habeas court should review the application of a valid aggravating circumstance to the facts of a particular case seems to me to be flawed in significant respects. My principal disagreement, however, is with the Court's insistence on addressing the issue. The majority makes no effort to justify its holding that the Arizona Supreme Court has placed con-

stitutionally sufficient limitations on its "especially heinous . . . or depraved" aggravating circumstance. Instead the Court relies entirely on a sentence of dictum from today's opinion in *Walton*—an opinion which itself offers no rationale in support of the Court's conclusion. My dissenting opinion in *Walton* notes the Court's increasing tendency to review the constitutional claims of capital defendants in a perfunctory manner, but the Court's action in this case goes far beyond anything that is there observed.

I dissent.

IDAHO *v.* WRIGHT

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 89–260. Argued April 18, 1990—Decided June 27, 1990

Respondent Wright was charged under Idaho law with two counts of lewd conduct with a minor, specifically her 5½- and 2½-year-old daughters. At the trial, it was agreed that the younger daughter was not "capable of communicating to the jury." However, the court admitted, under Idaho's residual hearsay exception, certain statements she had made to a pediatrician having extensive experience in child abuse cases. The doctor testified that she had reluctantly answered questions about her own abuse, but had spontaneously volunteered information about her sister's abuse. Wright was convicted on both counts, but appealed only from the conviction involving the younger child. The State Supreme Court reversed, finding that the admission of the doctor's testimony under the residual hearsay exception violated Wright's rights under the Confrontation Clause. The court noted that the child's statements did not fall within a traditional hearsay exception and lacked "particularized guarantees of trustworthiness" because the doctor had conducted the interview without procedural safeguards: He failed to videotape the interview, asked leading questions, and had a preconceived idea of what the child should be disclosing. This error, the court found, was not harmless beyond a reasonable doubt.

Held: The admission of the child's hearsay statements violated Wright's Confrontation Clause rights. Pp. 813–827.

(a) Incriminating statements admissible under an exception to the hearsay rule are not admissible under the Confrontation Clause unless the prosecution produces, or demonstrates the unavailability of, the declarant whose statement it wishes to use and unless the statement bears adequate indicia of reliability. The reliability requirement can be met where the statement either falls within a firmly rooted hearsay exception or is supported by a showing of "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U. S. 56. Although it is presumed here that the child was unavailable within the meaning of the Clause, the evidence will be barred unless the reliability requirement is met. Pp. 813–817.

(b) Idaho's residual hearsay exception is not a firmly rooted hearsay exception for Confrontation Clause purposes. It accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might be sufficiently reliable to be admissible at trial,

and thus does not share the same tradition of reliability supporting the admissibility of statements under a firmly rooted hearsay exception. To rule otherwise would require that virtually all codified hearsay exceptions be found to assume constitutional stature, something which this Court has declined to do. *California* v. *Green*, 399 U. S. 149, 155–156. Pp. 817–818.

(c) In determining that "particularized guarantees of trustworthiness" were not shown, the State Supreme Court erred in placing dispositive weight on the lack of procedural safeguards at the interview, since such safeguards may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. Rather, such trustworthiness guarantees must be shown from the totality of those circumstances that surround the making of the statement and render the declarant particularly worthy of belief. As is the case with statements admitted under a firmly rooted hearsay exception, see, *e. g.*, *Green*, *supra*, at 161, evidence possessing "particularized guarantees of trustworthiness" must be so trustworthy that adversarial testing would add little to its reliability. In child abuse cases, factors used to determine trustworthiness guarantees—such as the declarant's mental state and the use of terminology unexpected of a child of similar age—must relate to whether the child was particularly likely to be telling the truth when the statement was made. The State's contention that evidence corroborating a hearsay statement may properly support a finding that the statement bears such trustworthiness guarantees is rejected, since this would permit admission of presumptively unreliable statements, such as those made under duress, by bootstrapping on the trustworthiness of other evidence at trial. That result is at odds with the requirement that hearsay evidence admitted under the Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Also rejected is Wright's contention that the child's statements are *per se* or presumptively unreliable on the ground that the trial court found the child incompetent to testify at trial. The court found only that she was not capable of communicating to the jury and implicitly found that at the time she made the statements she was capable of receiving just impressions of the facts and of relating them truly. Moreover, the Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, 243–244. Pp. 818–825.

(d) In admitting the evidence, the trial court identified only two factors—whether the child had a motive to make up her story and whether, given her age, the statements were of the type that one would expect a child to fabricate—relating to circumstances surrounding the making of

the statements. The State Supreme Court properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which the doctor conducted his interview. Viewing the totality of the circumstances, there is no special reason for supposing that the incriminating statements about the child's own abuse were particularly trustworthy. Her statement about her sister presents a closer question. Although its spontaneity and the change in her demeanor suggest that she may have been telling the truth, spontaneity may be an inaccurate indicator of trustworthiness where there has been prior interrogation, prompting, or manipulation by adults. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Because the State does not challenge the State Supreme Court's determination that the Confrontation Clause error was not harmless beyond a reasonable doubt, this Court will not revisit the issue. Pp. 825–827.

116 Idaho 382, 775 P. 2d 1224, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, STEVENS, and SCALIA, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and BLACKMUN, JJ., joined, *post*, p. 827.

James T. Jones, Attorney General of Idaho, argued the cause for petitioner. With him on the briefs were *John J. McMahon*, Chief Deputy Attorney General, and *Myrna A. I. Stahman*, Deputy Attorney General.

Deputy Solicitor General Bryson argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Michael R. Dreeben*.

Rolf Michael Kehne, by appointment of the Court, 493 U. S. 1067, argued the cause and filed a brief for respondent.*

*A brief of *amici curiae* urging reversal was filed for the Commonwealth of Pennsylvania et al. by *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, and *Marylou Barton*, Chief Deputy Attorney General, *Douglas B. Baily*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *Steve Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pear-*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the admission at trial of certain hearsay statements made by a child declarant to an examining pediatrician violates a defendant's rights under the Confrontation Clause of the Sixth Amendment.

I

Respondent Laura Lee Wright was jointly charged with Robert L. Giles of two counts of lewd conduct with a minor under 16, in violation of Idaho Code § 18–1508 (1987). The alleged victims were respondent's two daughters, one of whom was 5½ and the other 2½ years old at the time the crimes were charged.

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son, Attorney General of Indiana, *Tom Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Joseph Curran, Jr.*, Attorney General of Maryland, *James M. Shannon*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Robert Del Tufo*, Attorney General Designate of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Nicholas Spaeth*, Attorney General of North Dakota, *Robert H. Henry*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Godfrey R. de Castro*, Attorney General of the Virgin Islands, *Mary Sue Terry*, Attorney General of Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Margaret A. Berger* and *Steven R. Shapiro;* and for the National Association of Criminal Defense Lawyers by *Natman Schaye*.

Stephan E. Lawton, *John E. B. Myers*, *Kirk B. Johnson*, and *Thomas R. Finn* filed a brief for the American Professional Society on the Abuse of Children et al. as *amici curiae*.

Respondent and her ex-husband, Louis Wright, the father of the older daughter, had reached an informal agreement whereby each parent would have custody of the older daughter for six consecutive months. The allegations surfaced in November 1986 when the older daughter told Cynthia Goodman, Louis Wright's female companion, that Giles had had sexual intercourse with her while respondent held her down and covered her mouth, App. 47–55; 3 Tr. 456–460, and that she had seen respondent and Giles do the same thing to respondent's younger daughter, App. 48–49, 61; 3 Tr. 460. The younger daughter was living with her parents—respondent and Giles—at the time of the alleged offenses.

Goodman reported the older daughter's disclosures to the police the next day and took the older daughter to the hospital. A medical examination of the older daughter revealed evidence of sexual abuse. One of the examining physicians was Dr. John Jambura, a pediatrician with extensive experience in child abuse cases. App. 91–94. Police and welfare officials took the younger daughter into custody that day for protection and investigation. Dr. Jambura examined her the following day and found conditions "strongly suggestive of sexual abuse with vaginal contact," occurring approximately two to three days prior to the examination. *Id.*, at 105, 106.

At the joint trial of respondent and Giles, the trial court conducted a *voir dire* examination of the younger daughter, who was three years old at the time of trial, to determine whether she was capable of testifying. *Id.*, at 32–38. The court concluded, and the parties agreed, that the younger daughter was "not capable of communicating to the jury." *Id.*, at 39.

At issue in this case is the admission at trial of certain statements made by the younger daughter to Dr. Jambura in response to questions he asked regarding the alleged abuse. Over objection by respondent and Giles, the trial court permitted Dr. Jambura to testify before the jury as follows:

"Q. [By the prosecutor] Now, calling your attention then to your examination of [the younger daughter] on November 10th. What—would you describe any interview dialogue that you had with [her] at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

"A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

"I started out with basically, 'Hi, how are you,' you know, 'What did you have for breakfast this morning?' Essentially a few minutes of just sort of chitchat.

"Q. Was there response from [the daughter] to that first—those first questions?

"A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, 'Well, how are things at home,' you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, 'Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?' And again we then established what was meant by pee-pee, it was a generic term for genital area.

"Q. Before you get into that, what was, as best you recollect, what was her response to the question 'Do you play with daddy?'

"A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

"Q. And 'Does daddy play with you?' Was there any response?

"A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

"Q. And then what did you say and her response?

"A. When I asked her 'Does daddy touch you with his pee-pee,' she did admit to that. When I asked, 'Do you touch his pee-pee,' she did not have any response.

"Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

"A. Yes.

"Q. What did you observe?

"A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

"Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

"A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur." *Id.*, at 121–123.

On cross-examination, Dr. Jambura acknowledged that a picture that he drew during his questioning of the younger daughter had been discarded. *Id.*, at 124. Dr. Jambura also stated that although he had dictated notes to summarize the conversation, his notes were not detailed and did not record any changes in the child's affect or attitude. *Id.*, at 123–124.

The trial court admitted these statements under Idaho's residual hearsay exception, which provides in relevant part:

"Rule 803. Hearsay exceptions; availability of declarant immaterial.—The following are not excluded by the

hearsay rule, even though the declarant is available as a witness.

. . . . .

"(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Idaho Rule Evid. 803(24).

Respondent and Giles were each convicted of two counts of lewd conduct with a minor under 16 and sentenced to 20 years' imprisonment. Each appealed only from the conviction involving the younger daughter. Giles contended that the trial court erred in admitting Dr. Jambura's testimony under Idaho's residual hearsay exception. The Idaho Supreme Court disagreed and affirmed his conviction. *State* v. *Giles*, 115 Idaho 984, 772 P. 2d 191 (1989). Respondent asserted that the admission of Dr. Jambura's testimony under the residual hearsay exception nevertheless violated her rights under the Confrontation Clause. The Idaho Supreme Court agreed and reversed respondent's conviction. 116 Idaho 382, 775 P. 2d 1224 (1989).

The Supreme Court of Idaho held that the admission of the inculpatory hearsay testimony violated respondent's federal constitutional right to confrontation because the testimony did not fall within a traditional hearsay exception and was based on an interview that lacked procedural safeguards. *Id.*, at 385, 775 P. 2d, at 1227. The court found Dr. Jambura's interview technique inadequate because "the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and,

blatantly leading questions were used in the interrogation." *Ibid.* The statements also lacked trustworthiness, according to the court, because "this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." *Ibid.* Noting that expert testimony and child psychology texts indicated that children are susceptible to suggestion and are therefore likely to be misled by leading questions, the court found that "[t]he circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not [audio or video] recorded, can never be fully assessed." *Id.*, at 388, 775 P. 2d, at 1230. The court concluded that the younger daughter's statements lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause and that therefore the trial court erred in admitting them. *Id.*, at 389, 775 P. 2d, at 1231. Because the court was not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred, the court reversed respondent's conviction on the count involving the younger daughter and remanded for a new trial. *Ibid.*

We granted certiorari, 493 U. S. 1041 (1990), and now affirm.

II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause. See, *e. g.*, *Mattox* v. *United States*, 156 U. S. 237, 243 (1895); *Pointer* v. *Texas*, 380 U. S. 400, 407 (1965).

We reaffirmed only recently that "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" *Bourjaily* v. *United States*, 483 U. S. 171, 182 (1987) (quoting *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980)); see also *Maryland* v. *Craig*, *post*, at 847 ("[T]he [Confrontation] Clause permits, where necessary, the admission of certain hearsay statements against a defendant despite the defendant's inability to confront the declarant at trial").

Although we have recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. See *California* v. *Green*, 399 U. S. 149, 155–156 (1970); *Dutton* v. *Evans*, 400 U. S. 74, 86 (1970) (plurality opinion); *United States* v. *Inadi*, 475 U. S. 387, 393, n. 5 (1986). The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. See, *e. g.*, *Green*, *supra*, at 155–156; *Bruton* v. *United States*, 391 U. S. 123 (1968); *Barber* v. *Page*, 390 U. S. 719 (1968); *Pointer*, *supra*.

In *Ohio* v. *Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. 448 U. S., at 65. We noted that the Confrontation Clause "operates in two separate ways to restrict the range of admissible hearsay." *Ibid.* "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ibid.* (citations omitted). Second, once a witness is shown to be unavailable, "his statement is admissible only

if it bears adequate 'indicia of reliability.' 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." *Id.*, at 66 (footnote omitted); see also *Mancusi* v. *Stubbs*, 408 U. S. 204, 213 (1972).

Applying this general analytical framework to the facts of *Roberts*, *supra*, we held that the admission of testimony given at a preliminary hearing, where the declarant failed to appear at trial despite the State's having issued five separate subpoenas to her, did not violate the Confrontation Clause. 448 U. S., at 67–77. Specifically, we found that the State had carried its burden of showing that the declarant was unavailable to testify at trial, see *Barber*, *supra*, at 724–725; *Mancusi*, *supra*, at 212, and that the testimony at the preliminary hearing bore sufficient indicia of reliability, particularly because defense counsel had had an adequate opportunity to cross-examine the declarant at the preliminary hearing, see *Mancusi*, *supra*, at 216.

We have applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation Clause and hearsay issues. In *United States* v. *Inadi*, *supra*, we held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator and that therefore the Confrontation Clause did not prohibit the admission of such statements, even though the Government had not shown that the declarant was unavailable to testify at trial. 475 U. S., at 394–400. In *Bourjaily* v. *United States*, *supra*, we held that such statements also carried with them sufficient "indicia of reliability" because the hearsay exception for co-conspirator statements was a firmly rooted one. 483 U. S., at 182–184.

Applying the *Roberts* approach to this case, we first note that this case does not raise the question whether, before a child's out-of-court statements are admitted, the Confron-

tation Clause requires the prosecution to show that a child witness is unavailable at trial—and, if so, what that showing requires. The trial court in this case found that respondent's younger daughter was incapable of communicating with the jury, and defense counsel agreed. App. 39. The court below neither questioned this finding nor discussed the general requirement of unavailability. For purposes of deciding this case, we assume without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause.

The crux of the question presented is therefore whether the State, as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause, has carried its burden of proving that the younger daughter's incriminating statements to Dr. Jambura bore sufficient indicia of reliability to withstand scrutiny under the Clause. The court below held that, although the trial court had properly admitted the statements under the State's residual hearsay exception, the statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate." 116 Idaho, at 389, 775 P. 2d, at 1231. The State asserts that the court below erected too stringent a standard for admitting the statements and that the statements were, under the totality of the circumstances, sufficiently reliable for Confrontation Clause purposes.

In *Roberts*, we suggested that the "indicia of reliability" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception," or where it is supported by "a showing of particularized guarantees of trustworthiness." 448 U. S., at 66; see also *Bourjaily*, *supra*, at 183 ("[T]he co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court's holding in *Roberts*, a court need not independently inquire into the reliability of such statements"); *Lee* v. *Illinois*, 476 U. S. 530, 543 (1986)

("[E]ven if certain hearsay evidence does not fall within 'a firmly rooted hearsay exception' and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness' ") (footnote and citation omitted).

We note at the outset that Idaho's residual hearsay exception, Idaho Rule Evid. 803(24), under which the challenged statements were admitted, App. 113–115, is not a firmly rooted hearsay exception for Confrontation Clause purposes. Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements. See *Mattox*, 156 U. S., at 243; *Roberts*, 448 U. S., at 66; *Bourjaily*, 483 U. S., at 183; see also *Lee*, *supra*, at 552 (BLACKMUN, J., dissenting) ("[S]tatements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted). The residual hearsay exception, by contrast, accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial. See, *e. g.*, Senate Judiciary Committee's Note on Fed. Rule Evid. 803(24), 28 U. S. C. App., pp. 786–787; E. Cleary, McCormick on Evidence § 324.1, pp. 907–909 (3d ed. 1984). Hearsay statements admitted under the residual exception, almost by definition, therefore do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception. Moreover, were we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume con-

stitutional stature, a step this Court has repeatedly declined to take. See *Green*, 399 U. S., at 155–156; *Evans*, 400 U. S., at 86–87 (plurality opinion); *Inadi*, 475 U. S., at 393, n. 5; see also *Evans*, *supra*, at 94–95 (Harlan, J., concurring in result).

The State in any event does not press the matter strongly and recognizes that, because the younger daughter's hearsay statements do not fall within a firmly rooted hearsay exception, they are "presumptively unreliable and inadmissible for Confrontation Clause purposes," *Lee*, *supra*, at 543, and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness," *Roberts*, *supra*, at 66. The court below concluded that the State had not made such a showing, in large measure because the statements resulted from an interview lacking certain procedural safeguards. The court below specifically noted that Dr. Jambura failed to record the interview on videotape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing. See 116 Idaho, at 388, 775 P. 2d, at 1230.

Although we agree with the court below that the Confrontation Clause bars the admission of the younger daughter's hearsay statements, we reject the apparently dispositive weight placed by that court on the lack of procedural safeguards at the interview. Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial. The procedural requirements identified by the court below, to the extent regarded as conditions precedent to the admission of child hearsay statements in child sexual abuse cases, may in many instances be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes. See, *e. g.*, *Nelson* v. *Farrey*, 874 F. 2d 1222, 1229 (CA7 1989) (videotape requirement not feasible,

especially where defendant had not yet been criminally charged), cert. denied, 493 U. S. 1042 (1990); J. Myers, Child Witness Law and Practice § 4.6, pp. 129–134 (1987) (use of leading questions with children, when appropriate, does not necessarily render responses untrustworthy). Although the procedural guidelines propounded by the court below may well enhance the reliability of out-of-court statements of children regarding sexual abuse, we decline to read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.

The State responds that a finding of "particularized guarantees of trustworthiness" should instead be based on a consideration of the totality of the circumstances, including not only the circumstances surrounding the making of the statement, but also other evidence at trial that corroborates the truth of the statement. We agree that "particularized guarantees of trustworthiness" must be shown from the totality of the circumstances, but we think the relevant circumstances include only those that surround the making of the statement and that render the declarant particularly worthy of belief. This conclusion derives from the rationale for permitting exceptions to the general rule against hearsay:

> "The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous; it may be sufficiently clear, in that instance, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of supererogation." 5 J. Wigmore, Evidence § 1420, p. 251 (J. Chadbourn rev. 1974).

In other words, if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, then the hearsay rule does not bar admission of the statement at trial. The basis for the "excited utterance" exception, for example, is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation, and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous. See, *e. g.*, 6 Wigmore, *supra*, §§ 1745–1764; 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 803(2)[01] (1988); Advisory Committee's Note on Fed. Rule Evid. 803(2), 28 U. S. C. App., p. 778. Likewise, the "dying declaration" and "medical treatment" exceptions to the hearsay rule are based on the belief that persons making such statements are highly unlikely to lie. See, *e. g.*, *Mattox*, 156 U. S., at 244 ("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath"); *Queen* v. *Osman*, 15 Cox Crim. Cas. 1, 3 (Eng. N. Wales Cir. 1881) (Lush, L. J.) ("[N]o person, who is immediately going into the presence of his Maker, will do so with a lie upon his lips"); Mosteller, Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment, 67 N. C. L. Rev. 257 (1989). "The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight." *Huff* v. *White Motor Corp.*, 609 F. 2d 286, 292 (CA7 1979).

We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. Our precedents

have recognized that statements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability. See *Green*, 399 U. S., at 161 (examining "whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"); see also *Mattox*, *supra*, at 244; *Evans*, 400 U. S., at 88–89 (plurality opinion); *Roberts*, 448 U. S., at 65, 73. Because evidence possessing "particularized guarantees of trustworthiness" must be at least as reliable as evidence admitted under a firmly rooted hearsay exception, see *Roberts*, *supra*, at 66, we think that evidence admitted under the former requirement must similarly be so trustworthy that adversarial testing would add little to its reliability. See *Lee* v. *Illinois*, 476 U. S., at 544 (determining indicia of reliability from the circumstances surrounding the making of the statement); see also *State* v. *Ryan*, 103 Wash. 2d 165, 174, 691 P. 2d 197, 204 (1984) ("Adequate indicia of reliability [under *Roberts*] must be found in reference to circumstances surrounding the making of the out-of-court statement, and not from subsequent corroboration of the criminal act"). Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

The state and federal courts have identified a number of factors that we think properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable. See, *e. g.*, *State* v. *Robinson*, 153 Ariz. 191, 201, 735 P. 2d 801, 811 (1987) (spontaneity and consistent repetition); *Morgan* v. *Foretich*, 846 F. 2d 941, 948 (CA4 1988) (mental state of the declarant); *State* v. *Sorenson*, 143 Wis. 2d 226, 246, 421 N. W. 2d 77, 85 (1988) (use of terminology unexpected of a child of similar age); *State* v. *Kuone*, 243 Kan. 218, 221–222, 757 P. 2d 289, 292–293 (1988) (lack

of motive to fabricate). Although these cases (which we cite for the factors they discuss and not necessarily to approve the results that they reach) involve the application of various hearsay exceptions to statements of child declarants, we think the factors identified also apply to whether such statements bear "particularized guarantees of trustworthiness" under the Confrontation Clause. These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors. We therefore decline to endorse a mechanical test for determining "particularized guarantees of trustworthiness" under the Clause. Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

As our discussion above suggests, we are unpersuaded by the State's contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness." To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Cf. *Delaware* v. *Van Arsdall*, 475 U. S. 673, 680 (1986). "[T]he Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Roberts*, *supra*, at 65 (quoting *Snyder* v. *Massachusetts*, 291 U. S. 97, 107 (1934)). A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made may provide no basis for supposing that the declarant is particularly likely to be telling the truth—indeed, the circumstances may even be such that the declarant is particularly *un*likely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant's state of mind when he made the statements; the presence of evidence tend-

ing to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.

In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees of trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Indeed, although a plurality of the Court in *Dutton* v. *Evans* looked to corroborating evidence as one of four factors in determining whether a particular hearsay statement possessed sufficient indicia of reliability, see 400 U. S., at 88, we think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless,* rather than that any basis exists for presuming the declarant to be trustworthy. See *id.*, at 90 (BLACKMUN, J., joined by Burger, C. J., concurring) (finding admission of the statement at issue to be harmless error, if error at all); see also 4 D. Louisell & C. Mueller, Federal Evidence §418, p. 143 (1980) (discussing *Evans*).

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*The dissent suggests that the Court unequivocally rejected this view in *Cruz* v. *New York*, 481 U. S. 186, 192 (1987), but the quoted language on which the dissent relies, *post*, at 832, is taken out of context. *Cruz* involved the admission at a joint trial of a nontestifying codefendant's confession that incriminated the defendant, where the jury was instructed to consider that confession only against the codefendant, and where the defendant's own confession, corroborating that of his codefendant, was introduced against him. The Court in *Cruz*, relying squarely on *Bruton* v. *United States*, 391 U. S. 123 (1968), held that the admission of the codefendant's confession violated the Confrontation Clause. 481 U. S., at 193. The language on which the dissent relies appears in a paragraph discussing whether the "interlocking" nature of the confessions was relevant to the applicability of *Bruton* (the Court concluded that it was not). The Court in that case said nothing about whether the codefendant's confession would be admissible against the defendant simply because it may have "interlocked" with the defendant's confession.

Moreover, although we considered in *Lee* v. *Illinois* the "interlocking" nature of a codefendant's and a defendant's confessions to determine whether the codefendant's confession was sufficiently trustworthy for confrontation purposes, we declined to rely on corroborative physical evidence and indeed rejected the "interlock" theory in that case. 476 U. S., at 545–546. We cautioned that "[t]he true danger inherent in this type of hearsay is, in fact, its selective reliability." *Id.*, at 545. This concern applies in the child hearsay context as well: Corroboration of a child's allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child's allegations regarding the identity of the abuser. There is a very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. Furthermore, we recognized the similarity between harmless-error analysis and the corroboration inquiry when we noted in *Lee* that the harm of "admission of the [hearsay] statement [was that it] poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment." *Ibid.* (emphasis added).

Finally, we reject respondent's contention that the younger daughter's out-of-court statements in this case are *per se* unreliable, or at least presumptively unreliable, on the ground that the trial court found the younger daughter incompetent to testify at trial. First, respondent's contention rests upon a questionable reading of the record in this case. The trial court found only that the younger daughter was "not capable of communicating to the jury." App. 39. Although Idaho law provides that a child witness may not testify if he "appear[s] incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," Idaho Code § 9–202 (Supp. 1989); Idaho Rule Evid. 601(a), the trial court in this case made no such findings. Indeed, the more reasonable inference is that, by ruling that the statements were admissible under Idaho's residual hearsay

exception, the trial court implicitly found that the younger daughter, at the time she made the statements, was capable of receiving just impressions of the facts and of relating them truly. See App. 115. In addition, we have in any event held that the Confrontation Clause does not erect a *per se* rule barring the admission of prior statements of a declarant who is unable to communicate to the jury at the time of trial. See, *e. g.*, *Mattox*, 156 U. S., at 243–244; see also 4 Louisell & Mueller, *supra*, § 486, at 1041–1045. Although such inability might be relevant to whether the earlier hearsay statement possessed particularized guarantees of trustworthiness, a *per se* rule of exclusion would not only frustrate the truth-seeking purpose of the Confrontation Clause, but would also hinder States in their own "enlightened development in the law of evidence," *Evans*, 400 U. S., at 95 (Harlan, J., concurring in result).

III

The trial court in this case, in ruling that the Confrontation Clause did not prohibit admission of the younger daughter's hearsay statements, relied on the following factors:

> "In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.
>
> "We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The [older daughter] has testified as to identification of [the] perpetrators. Those—the identifi-

> cation of the perpetrators in this case are persons well known to the [younger daughter]. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identity or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements." App. 115.

Of the factors the trial court found relevant, only two relate to circumstances surrounding the making of the statements: whether the child had a motive to "make up a story of this nature," and whether, given the child's age, the statements are of the type "that one would expect a child to fabricate." *Ibid.* The other factors on which the trial court relied, however, such as the presence of physical evidence of abuse, the opportunity of respondent to commit the offense, and the older daughter's corroborating identification, relate instead to whether other evidence existed to corroborate the truth of the statement. These factors, as we have discussed, are irrelevant to a showing of the "particularized guarantees of trustworthiness" necessary for admission of hearsay statements under the Confrontation Clause.

We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview. Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy. The younger daughter's last statement regarding the abuse of the older daughter, however, presents a closer question. According to Dr. Jambura, the younger daughter "volunteered" that statement "after she sort of clammed-up." *Id.*, at 123. Although the spontaneity of the statement and the change in demeanor suggest that the younger daughter was telling the truth when she made the statement, we note that it is possible that "[i]f there is evidence of prior interro-

gation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness." *Robinson*, 153 Ariz., at 201, 735 P. 2d, at 811. Moreover, the statement was not made under circumstances of reliability comparable to those required, for example, for the admission of excited utterances or statements made for purposes of medical diagnosis or treatment. Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, *Lee*, 476 U. S., at 543, we agree with the court below that the State has failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause to overcome that presumption.

The State does not challenge the Idaho Supreme Court's conclusion that the Confrontation Clause error in this case was not harmless beyond a reasonable doubt, and we see no reason to revisit the issue. We therefore agree with that court that respondent's conviction involving the younger daughter must be reversed and the case remanded for further proceedings. Accordingly, the judgment of the Supreme Court of Idaho is affirmed.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE BLACKMUN join, dissenting.

The issue is whether the Sixth Amendment right of confrontation is violated when statements from a child who is unavailable to testify at trial are admitted under a hearsay exception against a defendant who stands accused of abusing her. The Court today holds that it is not, provided that the child's statements bear "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U. S. 56, 66 (1980). I agree. My disagreement is with the rule the Court invents to control this inquiry and with the Court's ultimate determination that the statements in question here must be inadmissible as violative of the Confrontation Clause.

Given the principle, for cases involving hearsay statements that do not come within one of the traditional hearsay exceptions, that admissibility depends upon finding particular guarantees of trustworthiness in each case, it is difficult to state rules of general application. I believe the Court recognizes this. The majority errs, in my view, by adopting a rule that corroboration of the statement by other evidence is an impermissible part of the trustworthiness inquiry. The Court's apparent ruling is that corroborating evidence may not be considered in whole or in part for this purpose.[1] This limitation, at least on a facial interpretation of the Court's analytic categories, is a new creation by the Court; it likely will prove unworkable and does not even square with the examples of reliability indicators the Court itself invokes; and it is contrary to our own precedents.

I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child's statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child's hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child's statement, evidence which the child

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[1] The Court also states that the child's hearsay statements are "presumptively unreliable." *Ante*, at 818. I take this to mean only that the government bears the burden of coming forward with indicia of reliability sufficient for the purposes of the Confrontation Clause, and that if it fails to do so the statements are inadmissible. A presumption of unreliability exists as a counterweight to the indicia of reliability offered by the government only where there is an affirmative reason to believe that a particular category of hearsay may be unreliable. See, *e. g.*, *Lee* v. *Illinois*, 476 U. S. 530, 545 (1986) ("[A] codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another").

could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child's statements is substantially undermined. Under the Court's analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result; on the contrary, most federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions. See 4 D. Louisell & C. Mueller, Federal Evidence §472, p. 929 (1980) (collecting cases); 4 J. Weinstein & M. Berger, Weinstein's Evidence ¶804(b)(5)[01] (1988) (same). Specifically with reference to hearsay statements by children, a review of the cases has led a leading commentator on child witness law to conclude flatly: "If the content of an out-of-court statement is supported or corroborated by other evidence, the reliability of the hearsay is strengthened." J. Myers, Child Witness Law and Practice §5.37, p. 364 (1987).[2] The Court's apparent misgivings

[2] A sampling of cases using corroborating evidence as to support a finding that a child's statements were reliable includes: *United States* v. *Dorian*, 803 F. 2d 1439, 1445 (CA8 1986); *United States* v. *Cree*, 778 F. 2d 474, 477 (CA8 1985); *United States* v. *Nick*, 604 F. 2d 1199, 1204 (CA9 1979); *State* v. *Allen*, 157 Ariz. 165, 176–178, 755 P. 2d 1153, 1164–1166 (1988); *State* v. *Robinson*, 153 Ariz. 191, 204, 735 P. 2d 801, 814 (1987); *State* v. *Bellotti*, 383 N. W. 2d 308, 315 (Minn. App. 1986); *State* v. *Soukup*, 376 N. W. 2d 498, 501 (Minn. App. 1985); *State* v. *Doe*, 94 N. M. 637, 639, 614 P. 2d 1086, 1088 (App. 1980); *State* v. *McCafferty*, 356 N. W. 2d 159, 164 (S. D. 1984); *United States* v. *Quick*, 22 M. J. 722, 724 (A. C. M. R. 1986). Numerous other cases rely upon corroboration pursuant to state statutory rules regarding hearsay statements by children. See Myers §5.38.

Aside from *Lee* v. *Illinois*, *supra*, discussed *infra*, at 831–832, the only case cited by the Court for the proposition that corroborative evidence is irrelevant to reliability is *State* v. *Ryan*, 103 Wash. 2d 165, 174, 691 P. 2d 197,

about the weight to be given corroborating evidence, see *ante*, at 824, may or may not be correct, but those misgivings do not justify wholesale elimination of this evidence from consideration, in derogation of an overwhelming judicial and legislative consensus to the contrary. States are of course free, as a matter of state law, to demand corroboration of an unavailable child declarant's statements as well as other indicia of reliability before allowing the statements to be ad-

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204 (1984). The Court quotes the opinion out of context. In holding that corroborating evidence could not be used to demonstrate reliability, the Washington Supreme Court was not interpreting the Confrontation Clause; rather, its opinion clearly reveals that the court's holding was an interpretation of a Washington statute, Wash. Rev. Code. § 9A.44.120 (1989), which provided that hearsay statements from an unavailable child declarant could be admitted into evidence at trial only if they were reliable *and* corroborated by other evidence. The portion of the opinion following the sentence quoted by the majority reveals the true nature of its holding:

"The trial court was apparently persuaded that the statements of the children must be reliable, if, in hindsight they prove to be true. *RCW 9A.44.120 demands more.*

"*The statute* requires separate determinations of reliability *and* corroboration when the child is unavailable. The word 'and' is conjunctive. . . . The Legislature would have used the word 'or' had it intended the disjunctive. . . . Although defendant's confession was offered as corroboration, wholly absent are the requisite circumstantial guarantees of reliability." *State* v. *Ryan*, *supra*, at 174, 691 P. 2d, at 204 (citations omitted; emphasis added).

Other States also have expressly recognized the need for, and legitimacy of, considering corroborating evidence in determining whether a child declarant's statements are trustworthy and should be admitted into evidence. See Ariz. Rev. Stat. Ann. § 13–1416 (1989); Ark. Rule Evid. 803(25)(A); Cal. Evid. Code Ann. § 1228 (West 1990); Colo. Rev. Stat. § 13–25–129 (1987); Fla. Stat. § 90.803(23) (1989); Idaho Code § 19–3024 (1987); Ill. Rev. Stat., ch. 38, ¶ 115–10 (1989); Ind. Code § 35–37–4–6 (1988); Md. Cts. & Jud. Proc. Code Ann. § 9–103.1 (1989); Minn. Stat. § 595.02(3) (1988); Miss. Code. Ann. § 13–1–403 (Supp. 1989); N. J. Rule Evid. 63 (1989); N. D. Rule Evid. 803(24), Okla. Stat., Tit. 12, § 2803.1 (1989); Ore. Rev. Stat. § 40.460 (1989); 42 Pa. Cons. Stat. § 5985.1 (1989); S. D. Codified Laws § 19–16–38 (1987); Utah Code Ann. § 76–5–411 (1990).

mitted into evidence. Until today, however, no similar distinction could be found in our precedents interpreting the Confrontation Clause. If anything, the many state statutes requiring corroboration of a child declarant's statements emphasize the relevance, not the irrelevance, of corroborating evidence to the determination whether an unavailable child witness' statements bear particularized guarantees of trustworthiness, which is the ultimate inquiry under the Confrontation Clause. In sum, whatever doubt the Court has with the weight to be given the corroborating evidence found in this case is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness.

Far from rejecting this commonsense proposition, the very cases relied upon by the Court today embrace it. In *Lee* v. *Illinois*, 476 U. S. 530 (1986), we considered whether the confession of a codefendant that "interlocked" with a defendant's own confession bore particularized guarantees of trustworthiness so that its admission into evidence against the defendant did not violate the Confrontation Clause. Although the Court's ultimate conclusion was that the confession did not bear sufficient indicia of reliability, its analysis was far different from that utilized by the Court in the present case. The Court today notes that, in *Lee*, we determined the trustworthiness of the confession by looking to the circumstances surrounding its making, see *ante*, at 821; what the Court omits from its discussion of *Lee* is the fact that we also considered the extent of the "interlock," that is, the extent to which the two confessions corroborated each other. The Court in *Lee* was unanimous in its recognition of corroboration as a legitimate indicator of reliability; the only disagreement was whether the corroborative nature of the confessions and the circumstances of their making were sufficient to satisfy the Confrontation Clause. See 476 U. S., at 546 (finding insufficient indicia of reliability, "*flowing from either*

the circumstances surrounding the confession or the 'interlocking' character of the confessions," to support admission of the codefendant's confession) (emphasis added); *id.*, at 557 (BLACKMUN, J., dissenting) (finding the codefendant's confession supported by sufficient indicia of reliability including, *inter alia*, "extensive and convincing corroboration by petitioner's own confession" and "further corroboration provided by the physical evidence"). See also *New Mexico* v. *Earnest*, 477 U. S. 648, 649, n. (1986) (REHNQUIST, J., concurring); *Dutton* v. *Evans*, 400 U. S. 74, 88–89 (1970) (plurality opinion).

The Court today suggests that the presence of corroborating evidence goes more to the issue whether the admission of the hearsay statements was harmless error than whether the statements themselves were reliable and therefore admissible. See *ante*, at 823. Once again, in the context of interlocking confessions, our previous cases have been unequivocal in rejecting this suggestion:

> "Quite obviously, what the 'interlocking' nature of the codefendant's confession pertains to is not its *harmfulness* but rather its *reliability:* If it confirms essentially the same facts as the defendant's own confession it is more likely to be true." *Cruz* v. *New York*, 481 U. S. 186, 192 (1987) (emphasis in original).

It was precisely because the "interlocking" nature of the confessions heightened their reliability as hearsay that we noted in *Cruz* that "[o]f course, the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him." *Id.*, at 193–194 (citing *Lee*, *supra*, at 543–544). In short, corroboration has been an essential element in our past hearsay cases, and there is no justification for a categorical refusal to consider it here.

Our Fourth Amendment cases are also premised upon the idea that corroboration is a legitimate indicator of reliability.

We have long held that corroboration is an essential element in determining whether police may act on the basis of an informant's tip, for the simple reason that "because an informant is shown to be right about some things, he is probably right about other facts that he has alleged." *Alabama* v. *White*, 496 U. S. 325, 331 (1990). See also *Illinois* v. *Gates*, 462 U. S. 213, 244, 245 (1983); *Spinelli* v. *United States*, 393 U. S. 410, 415 (1969); *Jones* v. *United States*, 362 U. S. 257, 271 (1960).

The Court does not offer any justification for barring the consideration of corroborating evidence, other than the suggestion that corroborating evidence does not bolster the "inherent trustworthiness" of the statements. *Ante*, at 822. But for purposes of determining the reliability of the statements, I can discern no difference between the factors that the Court believes indicate "inherent trustworthiness" and those, like corroborating evidence, that apparently do not. Even the factors endorsed by the Court will involve consideration of the very evidence the Court purports to exclude from the reliability analysis. The Court notes that one test of reliability is whether the child "use[d] . . . terminology unexpected of a child of similar age." *Ante*, at 821. But making this determination requires consideration of the child's vocabulary skills and past opportunity, or lack thereof, to learn the terminology at issue. And, when all of the extrinsic circumstances of a case are considered, it may be shown that use of a particular word or vocabulary in fact supports the inference of prolonged contact with the defendant, who was known to use the vocabulary in question. As a further example, the Court notes that motive to fabricate is an index of reliability. *Ibid.* But if the suspect charges that a third person concocted a false case against him and coached the child, surely it is relevant to show that the third person had no contact with the child or no opportunity to suggest false testimony. Given the contradictions inherent in the Court's test when

measured against its own examples, I expect its holding will soon prove to be as unworkable as it is illogical.

The short of the matter is that both the circumstances existing at the time the child makes the statements and the existence of corroborating evidence indicate, to a greater or lesser degree, whether the statements are reliable. If the Court means to suggest that the circumstances surrounding the making of a statement are the best indicators of reliability, I doubt this is so in every instance. And, if it were true in a particular case, that does not warrant ignoring other indicators of reliability such as corroborating evidence, absent some other reason for excluding it. If anything, I should think that corroborating evidence in the form of testimony or physical evidence, apart from the narrow circumstances in which the statement was made, would be a preferred means of determining a statement's reliability for purposes of the Confrontation Clause, for the simple reason that, unlike other indicators of trustworthiness, corroborating evidence can be addressed by the defendant and assessed by the trial court in an objective and critical way.

In this case, the younger daughter's statements are corroborated in at least four respects: (1) physical evidence that she was the victim of sexual abuse; (2) evidence that she had been in the custody of the suspect at the time the injuries occurred; (3) testimony of the older daughter that their father abused the younger daughter, thus corroborating the younger daughter's statement; and (4) the testimony of the older daughter that she herself was abused by their father, thus corroborating the younger daughter's statement that her sister had also been abused. These facts, coupled with the circumstances surrounding the making of the statements acknowledged by the Court as suggesting that the statements are reliable, give rise to a legitimate argument that admission of the statements did not violate the Confrontation Clause. Because the Idaho Supreme Court did not consider these factors, I would vacate its judgment reversing respond-

ent's conviction and remand for it to consider in the first instance whether the child's statements bore "particularized guarantees of trustworthiness" under the analysis set forth in this separate opinion.

For these reasons, I respectfully dissent.

MARYLAND *v.* CRAIG

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 89–478. Argued April 18, 1990—Decided June 27, 1990

Respondent Craig was tried in a Maryland court on several charges related to her alleged sexual abuse of a 6-year-old child. Before the trial began, the State sought to invoke a state statutory procedure permitting a judge to receive, by one-way closed circuit television, the testimony of an alleged child abuse victim upon determining that the child's courtroom testimony would result in the child suffering serious emotional distress, such that he or she could not reasonably communicate. If the procedure is invoked, the child, prosecutor, and defense counsel withdraw to another room, where the child is examined and cross-examined; the judge, jury, and defendant remain in the courtroom, where the testimony is displayed. Although the child cannot see the defendant, the defendant remains in electronic communication with counsel, and objections may be made and ruled on as if the witness were in the courtroom. The court rejected Craig's objection that the procedure's use violates the Confrontation Clause of the Sixth Amendment, ruling that Craig retained the essence of the right to confrontation. Based on expert testimony, the court also found that the alleged victim and other allegedly abused children who were witnesses would suffer serious emotional distress if they were required to testify in the courtroom, such that each would be unable to communicate. Finding that the children were competent to testify, the court permitted testimony under the procedure, and Craig was convicted. The State Court of Special Appeals affirmed, but the State Court of Appeals reversed. Although it rejected Craig's argument that the Clause requires in all cases a face-to-face courtroom encounter between the accused and accusers, it found that the State's showing was insufficient to reach the high threshold required by *Coy* v. *Iowa*, 487 U. S. 1012, before the procedure could be invoked. The court held that the procedure usually cannot be invoked unless the child initially is questioned in the defendant's presence and that, before using the one-way television procedure, the trial court must determine whether a child would suffer severe emotional distress if he or she were to testify by two-way television.

Held:

1. The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with the witnesses against

them at trial. The Clause's central purpose, to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding before the trier of fact, is served by the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact. Although face-to-face confrontation forms the core of the Clause's values, it is not an indispensable element of the confrontation right. If it were, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme, *Ohio* v. *Roberts*, 448 U. S. 56, 63. Accordingly, the Clause must be interpreted in a manner sensitive to its purpose and to the necessities of trial and the adversary process. See, *e. g.*, *Kirby* v. *United States*, 174 U. S. 47. Nonetheless, the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured. *Coy*, *supra*, at 1021. Pp. 844–850.

2. Maryland's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of its special procedure, provided that the State makes an adequate showing of necessity in an individual case. Pp. 851–857.

(a) While Maryland's procedure prevents the child from seeing the defendant, it preserves the other elements of confrontation and, thus, adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These assurances are far greater than those required for the admission of hearsay statements. Thus, the use of the one-way closed circuit television procedure, where it is necessary to further an important state interest, does not impinge upon the Confrontation Clause's truth-seeking or symbolic purposes. Pp. 851–852.

(b) A State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. The fact that most States have enacted similar statutes attests to widespread belief in such a public policy's importance, and this Court has previously recognized that States have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment, see, *e. g.*, *Globe Newspaper Co.* v. *Superior Court of Norfolk County*, 457 U. S. 596, 607. The Maryland Legislature's considered judgment regarding the importance of its interest will not be second-guessed, given the State's traditional and transcendent interest in protecting the welfare of children and the growing body of academic literature

documenting the psychological trauma suffered by child abuse victims who must testify in court. Pp. 852–855.

(c) The requisite necessity finding must be case specific. The trial court must hear evidence and determine whether the procedure's use is necessary to protect the particular child witness' welfare; find that the child would be traumatized, not by the courtroom generally, but by the defendant's presence; and find that the emotional distress suffered by the child in the defendant's presence is more than *de minimis*. Without determining the minimum showing of emotional trauma required for the use of a special procedure, the Maryland statute, which requires a determination that the child will suffer serious emotional distress such that the child cannot reasonably communicate, clearly suffices to meet constitutional standards. Pp. 855–857.

(d) Since there is no dispute that, here, the children testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, admitting their testimony is consonant with the Confrontation Clause, provided that a proper necessity finding has been made. P. 857.

3. The Court of Appeals erred to the extent that it may have rested its conclusion that the trial court did not make the requisite necessity finding on the lower court's failure to observe the children's behavior in the defendant's presence and its failure to explore less restrictive alternatives to the one-way television procedure. While such evidentiary requirements could strengthen the grounds for the use of protective measures, only a case-specific necessity finding is required. This Court will not establish, as a matter of federal constitutional law, such categorical evidentiary prerequisites for the use of the one-way procedure. Pp. 857–860.

316 Md. 551, 560 A. 2d 1120, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 860.

J. Joseph Curran, Jr., Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *Gary E. Bair* and *Ann N. Bosse*, Assistant Attorneys General, and *William R. Hymes*.

William H. Murphy, Jr., argued the cause for respondent. With him on the brief were *Maria Cristina Gutierrez*, *Gary S. Bernstein*, *Byron L. Warnken*, and *Clarke F. Ahlers*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Florida et al. by *Robert A. Butterworth*, Attorney General of Florida, and *Richard E. Doran* and *Bradley R. Bischoff*, Assistant Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Doug Baily*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *Duane Woodard*, Attorney General of Colorado, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Warren Price III*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frederic J. Cowan*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *James M. Shannon*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Robert J. Del Tufo*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Robert H. Henry*, Attorney General of Oklahoma, *Ernest D. Preate*, Attorney General of Pennsylvania, *Hector Rivera Cruz*, Attorney General of Puerto Rico, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, *R. Paul Van Dam*, Attorney General of Utah, *Godfrey R. de Castro*, Attorney General of the Virgin Islands, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, and *Joseph B. Mayer*, Attorney General of Wyoming; for the District Attorney of Kings County, New York, et al. by *Charles J. Hynes*, *Peter A. Weinstein*, *Jay Cohen*, *Robert T. Johnson*, *Anthony Girese*, and *Howard R. Relin;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* for the National Association of Counsel for Children et al. by *Jacqueline Y. Parker*, *Philip J. McCarthy, Jr.*,

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television.

I

In October 1986, a Howard County grand jury charged respondent, Sandra Ann Craig, with child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. The named victim in each count was a 6-year-old girl who, from August 1984 to June 1986, had attended a kindergarten and prekindergarten center owned and operated by Craig.

In March 1987, before the case went to trial, the State sought to invoke a Maryland statutory procedure that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse.[1] To invoke the procedure, the

and *Thomas R. Finn;* for People Against Child Abuse by *Judith D. Schretter, Wallace A. Christensen,* and *Paul A. Dorf;* and for the Stephanie Roper Foundation by *Gary B. Born.*

Briefs of *amici curiae* urging affirmance were filed for the Illinois Public Defender Association et al. by *David P. Bergschneider;* for the National Association of Criminal Defense Lawyers by *Maria Cristina Gutierrez* and *Annabelle Whiting Hall;* and for Victims of Child Abuse Laws National Network (Vocal) by *Alan Silber.*

Briefs of *amici curiae* were filed for the American Psychological Association by *David W. Ogden;* for the Appellate Committee of the California District Attorney's Association by *Jonathan B. Conklin;* for the Institute for Psychological Therapies by *Louis Kiefer;* and for Richard A. Gardner by *Alan Silber.*

[1] Maryland Cts. & Jud. Proc. Code Ann. § 9–102 (1989) provides in full:

"(a)(1) In a case of abuse of a child as defined in § 5–701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

"(i) The testimony is taken during the proceeding; and

trial judge must first "determin[e] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9–102(a)(1)(ii) (1989). Once the procedure is invoked, the child witness, prosecutor, and defense counsel withdraw to a separate room; the judge, jury, and defendant remain in the courtroom. The child witness is then examined and cross-examined in the separate room, while a video monitor records and displays the witness' testimony to those in the courtroom. During this time the witness cannot see the de-

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"(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

"(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

"(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

"(b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

"(i) The prosecuting attorney;

"(ii) The attorney for the defendant;

"(iii) The operators of the closed circuit television equipment; and

"(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

"(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.

"(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

"(c) The provisions of this section do not apply if the defendant is an attorney pro se.

"(d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time."

For a detailed description of the § 9–102 procedure, see *Wildermuth* v. *State*, 310 Md. 496, 503–504, 530 A. 2d 275, 278–279 (1987).

fendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.

In support of its motion invoking the one-way closed circuit television procedure, the State presented expert testimony that the named victim, as well as a number of other children who were alleged to have been sexually abused by Craig, would suffer "serious emotional distress such that [they could not] reasonably communicate," § 9–102(a)(1)(ii), if required to testify in the courtroom. App. 7–59. The Maryland Court of Appeals characterized the evidence as follows:

> "The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said that what 'would cause him the most anxiety would be to testify in front of Mrs. Craig. . . .' The child 'wouldn't be able to communicate effectively.' As to another, an expert said she 'would probably stop talking and she would withdraw and curl up.' With respect to two others, the testimony was that one would 'become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions' while the other would 'become extremely timid and unwilling to talk.'" 316 Md. 551, 568–569, 560 A. 2d 1120, 1128–1129 (1989).

Craig objected to the use of the procedure on Confrontation Clause grounds, but the trial court rejected that contention, concluding that although the statute "take[s] away the right of the defendant to be face to face with his or her accuser," the defendant retains the "essence of the right of confrontation," including the right to observe, cross-examine, and have the jury view the demeanor of the witness. App. 65–66. The trial court further found that, "based upon the evidence presented . . . the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress . . . such that each of these children cannot reason-

ably communicate." *Id.*, at 66. The trial court then found the named victim and three other children competent to testify and accordingly permitted them to testify against Craig via the one-way closed circuit television procedure. The jury convicted Craig on all counts, and the Maryland Court of Special Appeals affirmed the convictions, 76 Md. App. 250, 544 A. 2d 784 (1988).

The Court of Appeals of Maryland reversed and remanded for a new trial. 316 Md. 551, 560 A. 2d 1120 (1989). The Court of Appeals rejected Craig's argument that the Confrontation Clause requires in all cases a face-to-face courtroom encounter between the accused and his accusers, *id.*, at 556–562, 560 A. 2d, at 1122–1125, but concluded:

> "[U]nder § 9–102(a)(1)(ii), the operative 'serious emotional distress' which renders a child victim unable to 'reasonably communicate' must be determined to arise, at least primarily, from face-to-face confrontation with the defendant. Thus, we construe the phrase 'in the courtroom' as meaning, for sixth amendment and [state constitution] confrontation purposes, 'in the courtroom in the presence of the defendant.' Unless prevention of 'eyeball-to-eyeball' confrontation is necessary to obtain the trial testimony of the child, the defendant cannot be denied that right." *Id.*, at 566, 560 A. 2d, at 1127.

Reviewing the trial court's finding and the evidence presented in support of the § 9–102 procedure, the Court of Appeals held that, "as [it] read *Coy* [v. *Iowa*, 487 U. S. 1012 (1988)], the showing made by the State was insufficient to reach the high threshold required by that case before § 9–102 may be invoked." *Id.*, at 554–555, 560 A. 2d, at 1121 (footnote omitted).

We granted certiorari to resolve the important Confrontation Clause issues raised by this case. 493 U. S. 104 (1990).

II

The Confrontation Clause of the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

We observed in *Coy* v. *Iowa* that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." 487 U. S., at 1016 (citing *Kentucky* v. *Stincer*, 482 U. S. 730, 748, 749–750 (1987) (MARSHALL, J., dissenting)); see also *Pennsylvania* v. *Ritchie*, 480 U. S. 39, 51 (1987) (plurality opinion); *California* v. *Green*, 399 U. S. 149, 157 (1970); *Snyder* v. *Massachusetts*, 291 U. S. 97, 106 (1934); *Dowdell* v. *United States*, 221 U. S. 325, 330 (1911); *Kirby* v. *United States*, 174 U. S. 47, 55 (1899); *Mattox* v. *United States*, 156 U. S. 237, 244 (1895). This interpretation derives not only from the literal text of the Clause, but also from our understanding of its historical roots. See *Coy*, *supra*, at 1015–1016; *Mattox*, *supra*, at 242 (Confrontation Clause intended to prevent conviction by affidavit); *Green*, *supra*, at 156 (same); cf. 3 J. Story, Commentaries on the Constitution § 1785, p. 662 (1833).

We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial. Indeed, in *Coy* v. *Iowa*, we expressly "le[ft] for another day . . . the question whether any exceptions exist" to the "irreducible literal meaning of the Clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*.'" 487 U. S., at 1021 (quoting *Green*, *supra*, at 175 (Harlan, J., concurring)). The procedure challenged in *Coy* involved the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant as they testified against him at trial. See 487 U. S., at 1014–1015. In holding that the use of this procedure violated the defendant's right to confront witnesses against him, we suggested that

any exception to the right "would surely be allowed only when necessary to further an important public policy"—*i. e.*, only upon a showing of something more than the generalized, "legislatively imposed presumption of trauma" underlying the statute at issue in that case. *Id.*, at 1021; see also *id.*, at 1025 (O'CONNOR, J., concurring). We concluded that "[s]ince there ha[d] been no individualized findings that these particular witnesses needed special protection, the judgment [in the case before us] could not be sustained by any conceivable exception." *Id.*, at 1021. Because the trial court in this case made individualized findings that each of the child witnesses needed special protection, this case requires us to decide the question reserved in *Coy*.

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront," after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. As we noted in our earliest case interpreting the Clause:

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, 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." *Mattox*, *supra*, at 242–243.

As this description indicates, the right guaranteed by the Confrontation Clause includes not only a "personal examination," 156 U. S., at 242, but also "(1) insures that the witness will give his statements under oath—thus impressing him with

the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *Green*, *supra*, at 158 (footnote omitted).

The combined effect of these elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact—serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. See *Stincer*, *supra*, at 739 ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial"); *Dutton* v. *Evans*, 400 U. S. 74, 89 (1970) (plurality opinion) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony]'"); *Lee* v. *Illinois*, 476 U. S. 530, 540 (1986) (confrontation guarantee serves "symbolic goals" and "promotes reliability"); see also *Faretta* v. *California*, 422 U. S. 806, 818 (1975) (Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it"); *Strickland* v. *Washington*, 466 U. S. 668, 684–685 (1984).

We have recognized, for example, that face-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person. See *Coy*, *supra*, at 1019–1020 ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' . . . 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"); *Ohio* v. *Roberts*, 448 U. S. 56, 63, n. 6 (1980); see also 3 W. Blackstone, Commentaries *373–*374. We have also noted the strong symbolic purpose served by requiring adverse witnesses at trial to testify in the accused's presence. See *Coy*, 487 U. S., at 1017 ("[T]here 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'") (quoting *Pointer* v. *Texas*, 380 U. S. 400, 404 (1965)).

Although face-to-face confrontation forms "the core of the values furthered by the Confrontation Clause," *Green*, 399 U. S., at 157, we have nevertheless recognized that it is not the *sine qua non* of the confrontation right. See *Delaware* v. *Fensterer*, 474 U. S. 15, 22 (1985) *(per curiam)* ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"); *Roberts*, *supra*, at 69 (oath, cross-examination, and demeanor provide "all that the Sixth Amendment demands: 'substantial compliance with the purposes behind the confrontation requirement'") (quoting *Green*, *supra*, at 166); see also *Stincer*, 482 U. S., at 739–744 (confrontation right not violated by exclusion of defendant from competency hearing of child witnesses, where defendant had opportunity for full and effective cross-examination at trial); *Davis* v. *Alaska*, 415 U. S. 308, 315–316 (1974); *Douglas* v. *Alabama*, 380 U. S. 415, 418 (1965); *Pointer*, *supra*, at 406–407; 5 J. Wigmore, Evidence § 1395, p. 150 (J. Chadbourn rev. 1974).

For this reason, we have never insisted on an actual face-to-face encounter at trial in *every* instance in which testimony is admitted against a defendant. Instead, we have repeatedly held that the Clause permits, where necessary, the admission of certain hearsay statements against a defendant de-

spite the defendant's inability to confront the declarant at trial. See, *e. g.*, *Mattox*, 156 U. S., at 243 ("[T]here could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations"); *Pointer*, *supra*, at 407 (noting exceptions to the confrontation right for dying declarations and "other analogous situations"). In *Mattox*, for example, we held that the testimony of a Government witness at a former trial against the defendant, where the witness was fully cross-examined but had died after the first trial, was admissible in evidence against the defendant at his second trial. See 156 U. S., at 240–244. We explained:

> "There is doubtless reason for saying that . . . if notes of [the witness'] testimony are permitted to be read, [the defendant] is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." *Id.*, at 243.

We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts*, 448 U. S., at 63. Thus, in certain narrow circumstances, "competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." *Id.*, at 64 (quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973), and citing *Mattox*, *supra*). We have recently held,

for example, that hearsay statements of nontestifying coconspirators may be admitted against a defendant despite the lack of any face-to-face encounter with the accused. See *Bourjaily* v. *United States*, 483 U. S. 171 (1987); *United States* v. *Inadi*, 475 U. S. 387 (1986). Given our hearsay cases, the word "confronted," as used in the Confrontation Clause, cannot simply mean face-to-face confrontation, for the Clause would then, contrary to our cases, prohibit the admission of any accusatory hearsay statement made by an absent declarant—a declarant who is undoubtedly as much a "witness against" a defendant as one who actually testifies at trial.

In sum, our precedents establish that "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," *Roberts*, *supra*, at 63 (emphasis added; footnote omitted), a preference that "must occasionally give way to considerations of public policy and the necessities of the case," *Mattox*, *supra*, at 243. "[W]e have attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate factfinding, which may require consideration of out-of-court statements." *Bourjaily*, *supra*, at 182. We have accordingly interpreted the Confrontation Clause in a manner sensitive to its purposes and sensitive to the necessities of trial and the adversary process. See, *e. g.*, *Kirby*, 174 U. S., at 61 ("It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case"); *Chambers*, *supra*, at 295 ("Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process"). Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee

of the right to confront one's accusers. Indeed, one commentator has noted that "[i]t is all but universally assumed that there are circumstances that excuse compliance with the right of confrontation." Graham, The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One, 8 Crim. L. Bull. 99, 107–108 (1972).

This interpretation of the Confrontation Clause is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process. See, *e. g.*, *Illinois* v. *Allen*, 397 U. S. 337, 342–343 (1970) (right to be present at trial not violated where trial judge removed defendant for disruptive behavior); *Ritchie*, 480 U. S., at 51–54 (plurality opinion) (right to cross-examination not violated where State denied defendant access to investigative files); *Taylor* v. *Illinois*, 484 U. S. 400, 410–416 (1988) (right to compulsory process not violated where trial judge precluded testimony of a surprise defense witness); *Perry* v. *Leeke*, 488 U. S. 272, 280–285 (1989) (right to effective assistance of counsel not violated where trial judge prevented testifying defendant from conferring with counsel during a short break in testimony). We see no reason to treat the face-to-face component of the confrontation right any differently, and indeed we think it would be anomalous to do so.

That the face-to-face confrontation requirement is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in *Coy*, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured. See 487 U. S., at 1021 (citing *Roberts*, *supra*, at 64; *Chambers*, *supra*, at 295); *Coy*, *supra*, at 1025 (O'Connor, J., concurring).

III

Maryland's statutory procedure, when invoked, prevents a child witness from seeing the defendant as he or she testifies against the defendant at trial. We find it significant, however, that Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies. Although we are mindful of the many subtle effects face-to-face confrontation may have on an adversary criminal proceeding, the presence of these other elements of confrontation—oath, cross-examination, and observation of the witness' demeanor—adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony. These safeguards of reliability and adversariness render the use of such a procedure a far cry from the undisputed prohibition of the Confrontation Clause: trial by *ex parte* affidavit or inquisition, see *Mattox*, 156 U. S., at 242; see also *Green*, 399 U. S., at 179 (Harlan, J., concurring) ("[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses"). Rather, we think these elements of effective confrontation not only permit a defendant to "confound and undo the false accuser, or reveal the child coached by a malevolent adult," *Coy*, *supra*, at 1020, but may well aid a defendant in eliciting favorable testimony from the child witness. Indeed, to the extent the child witness' testimony may be said to be technically given out of court (though we do not so hold), these assurances of reliability and adversariness are far greater than those required for admission of hearsay testimony under the Confrontation Clause. See *Roberts*, 448

U. S., at 66. We are therefore confident that use of the one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause.

The critical inquiry in this case, therefore, is whether use of the procedure is necessary to further an important state interest. The State contends that it has a substantial interest in protecting children who are allegedly victims of child abuse from the trauma of testifying against the alleged perpetrator and that its statutory procedure for receiving testimony from such witnesses is necessary to further that interest.

We have of course recognized that a State's interest in "the protection of minor victims of sex crimes from further trauma and embarrassment" is a "compelling" one. *Globe Newspaper Co.* v. *Superior Court of Norfolk County*, 457 U. S. 596, 607 (1982); see also *New York* v. *Ferber*, 458 U. S. 747, 756–757 (1982); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 749–750 (1978); *Ginsberg* v. *New York*, 390 U. S. 629, 640 (1968); *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). "[W]e have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, *supra*, at 757. In *Globe Newspaper*, for example, we held that a State's interest in the physical and psychological well-being of a minor victim was sufficiently weighty to justify depriving the press and public of their constitutional right to attend criminal trials, where the trial court makes a case-specific finding that closure of the trial is necessary to protect the welfare of the minor. See 457 U. S., at 608–609. This Term, in *Osborne* v. *Ohio*, 495 U. S. 103 (1990), we upheld a state statute that proscribed the possession and viewing of child pornography, reaffirming that "'[i]t is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and

psychological well-being of a minor" is "compelling."'" *Id.*, at 109 (quoting *Ferber*, *supra*, at 756–757).

We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. See *Coy*, 487 U. S., at 1022–1023 (O'CONNOR, J., concurring) ("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"). Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children;[2] 24 States have authorized the use of one-way

[2] See Ala. Code § 15–25–2 (Supp. 1989); Ariz. Rev. Stat. Ann. §§ 13–4251 and 4253(B), (C) (1989); Ark. Code Ann. § 16–44–203 (1987); Cal. Penal Code Ann. § 1346 (West Supp. 1990); Colo. Rev. Stat. §§ 18–3–413 and 18–6–401.3 (1986); Conn. Gen. Stat. § 54–86g (1989); Del. Code Ann., Tit. 11, § 3511 (1987); Fla. Stat. § 92.53 (1989); Haw. Rev. Stat., ch. 626, Rule Evid. 616 (1985); Ill. Rev. Stat., ch. 38, ¶ 106A–2 (1989); Ind. Code §§ 35–37–4–8(c), (d), (f), (g) (1988); Iowa Code § 910A.14 (1987); Kan. Stat. Ann. § 38–1558 (1986); Ky. Rev. Stat. Ann. § 421.350(4) (Baldwin Supp. 1989); Mass. Gen. Laws § 278:16D (Supp. 1990); Mich. Comp. Laws Ann. § 600.2163a(5) (Supp. 1990); Minn. Stat. § 595.02(4) (1988); Miss. Code Ann. § 13–1–407 (Supp. 1989); Mo. Rev. Stat. §§ 491.675–491.690 (1986); Mont. Code Ann. §§ 46–15–401 to 46–15–403 (1989); Neb. Rev. Stat. § 29–1926 (1989); Nev. Rev. Stat. § 174.227 (1989); N. H. Rev. Stat. Ann. § 517:13–a (Supp. 1989); N. M. Stat. Ann. § 30–9–17 (1984); Ohio Rev. Code Ann. §§ 2907.41(A), (B), (D), (E) (1987); Okla. Stat., Tit. 22, § 753(c) (Supp. 1988); Ore. Rev. Stat. § 40.460(24) (1989); 42 Pa. Cons. Stat. §§ 5982, 5984 (1988); R. I. Gen. Laws § 11–37–13.2 (Supp. 1989); S. C. Code Ann. § 16–3–1530(G) (1985); S. D. Codified Laws § 23A–12–9 (1988); Tenn. Code Ann. §§ 24–7–116(d), (e), (f) (Supp. 1989); Tex. Code Crim. Proc. Ann., Art. 38.071, § 4 (Vernon Supp. 1990); Utah Rule Crim. Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp. 1989); Wis. Stat. §§ 967.04(7) to (10) (1987–1988); Wyo. Stat. § 7–11–408 (1987).

closed circuit television testimony in child abuse cases;[3] and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.[4]

The statute at issue in this case, for example, was specifically intended "to safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying." *Wildermuth* v. *State*, 310 Md. 496, 518, 530 A. 2d 275, 286 (1987). The *Wildermuth* court noted:

> "In Maryland, the Governor's Task Force on Child Abuse in its *Interim Report* (Nov. 1984) documented the existence of the [child abuse] problem in our State. *Interim Report* at 1. It brought the picture up to date in its *Final Report* (Dec. 1985). In the first six months of 1985, investigations of child abuse were 12 percent more numerous than during the same period of 1984. In 1979 4,615 cases of child abuse were investigated; in 1984,

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[3] See Ala. Code § 15–25–3 (Supp. 1989); Alaska Stat. Ann. § 12.45.046 (Supp. 1989); Ariz. Rev. Stat. Ann. § 13–4253 (1989); Conn. Gen. Stat. § 54–86g (1989); Fla. Stat. § 92.54 (1989); Ga. Code Ann. § 17–8–55 (Supp. 1989); Ill. Rev. Stat., ch. 38, ¶ 106A–3 (1987); Ind. Code § 35–37–4–8 (1988); Iowa Code § 910A–14 (Supp. 1990); Kan. Stat. Ann. § 38–1558 (1986); Ky. Rev. Stat. Ann. §§ 421–350(1), (3) (Baldwin Supp. 1989); La. Rev. Stat. Ann. § 15:283 (West Supp. 1990); Md. Cts. & Jud. Proc. Code Ann. § 9–102 (1989); Mass. Gen. Laws § 278:16D (Supp. 1990); Minn. Stat. § 595.02(4) (1988); Miss. Code Ann. § 13–1–405 (Supp. 1989); N. J. Stat. Ann. § 2A:84A–32.4 (West Supp. 1989); Okla. Stat., Tit. 22, § 753(b) (Supp. 1988); Ore. Rev. Stat. § 40.460(24) (1989); 42 Pa. Cons. Stat. §§ 5982, 5985 (1988); R. I. Gen. Laws § 11–37–13.2 (Supp. 1989); Tex. Code Crim. Proc. Ann., Art. 38.071, § 3 (Vernon Supp. 1990); Utah Rule Crim. Proc. 15.5 (1990); Vt. Rule Evid. 807(d) (Supp. 1989).

[4] See Cal. Penal Code Ann. § 1347 (West Supp. 1990); Haw. Rev. Stat., ch. 626, Rule Evid. 616 (1985); Idaho Code § 19–3024A (Supp. 1989); Minn. Stat. § 595.02(4)(c)(2) (1988); N. Y. Crim. Proc. Law §§ 65.00 to 65.30 (McKinney Supp. 1990); Ohio Rev. Code Ann. §§ 2907.41(C), (E) (1987); Va. Code Ann. § 18.2–67.9 (1988); Vt. Rule Evid. 807(e) (Supp. 1989).

> 8,321. *Final Report* at iii. In its *Interim Report* at 2, the Commission proposed legislation that, with some changes, became § 9–102. The proposal was 'aimed at alleviating the trauma to a child victim in the courtroom atmosphere by allowing the child's testimony to be obtained outside of the courtroom.' *Id.*, at 2. This would both protect the child and enhance the public interest by encouraging effective prosecution of the alleged abuser." *Id.*, at 517, 530 A. 2d, at 285.

Given the State's traditional and "'transcendent interest in protecting the welfare of children,'" *Ginsberg*, 390 U. S., at 640 (citation omitted), and buttressed by the growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court, see Brief for American Psychological Association as *Amicus Curiae* 7–13; G. Goodman et al., Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, Final Report to the National Institute of Justice (presented as conference paper at annual convention of American Psychological Assn., Aug. 1989), we will not second-guess the considered judgment of the Maryland Legislature regarding the importance of its interest in protecting child abuse victims from the emotional trauma of testifying. Accordingly, we hold that, if the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.

The requisite finding of necessity must of course be a case-specific one: The trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. See *Globe Newspaper Co.*, 457 U. S., at 608–609 (compelling interest in protecting

child victims does not justify a *mandatory* trial closure rule); *Coy*, 487 U. S., at 1021; *id.*, at 1025 (O'CONNOR, J., concurring); see also *Hochheiser* v. *Superior Court*, 161 Cal. App. 3d 777, 793, 208 Cal. Rptr. 273, 283 (1984). The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. See, *e. g.*, *State* v. *Wilhite*, 160 Ariz. 228, 772 P. 2d 582 (1989); *State* v. *Bonello*, 210 Conn. 51, 554 A. 2d 277 (1989); *State* v. *Davidson*, 764 S. W. 2d 731 (Mo. App. 1989); *Commonwealth* v. *Ludwig*, 366 Pa. Super. 361, 531 A. 2d 459 (1987). Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i. e.*, more than "mere nervousness or excitement or some reluctance to testify," *Wildermuth*, *supra*, at 524, 530 A. 2d, at 289; see also *State* v. *Mannion*, 19 Utah 505, 511–512, 57 P. 542, 543–544 (1899). We need not decide the minimum showing of emotional trauma required for use of the special procedure, however, because the Maryland statute, which requires a determination that the child witness will suffer "serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii), clearly suffices to meet constitutional standards.

To be sure, face-to-face confrontation may be said to cause trauma for the very purpose of eliciting truth, cf. *Coy*, *supra*, at 1019–1020, but we think that the use of Maryland's special procedure, where necessary to further the important state interest in preventing trauma to child witnesses in child

abuse cases, adequately ensures the accuracy of the testimony and preserves the adversary nature of the trial. See *supra*, at 851–852. Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal. See, *e. g.*, *Coy*, *supra*, at 1032 (BLACKMUN, J., dissenting) (face-to-face confrontation "may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself"); Brief for American Psychological Association as *Amicus Curiae* 18–24; *State* v. *Sheppard*, 197 N. J. Super. 411, 416, 484 A. 2d 1330, 1332 (1984); Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 U. Miami L. Rev. 181, 203–204 (1985); Note, Videotaping Children's Testimony: An Empirical View, 85 Mich. L. Rev. 809, 813–820 (1987).

In sum, we conclude that where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation. Because there is no dispute that the child witnesses in this case testified under oath, were subject to full cross-examination, and were able to be observed by the judge, jury, and defendant as they testified, we conclude that, to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause.

IV

The Maryland Court of Appeals held, as we do today, that although face-to-face confrontation is not an absolute constitutional requirement, it may be abridged only where there

is a "'case-specific finding of necessity.'" 316 Md., at 564, 560 A. 2d, at 1126 (quoting *Coy*, *supra*, at 1025 (O'CONNOR, J., concurring)). Given this latter requirement, the Court of Appeals reasoned that "[t]he question of whether a child is unavailable to testify . . . should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused." 316 Md., at 564, 560 A. 2d, at 1126 (footnote omitted). "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony." *Id.*, at 565, 560 A. 2d, at 1127. The Court of Appeals accordingly concluded that, as a prerequisite to use of the § 9–102 procedure, the Confrontation Clause requires the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate. *Id.*, at 566, 560 A. 2d, at 1127. This conclusion, of course, is consistent with our holding today.

In addition, however, the Court of Appeals interpreted our decision in *Coy* to impose two subsidiary requirements. First, the court held that "§ 9–102 ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence." *Id.*, at 566, 560 A. 2d, at 1127; see also *Wildermuth*, 310 Md., at 523–524, 530 A. 2d, at 289 (personal observation by the judge should be the rule rather than the exception). Second, the court asserted that, before using the one-way television procedure, a trial judge must determine whether a child would suffer "severe emotional distress" if he or she were to testify by *two*-way closed circuit television. 316 Md., at 567, 560 A. 2d, at 1128.

Reviewing the evidence presented to the trial court in support of the finding required under § 9–102(a)(1)(ii), the Court of Appeals determined that "the finding of necessity required

to limit the defendant's right of confrontation through invocation of § 9–102 . . . was not made here." *Id.*, at 570–571, 560 A. 2d, at 1129. The Court of Appeals noted that the trial judge "had the benefit only of expert testimony on the ability of the children to communicate; he did not question any of the children himself, nor did he observe any child's behavior on the witness stand before making his ruling. He did not explore any alternatives to the use of one-way closed-circuit television." *Id.*, at 568, 560 A. 2d, at 1128 (footnote omitted). The Court of Appeals also observed that "the testimony in this case was not sharply focused on the effect of the defendant's presence on the child witnesses." *Id.*, at 569, 560 A. 2d, at 1129. Thus, the Court of Appeals concluded:

> "Unable to supplement the expert testimony by responses to questions put by him, or by his own observations of the children's behavior in Craig's presence, the judge made his § 9–102 finding in terms of what the experts had said. He ruled that 'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate.' He failed to find—indeed, on the evidence before him, *could not have found*—that this result would be the product of testimony in a courtroom in the defendant's presence or outside the courtroom but in the defendant's televised presence. That, however, is the finding of necessity required to limit the defendant's right of confrontation through invocation of § 9–102. Since that finding was not made here, and since the procedures we deem requisite to the valid use of § 9–102 were not followed, the judgment of the Court of Special Appeals must be reversed and the case remanded for a new trial." *Id.*, at 570–571, 560 A. 2d, at 1129 (emphasis added).

The Court of Appeals appears to have rested its conclusion at least in part on the trial court's failure to observe the children's behavior in the defendant's presence and its failure to

explore less restrictive alternatives to the use of the one-way closed circuit television procedure. See *id.*, at 568–571, 560 A. 2d, at 1128–1129. Although we think such evidentiary requirements could strengthen the grounds for use of protective measures, we decline to establish, as a matter of federal constitutional law, any such categorical evidentiary prerequisites for the use of the one-way television procedure. The trial court in this case, for example, could well have found, on the basis of the expert testimony before it, that testimony by the child witnesses in the courtroom in the defendant's presence "will result in [each] child suffering serious emotional distress such that the child cannot reasonably communicate," § 9–102(a)(1)(ii). See *id.*, at 568–569, 560 A. 2d, at 1128–1129; see also App. 22–25, 39, 41, 43, 44–45, 54–57. So long as a trial court makes such a case-specific finding of necessity, the Confrontation Clause does not prohibit a State from using a one-way closed circuit television procedure for the receipt of testimony by a child witness in a child abuse case. Because the Court of Appeals held that the trial court had not made the requisite finding of necessity under its interpretation of "the high threshold required by *[Coy]* before § 9–102 may be invoked," 316 Md., at 554–555, 560 A. 2d, at 1121 (footnote omitted), we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today. We therefore vacate the judgment of the Court of Appeals of Maryland and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

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

Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion. The Sixth Amendment provides, with unmistakable clarity, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted

with the witnesses against him." The purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court. The Court, however, says:

> "We . . . conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy." *Ante*, at 853.

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I—your father (or mother) whom you see before you—did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

Because the text of the Sixth Amendment is clear, and because the Constitution is meant to protect against, rather than conform to, current "widespread belief," I respectfully dissent.

I

According to the Court, "we cannot say that [face-to-face] confrontation [with witnesses appearing at trial] is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Ante*, at 849–850. That is rather like saying "we cannot say that being tried before a jury is an indispensable element of the Sixth Amendment's guarantee of the right to jury trial." The Court makes the impossible plausible by recharacterizing the Confrontation Clause, so that confrontation (redesignated "face-to-face confrontation") becomes only one of many "elements of confrontation." *Ante*, at 846. The reasoning is as follows: The Confrontation Clause guarantees not only what it explicitly provides for—"face-to-face" confrontation—but also implied and collateral rights such as cross-examination, oath, and observation of demeanor (TRUE); the purpose of this entire cluster of rights is to ensure the reliability of evidence (TRUE); the Maryland procedure preserves the implied and collateral rights (TRUE), which adequately ensure the reliability of evidence (perhaps TRUE); therefore the Confrontation Clause is not violated by denying what it explicitly provides for—"face-to-face" confrontation (unquestionably FALSE). This reasoning abstracts from the right to its purposes, and then eliminates the right. It is wrong because the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was "face-to-face" confrontation. Whatever else it may mean in addition, the defendant's constitutional right "to be confronted with the witnesses against him" means, always and everywhere, at least what it explicitly says: the "'right to meet face to face all those who appear and give evidence at trial.'" *Coy* v. *Iowa*, 487 U. S. 1012, 1016 (1988), quoting *California* v. *Green*, 399 U. S. 149, 175 (1970) (Harlan, J., concurring).

The Court supports its antitextual conclusion by cobbling together scraps of dicta from various cases that have no bearing here. It will suffice to discuss one of them, since they are all of a kind: Quoting *Ohio* v. *Roberts*, 448 U. S. 56, 63 (1980), the Court says that "[i]n sum, our precedents establish that 'the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,'" *ante*, at 849 (emphasis added by the Court). But *Roberts*, and all the other "precedents" the Court enlists to prove the implausible, dealt with the *implications* of the Confrontation Clause, and not its literal, unavoidable text. When *Roberts* said that the Clause merely "reflects a preference for face-to-face confrontation at trial," what it had in mind as the nonpreferred alternative was not (as the Court implies) the appearance of a witness at trial without confronting the defendant. That has been, until today, not merely "nonpreferred" but utterly unheard-of. What *Roberts* had in mind was the receipt of *other-than-first-hand testimony* from witnesses at trial—that is, witnesses' recounting of hearsay statements by absent parties who, *since they did not appear at trial*, did not have to endure face-to-face confrontation. Rejecting that, I agree, was merely giving effect to an evident constitutional preference; there are, after all, many exceptions to the Confrontation Clause's hearsay rule. But that the defendant should be confronted by the witnesses who appear at trial is not a preference "reflected" by the Confrontation Clause; it is a constitutional right unqualifiedly guaranteed.

The Court claims that its interpretation of the Confrontation Clause "is consistent with our cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Ante*, at 850. I disagree. It is true enough that the "necessities of trial and the adversary process" limit the *manner* in which Sixth Amendment rights may be exercised, and limit the *scope* of Sixth Amendment guarantees to the extent that scope is textually indeterminate. Thus (to

describe the cases the Court cites): The right to confront is not the right to confront in a manner that disrupts the trial. *Illinois* v. *Allen*, 397 U. S. 337 (1970). The right "to have compulsory process for obtaining witnesses" is not the right to call witnesses in a manner that violates fair and orderly procedures. *Taylor* v. *Illinois*, 484 U. S. 400 (1988). The scope of the right "to have the assistance of counsel" does not include consultation with counsel at all times during the trial. *Perry* v. *Leeke*, 488 U. S. 272 (1989). The scope of the right to cross-examine does not include access to the State's investigative files. *Pennsylvania* v. *Ritchie*, 480 U. S. 39 (1987). But we are not talking here about denying expansive scope to a Sixth Amendment provision whose scope for the purpose at issue is textually unclear; "to confront" plainly means to encounter face to face, whatever else it may mean in addition. And we are not talking about the manner of arranging that face-to-face encounter, but about whether it shall occur at all. The "necessities of trial and the adversary process" are irrelevant here, since they cannot alter the constitutional text.

II

Much of the Court's opinion consists of applying to this case the mode of analysis we have used in the admission of hearsay evidence. The Sixth Amendment does not literally contain a prohibition upon such evidence, since it guarantees the defendant only the right to confront "the witnesses against him." As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," *i. e.*, "[i]n *judicial proceedings*, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, An American Dictionary of the English Language (1828) (emphasis added). See also J. Buchanan, Linguae Britannicae Vera Pronunciatio (1757). The former meaning (one "who

knows or sees") would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: "witnesses *against him*." The phrase obviously refers to those who give testimony against the defendant at trial. We have nonetheless found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said. And in determining the scope of that implicit limitation, we have focused upon whether the reliability of the hearsay statements (which are not *expressly* excluded by the Confrontation Clause) "is otherwise assured." *Ante*, at 850. The same test cannot be applied, however, to permit what is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to "the irreducible literal meaning of the Clause." *Coy*, *supra*, at 1020–1021.

Some of the Court's analysis seems to suggest that the children's testimony here was itself hearsay of the sort permissible under our Confrontation Clause cases. See *ante*, at 851. That cannot be. Our Confrontation Clause conditions for the admission of hearsay have long included a "general requirement of unavailability" of the declarant. *Idaho* v. *Wright*, *ante*, at 815. "In the usual case . . . , the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." *Ohio* v. *Roberts*, 448 U. S., at 65. We have permitted a few exceptions to this general rule—*e. g.*, for coconspirators' statements, whose effect cannot be replicated by live testimony because they "derive [their] significance from the circumstances in which [they were] made," *United States* v. *Inadi*, 475 U. S. 387, 395 (1986). "Live" closed-circuit television testimony, however—if it can be called hearsay at all—is surely an example of hearsay as "a weaker substitute for live testimony," *id.*, at 394, which can be employed only when the genuine article is unavailable. "When

two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence." *Ibid.* See also *Roberts*, *supra* (requiring unavailability as precondition for admission of prior testimony); *Barber* v. *Page*, 390 U. S. 719 (1968) (same).

The Court's test today requires unavailability only in the sense that the child is unable to testify in the presence of the defendant.[1] That cannot possibly be the relevant sense. If unconfronted testimony is admissible hearsay when the witness is unable to confront the defendant, then presumably there are other categories of admissible hearsay consisting of unsworn testimony when the witness is unable to risk perjury, un-cross-examined testimony when the witness is unable to undergo hostile questioning, etc. *California* v. *Green*, 399 U. S. 149 (1970), is not precedent for such a silly system. That case held that the Confrontation Clause does not bar admission of prior testimony when the declarant is sworn as a witness but refuses to answer. But in *Green*, as in most cases of refusal, we could not know *why* the declarant refused to testify. Here, by contrast, we know that it is precisely because the child is unwilling to testify in the presence of the defendant. That unwillingness cannot be a valid excuse under the Confrontation Clause, whose very object is to place the witness under the sometimes hostile glare of the defendant. "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." *Coy*, 487

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[1] I presume that when the Court says "trauma would impair the child's ability to communicate," *ante*, at 857, it means that trauma would make it impossible for the child to communicate. That is the requirement of the Maryland law at issue here: "serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9–102(a)(1)(ii) (1989). Any implication beyond that would in any event be dictum.

U. S., at 1020. To say that a defendant loses his right to confront a witness when that would cause the witness not to testify is rather like saying that the defendant loses his right to counsel when counsel would save him, or his right to subpoena witnesses when they would exculpate him, or his right not to give testimony against himself when that would prove him guilty.

III

The Court characterizes the State's interest which "outweigh[s]" the explicit text of the Constitution as an "interest in the physical and psychological well-being of child abuse victims," *ante*, at 853, an "interest in protecting" such victims "from the emotional trauma of testifying," *ante*, at 855. That is not so. A child who meets the Maryland statute's requirement of suffering such "serious emotional distress" from confrontation that he "cannot reasonably communicate" would seem entirely safe. Why would a prosecutor want to call a witness who cannot reasonably communicate? And if he did, it would be the State's own fault. Protection of the child's interest—as far as the Confrontation Clause is concerned[2]—is entirely within Maryland's control. The State's interest here is in fact no more and no less than what the State's interest always is when it seeks to get a class of evidence admitted in criminal proceedings: more convictions of guilty defendants. That is not an unworthy interest, but it should not be dressed up as a humanitarian one.

And the interest on the other side is also what it usually is when the State seeks to get a new class of evidence admitted: fewer convictions of innocent defendants—specifically, in the

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[2] A different situation would be presented if the defendant sought to call the child. In that event, the State's refusal to compel the child to appear, or its insistence upon a procedure such as that set forth in the Maryland statute as a condition of its compelling him to do so, would call into question—initially, at least, and perhaps exclusively—the scope of the defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

present context, innocent defendants accused of particularly heinous crimes. The "special" reasons that exist for suspending one of the usual guarantees of reliability in the case of children's testimony are perhaps matched by "special" reasons for being particularly insistent upon it in the case of children's testimony. Some studies show that children are substantially more vulnerable to suggestion than adults, and often unable to separate recollected fantasy (or suggestion) from reality. See Lindsay & Johnson, Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources, in Children's Eyewitness Memory 92 (S. Ceci, M. Toglia, & D. Ross eds. 1987); Feher, The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?, 14 Am. J. Crim. L. 227, 230–233 (1987); Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash. L. Rev. 705, 708–711 (1987). The injustice their erroneous testimony can produce is evidenced by the tragic Scott County investigations of 1983–1984, which disrupted the lives of many (as far as we know) innocent people in the small town of Jordan, Minnesota. At one stage those investigations were pursuing allegations by at least eight children of multiple murders, but the prosecutions actually initiated charged only sexual abuse. Specifically, 24 adults were charged with molesting 37 children. In the course of the investigations, 25 children were placed in foster homes. Of the 24 indicted defendants, one pleaded guilty, two were acquitted at trial, and the charges against the remaining 21 were voluntarily dismissed. See Feher, *supra*, at 239–240. There is no doubt that some sexual abuse took place in Jordan; but there is no reason to believe it was as widespread as charged. A report by the Minnesota attorney general's office, based on inquiries conducted by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, concluded that there was an "absence of credible testimony and [a] lack of

significant corroboration" to support reinstitution of sex-abuse charges, and "no credible evidence of murders." H. Humphrey, Report on Scott County Investigation 8, 7 (1985). The report describes an investigation full of well-intentioned techniques employed by the prosecution team, police, child protection workers, and foster parents, that distorted and in some cases even coerced the children's recollection. Children were interrogated repeatedly, in some cases as many as 50 times, *id.*, at 9; answers were suggested by telling the children what other witnesses had said, *id.*, at 11; and children (even some who did not at first complain of abuse) were separated from their parents for months, *id.*, at 9. The report describes the consequences as follows:

> "As children continued to be interviewed the list of accused citizens grew. In a number of cases, it was only after weeks or months of questioning that children would 'admit' their parents abused them.
>
> . . . . . .
>
> "In some instances, over a period of time, the allegations of sexual abuse turned to stories of mutilations, and eventually homicide." *Id.*, at 10–11.

The value of the confrontation right in guarding against a child's distorted or coerced recollections is dramatically evident with respect to one of the misguided investigative techniques the report cited: some children were told by their foster parents that reunion with their real parents would be hastened by "admission" of their parents' abuse. *Id.*, at 9. Is it difficult to imagine how unconvincing such a testimonial admission might be to a jury that witnessed the child's delight at seeing his parents in the courtroom? Or how devastating it might be if, pursuant to a psychiatric evaluation that "trauma would impair the child's ability to communicate" in front of his parents, the child were permitted to tell his story to the jury on closed-circuit television?

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confronta-

tion, because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact *disserve* the Confrontation Clause's truth-seeking goal." *Ante*, at 857. If so, that is a defect in the Constitution—which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added).

* * *

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings. The Court has convincingly proved that the Maryland procedure serves a valid interest, and gives the defendant virtually everything the Confrontation Clause guarantees (everything, that is, except confrontation). I am persuaded, therefore, that the Maryland procedure is virtually constitutional. Since it is not, however, actually constitutional I would affirm the judgment of the Maryland Court of Appeals reversing the judgment of conviction.

LUJAN, SECRETARY OF THE INTERIOR, ET AL. *v.* NATIONAL WILDLIFE FEDERATION ET AL.

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

No. 89–640. Argued April 16, 1990—Decided June 27, 1990

The National Wildlife Federation (hereinafter respondent) filed this action in the District Court against petitioners, the Director of the Bureau of Land Management (BLM) and other federal parties, alleging that, in various respects, they had violated the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Environmental Policy Act of 1969 (NEPA) in the course of administering the BLM's "land withdrawal review program," and that the complained-of actions should be set aside because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" within the meaning of § 10(e) of the Administrative Procedure Act (APA), 5 U. S. C. § 706. Under the program, petitioners make various types of decisions affecting the status of public lands and their availability for private uses such as mining, a number of which decisions were listed in an appendix to the complaint. The court granted petitioners' motion for summary judgment under Federal Rule of Civil Procedure 56, holding that respondent lacked standing to seek judicial review of petitioners' actions under the APA, § 702. The court ruled that affidavits by two of respondent's members, Peterson and Erman, claiming use of public lands "in the vicinity" of lands covered by two of the listed decisions, were insufficient to confer standing as to those particular decisions, and that, even if they had been adequate for that limited purpose, they could not support respondent's attempted APA challenge to each of the 1,250 or so individual actions effected under the program. The court rejected as untimely four more member affidavits pertaining to standing, which were submitted after argument on the summary judgment motion and in purported response to the District Court's postargument request for additional briefing. The Court of Appeals reversed, holding that the Peterson and Erman affidavits were sufficient in themselves, that it was an abuse of discretion not to consider the four additional affidavits, and that standing to challenge the individual decisions conferred standing to challenge all such decisions.

Held:

1. The Peterson and Erman affidavits are insufficient to establish respondent's § 702 entitlement to judicial review as "[a] person . . .

adversely affected or aggrieved by agency action within the meaning of a relevant statute." Pp. 882–889.

(a) To establish a right to relief under § 702, respondent must satisfy two requirements. First, it must show that it has been affected by some "agency action," as defined in § 551(13). See § 701(b)(2). Since neither the FLPMA nor NEPA provides a private right of action, the "agency action" in question must also be "final agency action" under § 704. Second, respondent must prove that it is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute," which requires a showing that the injury complained of falls within the "zone of interests" sought to be protected by the FLPMA and NEPA. Cf. *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 396–397. Pp. 882–883.

(b) When a defendant moves for summary judgment on the ground that the plaintiff has failed to establish a right to relief under § 702, the burden is on the plaintiff, under Rule 56(e), to set forth specific facts (even though they may be controverted by the defendant) showing that there is a genuine issue for trial. Cf. *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322. Where no such showing is made, the defendant is entitled to judgment as a matter of law. *Id.*, at 323. Pp. 883–885.

(c) The specific facts alleged in the two affidavits do not raise a genuine issue of fact as to whether respondent has a right to relief under § 702. It may be assumed that the allegedly affected interests set forth in the affidavits—"recreational use and aesthetic enjoyment"—are sufficiently related to respondent's purposes that respondent meets § 702's requirements if any of its members do. Moreover, each affidavit can be read to complain of a particular "agency action" within § 551's meaning; and whatever "adverse effect" or "aggrievement" is established by the affidavits meets the "zone of interests" test, since "recreational use and aesthetic enjoyment" are among the *sorts* of interests that the FLPMA and NEPA are designed to protect. However, there has been no showing that those interests of *Peterson and Erman* were actually "affected" by petitioners' actions, since the affidavits alleged only that the affiants used unspecified lands "in the vicinity of" immense tracts of territory, only on some portions of which, the record shows, mining activity has occurred or probably will occur by virtue of the complained-of actions. The Court of Appeals erred in ruling that the District Court had to presume specific facts sufficient to support the general allegations of injury to the affiants, since such facts are essential to sustaining the complaint and, under Rule 56(e), had to be set forth by respondent. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669, distinguished. Pp. 885–889.

2. Respondent's four additional member affidavits did not establish its right to § 702 review. Pp. 890–898.

(a) The affidavits are insufficient to enable respondent to challenge the entirety of petitioners' "land withdrawal review program." That term does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations, but is simply the name by which petitioners have occasionally referred to certain continuing (and thus constantly changing) BLM operations regarding public lands, which currently extend to about 1,250 individual decisions and presumably will include more actions in the future. Thus, the program is not an identifiable "agency action" within § 702's meaning, much less a "final agency action" under § 704. Absent an explicit congressional authorization to correct the administrative process on a systemic level, agency action is not ordinarily considered "ripe" for judicial review under the APA until the scope of the controversy has been reduced to manageable proportions, and its factual components fleshed out, by concrete action that harms or threatens to harm the complainant. It may well be, due to the scope of the "program," that the individual BLM actions identified in the affidavits will not be "ripe" for challenge until some further agency action or inaction more immediately harming respondent occurs. But it is entirely certain that the flaws in the entire "program" cannot be laid before the courts for wholesale correction under the APA simply because one of them that is ripe for review adversely affects one of respondent's members. Respondent must seek such programmatic improvements from the BLM or Congress. Pp. 890–894.

(b) The District Court did not abuse its discretion in declining to admit the supplemental affidavits. Since the affidavits were filed in response to the court's briefing order following the summary judgment hearing, they were untimely under, *inter alia*, Rule 6(d), which provides that "opposing affidavits may be served not later than 1 day before the hearing." Although Rule 6(b) allows a court, "in its discretion," to extend any filing deadline "for cause shown," a *post*-deadline extension must be "upon motion made," and is permissible only where the failure to meet the deadline "was the result of excusable neglect." Here, respondent made no motion for extension nor any showing of "cause." Moreover, the failure to timely file did not result from "excusable neglect," since the court's order setting the hearing on the summary judgment motion put respondent on notice that its right to sue was at issue, and that (absent proper motion) the time for filing additional evidentiary materials was, at the latest, the day before the hearing. Even if the court could have overcome these obstacles to admit the affidavits, it was not *compelled*, in exercising its discretion, to do so. Pp. 894–898.

3. Respondent is not entitled to seek § 702 review of petitioners' actions in its own right. The brief affidavit submitted to the District Court to show that respondent's ability to fulfill its informational and advocacy functions was "adversely affected" by petitioners' alleged failure to provide adequate information and opportunities for public participation with respect to the land withdrawal review program fails to identify any particular "agency action" that was the source of respondent's alleged injuries, since that program is not an identifiable action or event. Thus, the affidavit does not set forth the specific facts necessary to survive a Rule 56 motion. Pp. 898–899.

278 U. S. App. D. C. 320, 878 F. 2d 422, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 900.

Acting Solicitor General Roberts argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Stewart*, *Deputy Solicitor General Wallace*, *Lawrence S. Robbins*, *Peter R. Steenland, Jr.*, *Anne S. Almy*, *Fred R. Disheroon*, and *Vicki L. Plaut*.

E. Barrett Prettyman, Jr., argued the cause for respondents. With him on the brief were *John C. Keeney, Jr.*, *Kathleen C. Zimmerman*, and *Norman L. Dean, Jr.* *William Perry Pendley* filed a brief for respondents Mountain States Legal Foundation et al.*

*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *Kathryn A. Oberly* and *John J. Rademacher;* for the American Mining Congress by *Jerry L. Haggard* and *Gerrie Apker Kurtz;* for the National Cattlemen's Association et al. by *Constance E. Brooks;* for the Pacific Legal Foundation by *Ronald A. Zumbrun*, *Robin L. Rivett*, and *James S. Burling;* and for the Washington Legal Foundation et al. by *Terence P. Ross*, *Daniel J. Popeo*, and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, and *Craig C. Thompson*, *Susan L. Durbin*, *Clifford L. Rechtschaffen*, and *Nilda M. Mesa*, Deputy Attorney Generals, and for the Attorneys General for their respective States as follows: *Robert A. Butterworth* of Florida, *Lacy H.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case we must decide whether respondent, the National Wildlife Federation (hereinafter respondent), is a proper party to challenge actions of the Federal Government relating to certain public lands.

I

Respondent filed this action in 1985 in the United States District Court for the District of Columbia against petitioners the United States Department of the Interior, the Secretary of the Interior, and the Director of the Bureau of Land Management (BLM), an agency within the Department. In its amended complaint, respondent alleged that petitioners had violated the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U. S. C. § 1701 *et seq.* (1982 ed.), the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, and § 10(e) of the Administrative Procedure Act (APA), 5 U. S. C. § 706, in the course of administering what the complaint called the "land withdrawal review program" of the BLM. Some background information concerning that program is necessary to an understanding of this dispute.

In various enactments, Congress empowered United States citizens to acquire title to, and rights in, vast portions of federally owned land. See, *e. g.*, Rev. Stat. § 2319, 30 U. S. C. § 22 *et seq.* (Mining Law of 1872); 41 Stat. 437, as amended, 30 U. S. C. § 181 *et seq.* (Mineral Leasing Act of 1920). Congress also provided means, however, for the Executive to remove public lands from the operation of these statutes. The Pickett Act, 36 Stat. 847, 43 U. S. C. § 141 (1970 ed.), repealed, 90 Stat. 2792 (1976), authorized the President "at any time in his discretion, temporarily [to] withdraw from settlement, location, sale, or entry any of the

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Thornburg of North Carolina, *Anthony J. Celebrezze, Jr.*, of Ohio, *Jeffrey L. Amestoy* of Vermont, and *Joseph B. Meyer* of Wyoming; and for the Wilderness Society et al. by *Bruce J. Ennis, Jr.*

public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes . . . ." Acting under this and under the Taylor Grazing Act of 1934, ch. 865, 48 Stat. 1269, as amended, 43 U. S. C. § 315f, which gave the Secretary of the Interior authority to "classify" public lands as suitable for either disposal or federal retention and management, President Franklin Roosevelt withdrew all unreserved public land from disposal until such time as they were classified. Exec. Order No. 6910, Nov. 26, 1934; Exec. Order No. 6964, Feb. 5, 1935. In 1936, Congress amended § 7 of the Taylor Grazing Act to authorize the Secretary of the Interior "to examine and classify any lands" withdrawn by these orders and by other authority as "more valuable or suitable" for other uses "and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws." 49 Stat. 1976, 43 U. S. C. § 315f (1982 ed.). The amendment also directed that "[s]uch lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." *Ibid.* The 1964 classification and multiple use Act, 78 Stat. 986, 43 U. S. C. §§ 1411–1418 (1970 ed.) (expired 1970), gave the Secretary further authority to classify lands for the purpose of either disposal or retention by the Federal Government.

Management of the public lands under these various laws became chaotic. The Public Land Law Review Commission, established by Congress in 1964 to study the matter, 78 Stat. 982, determined in 1970 that "virtually all" of the country's public domain, see Public Land Law Review Commission, One Third of the Nation's Land 52 (1970)—about one-third of the land within the United States, see *id.*, at 19—had been withdrawn or classified for retention; that it was difficult to determine "the extent of existing Executive withdrawals and the degree to which withdrawals overlap each other," *id.*, at 52; and that there were inadequate records to show the pur-

poses of withdrawals and the permissible public uses. *Ibid.* Accordingly, it recommended that "Congress should provide for a careful review of (1) all Executive withdrawals and reservations, and (2) BLM retention and disposal classifications under the Classification and Multiple Use Act of 1964." *Ibid.*

In 1976, Congress passed the FLPMA, which repealed many of the miscellaneous laws governing disposal of public land, 43 U. S. C. § 1701 *et seq.* (1982 ed.), and established a policy in favor of retaining public lands for multiple use management. It directed the Secretary to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values," § 1711(a), required land use planning for public lands, and established criteria to be used for that purpose, § 1712. It provided that existing classifications of public lands were subject to review in the land use planning process, and that the Secretary could "modify or terminate any such classification consistent with such land use plans." § 1712(d). It also authorized the Secretary to "make, modify, extend or revoke" withdrawals. § 1714(a). Finally it directed the Secretary, within 15 years, to review withdrawals in existence in 1976 in 11 Western States, § 1714 (*l*)(1), and to "determine whether, and for how long, the continuation of the existing withdrawal of the lands would be, in his judgment, consistent with the statutory objectives of the programs for which the lands were dedicated and of the other relevant programs," § 1714(*l*)(2). The activities undertaken by the BLM to comply with these various provisions constitute what respondent's amended complaint styles the BLM's "land withdrawal review program," which is the subject of the current litigation.

Pursuant to the directives of the FLPMA, petitioners engage in a number of different types of administrative action with respect to the various tracts of public land within the United States. First, the BLM conducts the review and recommends the determinations required by § 1714(*l*) with

respect to withdrawals in 11 Western States. The law requires the Secretary to "report his recommendations to the President, together with statements of concurrence or nonconcurrence submitted by the heads of the departments or agencies which administer the lands"; the President must in turn submit this report to the Congress, together with his recommendation "for action by the Secretary, or for legislation." § 1714(*l*)(2). The Secretary has submitted a number of reports to the President in accordance with this provision.

Second, the Secretary revokes some withdrawals under § 204(a) of the Act, which the Office of the Solicitor has interpreted to give the Secretary the power to process proposals for revocation of withdrawals made during the "ordinary course of business." U. S. Dept. of the Interior, Memorandum from the Office of the Solicitor, Oct. 30, 1980. These revocations are initiated in one of three manners: An agency or department holding a portion of withdrawn land that it no longer needs may file a notice of intention to relinquish the lands with the BLM. Any member of the public may file a petition requesting revocation. And in the case of lands held by the BLM, the BLM itself may initiate the revocation proposal. App. 56–57. Withdrawal revocations may be made for several reasons. Some are effected in order to permit sale of the land; some for record-clearing purposes, where the withdrawal designation has been superseded by congressional action or overlaps with another withdrawal designation; some in order to restore the land to multiple use management pursuant to § 102(a)(7) of the FLPMA, 43 U. S. C. § 1701(a)(7) (1982 ed.). App. 142–145.

Third, the Secretary engages in the ongoing process of classifying public lands, either for multiple use management, 43 CFR pt. 2420 (1988), for disposal, pt. 2430, or for other uses. Classification decisions may be initiated by petition, pt. 2450, or by the BLM itself, pt. 2460. Regulations pro-

mulgated by the Secretary prescribe the procedures to be followed in the case of each type of classification determination.

II

In its complaint, respondent averred generally that the reclassification of some withdrawn lands and the return of others to the public domain would open the lands up to mining activities, thereby destroying their natural beauty. Respondent alleged that petitioners, in the course of administering the Nation's public lands, had violated the FLPMA by failing to "develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands," 43 U. S. C. § 1712(a) (1982 ed.); failing to submit recommendations as to withdrawals in the 11 Western States to the President, § 1714(*l*); failing to consider multiple uses for the disputed lands, § 1732(a), focusing inordinately on such uses as mineral exploitation and development; and failing to provide public notice of decisions, §§ 1701(a)(5), 1712(c)(9), 1712(f), and 1739(e). Respondent also claimed that petitioners had violated NEPA, which requires federal agencies to "include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U. S. C. § 4332(2)(C) (1982 ed.). Finally, respondent alleged that all of the above actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and should therefore be set aside pursuant to § 10(e) of the APA, 5 U. S. C. § 706. Appended to the amended complaint was a schedule of specific land-status determinations, which the complaint stated had been "taken by defendants since January 1, 1981"; each was identified by a listing in the Federal Register.

In December 1985, the District Court granted respondent's motion for a preliminary injunction prohibiting petitioners from "[m]odifying, terminating or altering any withdrawal, classification, or other designation governing the protection

of lands in the public domain that was in effect on January 1, 1981," and from "[t]aking any action inconsistent" with any such withdrawal, classification, or designation. App. to Pet. for Cert. 185a. In a subsequent order, the court denied petitioners' motion under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to demonstrate standing to challenge petitioners' actions under the APA, 5 U. S. C. § 702. App. to Pet. for Cert. 183a. The Court of Appeals affirmed both orders. *National Wildlife Federation* v. *Burford*, 266 U. S. App. D. C. 241, 835 F. 2d 305 (1987). As to the motion to dismiss, the Court of Appeals found sufficient to survive the motion the general allegation in the amended complaint that respondent's members used environmental resources that would be damaged by petitioners' actions. See *id.*, at 248, 835 F. 2d, at 312. It held that this allegation, fairly read along with the balance of the complaint, both identified particular land-status actions that respondent sought to challenge—since at least some of the actions complained of were listed in the complaint's appendix of Federal Register references—and asserted harm to respondent's members attributable to those particular actions. *Id.*, at 249, 835 F. 2d, at 313. To support the latter point, the Court of Appeals pointed to the affidavits of two of respondent's members, Peggy Kay Peterson and Richard Erman, which claimed use of land "in the vicinity" of the land covered by two of the listed actions. Thus, the Court of Appeals concluded, there was "concrete indication that [respondent's] members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions," and the complaint was "sufficiently specific for purposes of a motion to dismiss." *Ibid.* On petitions for rehearing, the Court of Appeals stood by its denial of the motion to dismiss and directed the parties and the District Court "to proceed with this litigation with dispatch." *National Wildlife Federation* v. *Burford*, 269 U. S. App. D. C. 271, 272, 844 F. 2d 889, 890 (1988).

Back before the District Court, petitioners again claimed, this time by means of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (which motion had been outstanding during the proceedings before the Court of Appeals), that respondent had no standing to seek judicial review of petitioners' actions under the APA. After argument on this motion, and in purported response to the court's postargument request for additional briefing, respondent submitted four additional member affidavits pertaining to the issue of standing. The District Court rejected them as untimely, vacated the injunction, and granted the Rule 56 motion to dismiss. It noted that neither its earlier decision nor the Court of Appeals' affirmance controlled the question, since both pertained to a motion under Rule 12(b). It found the Peterson and Erman affidavits insufficient to withstand the Rule 56 motion, even as to judicial review of the particular classification decisions to which they pertained. And even if they had been adequate for that limited purpose, the court said, they could not support respondent's attempted APA challenge to "each of the 1250 or so individual classification terminations and withdrawal revocations" effected under the land withdrawal review program. *National Wildlife Federation* v. *Burford*, 699 F. Supp. 327, 332 (DC 1988).

This time the Court of Appeals reversed. *National Wildlife Federation* v. *Burford*, 278 U. S. App. D. C. 320, 878 F. 2d 422 (1989). It both found the Peterson and Erman affidavits sufficient in themselves and held that it was an abuse of discretion not to consider the four additional affidavits as well.[1] The Court of Appeals also concluded that

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[1] As an additional basis for its conclusion, the Court of Appeals held that the earlier panel's finding that the Peterson and Erman affidavits were sufficient to establish respondent's right to sue was the "law of the case." We do not address this conclusion, as the earlier panel's ruling does not, of course, bind this Court. *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912).

standing to challenge individual classification and withdrawal decisions conferred standing to challenge all such decisions under the land withdrawal review program. We granted certiorari. 493 U. S. 1042 (1990).

III

A

We first address respondent's claim that the Peterson and Erman affidavits alone suffice to establish respondent's right to judicial review of petitioners' actions. Respondent does not contend that either the FLPMA or NEPA provides a private right of action for violations of its provisions. Rather, respondent claims a right to judicial review under § 10(a) of the APA, which provides:

> "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." 5 U. S. C. § 702.

This provision contains two separate requirements. First, the person claiming a right to sue must identify some "agency action" that affects him in the specified fashion; it is judicial review "thereof" to which he is entitled. The meaning of "agency action" for purposes of § 702 is set forth in 5 U. S. C. § 551(13), see 5 U. S. C. § 701(b)(2) ("For the purpose of this chapter . . . 'agency action' ha[s] the meanin[g] given . . . by section 551 of this title"), which defines the term as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U. S. C. § 551(13). When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the "agency action" in question must be "final agency action." See 5 U. S. C. § 704 ("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" (emphasis added).

Second, the party seeking review under § 702 must show that he has "suffer[ed] legal wrong" because of the challenged agency action, or is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute." Respondent does not assert that it has suffered "legal wrong," so we need only discuss the meaning of "adversely affected or aggrieved . . . within the meaning of a relevant statute." As an original matter, it might be thought that one cannot be "adversely affected or aggrieved *within the meaning*" of a statute unless the statute in question uses those terms (or terms like them)—as some pre-APA statutes in fact did when conferring rights of judicial review. See, *e. g.*, Federal Communications Act of 1934, § 402(b)(2), 48 Stat. 1093, as amended, 47 U. S. C. § 402(b)(6) (1982 ed.). We have long since rejected that interpretation, however, which would have made the judicial review provision of the APA no more than a restatement of pre-existing law. Rather, we have said that to be "adversely affected or aggrieved . . . within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. See *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 396–397 (1987). Thus, for example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

B

Because this case comes to us on petitioners' motion for summary judgment, we must assess the record under the

standard set forth in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that a party is entitled to summary judgment in his favor "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(e) further provides:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

As we stated in *Celotex Corp.* v. *Catrett*, 477 U. S. 317 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.*, at 322. Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.*, at 323.

These standards are fully applicable when a defendant moves for summary judgment, in a suit brought under § 702, on the ground that the plaintiff has failed to show that he is "adversely affected or aggrieved by agency action within the meaning of a relevant statute." The burden is on the party seeking review under § 702 to set forth specific facts (even though they may be controverted by the Government) showing that he has satisfied its terms. *Sierra Club* v. *Morton*,

405 U. S. 727, 740 (1972). *Celotex* made clear that Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case; to the contrary, "regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." 477 U. S., at 323.

C

We turn, then, to whether the specific facts alleged in the two affidavits considered by the District Court raised a genuine issue of fact as to whether an "agency action" taken by petitioners caused respondent to be "adversely affected or aggrieved . . . within the meaning of a relevant statute." We assume, since it has been uncontested, that the allegedly affected interests set forth in the affidavits—"recreational use and aesthetic enjoyment"—are sufficiently related to the purposes of respondent association that respondent meets the requirements of § 702 if any of its members do. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333 (1977).

As for the "agency action" requirement, we think that each of the affidavits can be read, as the Court of Appeals believed, to complain of a particular "agency action" as that term is defined in § 551. The parties agree that the Peterson affidavit, judging from the geographic area it describes, must refer to that one of the BLM orders listed in the appendix to the complaint that appears at 49 Fed. Reg. 19904–19905 (1984), an order captioned W–6228 and dated April 30, 1984, terminating the withdrawal classification of some 4,500 acres of land in that area. See, *e. g.*, Brief for Petitioners 8–10. The parties also appear to agree, on the basis of similar deduction, that the Erman affidavit refers to the BLM order listed in the appendix that appears at 47 Fed. Reg. 7232–7233

(1982), an order captioned Public Land Order 6156 and dated February 18, 1982.

We also think that whatever "adverse effect" or "aggrievement" is established by the affidavits was "within the meaning of the relevant statute"—*i. e.*, met the "zone of interests" test. The relevant statute, of course, is the statute whose violation is the gravamen of the complaint—both the FLPMA and NEPA. We have no doubt that "recreational use and aesthetic enjoyment" are among the *sorts* of interests those statutes were specifically designed to protect. The only issue, then, is whether the facts alleged in the affidavits showed that those interests *of Peterson and Erman* were actually affected.

The Peterson affidavit averred:

> "My recreational use and aesthetic enjoyment of federal lands, particularly those in the vicinity of South Pass-Green Mountain, Wyoming have been and continue to be adversely affected in fact by the unlawful actions of the Bureau and the Department. In particular, the South Pass-Green Mountain area of Wyoming has been opened to the staking of mining claims and oil and gas leasing, an action which threatens the aesthetic beauty and wildlife habitat potential of these lands." App. to Pet. for Cert. 191a.

Erman's affidavit was substantially the same as Peterson's, with respect to all except the area involved; he claimed use of land "in the vicinity of Grand Canyon National Park, the Arizona Strip (Kanab Plateau), and the Kaibab National Forest." *Id.*, at 187a.

The District Court found the Peterson affidavit inadequate for the following reasons:

> "Peterson . . . claims that she uses federal lands *in the vicinity* of the South Pass-Green Mountain area of Wyoming for recreational purposes and for aesthetic enjoyment and that her recreational and aesthetic enjoyment

> has been and continues to be adversely affected as the result of the decision of BLM to open it to the staking of mining claims and oil and gas leasing. . . . This decision [W–6228] opened up to mining approximately 4500 acres within a two million acre area, the balance of which, with the exception of 2000 acres, has always been open to mineral leasing and mining. . . . There is no showing that Peterson's recreational use and enjoyment extends to the particular 4500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands 'in the vicinity.' The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation." 699 F. Supp., at 331 (emphasis in original).

The District Court found the Erman affidavit "similarly flawed."

> "The magnitude of Erman's claimed injury stretches the imagination. . . . [T]he Arizona Strip consists of all lands in Arizona north and west of the Colorado River on approximately 5.5 million acres, an area one-eighth the size of the State of Arizona. Furthermore, virtually the entire Strip is and for many years has been open to uranium and other metalliferous mining. The revocation of withdrawal [in Public Land Order 6156] concerned only non-metalliferous mining in the western one-third of the Arizona Strip, an area possessing no potential for non-metalliferous mining." *Id.*, at 332.

The Court of Appeals disagreed with the District Court's assessment as to the Peterson affidavit (and thus found it unnecessary to consider the Erman affidavit) for the following reason:

> "If Peterson was not referring to lands in this 4500-acre affected area, her allegation of impairment to her use and enjoyment would be meaningless, or perjurious. . . .

> [T]he trial court overlooks the fact that unless Peterson's language is read to refer to the lands affected by the Program, the affidavit is, at best, a meaningless document.
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> "At a minimum, Peterson's affidavit is ambiguous regarding whether the adversely affected lands are the ones she uses. When presented with ambiguity on a motion for summary judgment, a District Court must resolve any factual issues of controversy in favor of the non-moving party . . . . This means that the District Court was obliged to resolve any factual ambiguity in favor of NWF, and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres." 278 U. S. App. D. C., at 329, 878 F. 2d, at 431.

That is not the law. In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. Cf. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 249 (1986) ("[T]he plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint'"), quoting *First National Bank of Ariz.* v. *Cities Service Co.*, 391 U. S. 253, 290 (1968). Rather, the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one

sworn averment of that fact before the lengthy process of litigation continues.

At the margins there is some room for debate as to how "specific" must be the "specific facts" that Rule 56(e) requires in a particular case. But where the fact in question is the one put in issue by the § 702 challenge here—whether one of respondent's members has been, or is threatened to be, "adversely affected or aggrieved" by Government action—Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action. It will not do to "presume" the missing facts because without them the affidavits would not establish the injury that they generally allege. That converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegation of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what defendant claims it is).

Respondent places great reliance, as did the Court of Appeals, upon our decision in *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669 (1973). The *SCRAP* opinion, whose expansive expression of what would suffice for § 702 review under its particular facts has never since been emulated by this Court, is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss on the pleadings. The latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim. *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957).

IV

We turn next to the Court of Appeals' alternative holding that the four additional member affidavits proffered by respondent in response to the District Court's briefing order established its right to § 702 review of agency action.

A

It is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called "land withdrawal review program." That is not an "agency action" within the meaning of § 702, much less a "final agency action" within the meaning of § 704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action"—much less a "final agency action"—than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations." 699 F. Supp., at 332.[2]

[2] Contrary to the apparent understanding of the dissent, we do not contend that no "land withdrawal review program" exists, any more than we would contend that no weapons procurement program exists. We merely assert that it is not an identifiable "final agency action" for purposes of the APA. If there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review in the manner we discuss subsequently in

Respondent alleges that violation of the law is rampant within this program—failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, inordinate focus upon mineral exploitation, failure to provide required public notice, failure to provide adequate environmental impact statements. Perhaps so. But respondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt. Absent such a provision, however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is "ripe" for review at once, whether or not explicit statutory review apart from the APA is provided. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152–154 (1967); *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167, 171–173 (1967). Cf. *Toi-*

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text, it can of course be challenged under the APA by a person adversely affected—and the entire "land withdrawal review program," insofar as the content of that particular action is concerned, would thereby be affected. But that is quite different from permitting a generic challenge to all aspects of the "land withdrawal review program," as though that itself constituted a final agency action.

let Goods Assn., Inc. v. *Gardner*, 387 U. S. 158, 164–166 (1967).)

In the present case, the individual actions of the BLM identified in the six affidavits can be regarded as rules of general applicability (a "rule" is defined in the APA as agency action of "general or particular applicability *and future effect*," 5 U. S. C. § 551(4) (emphasis added)) announcing, with respect to vast expanses of territory that they cover, the agency's intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested. It may well be, then, that even those individual actions will not be ripe for challenge until some further agency action or inaction more immediately harming the plaintiff occurs.[3] But it is at least entirely

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[3] Under the Secretary's regulations, any person seeking to conduct mining operations that will "cause a cumulative surface disturbance" of five acres or more must first obtain approval of a plan of operations. 43 CFR § 3809.1–4 (1988). Mining operations that cause surface disturbance of less than five acres do not require prior approval, but prior notice must be given to the district office of the BLM. § 3809.1–3. Neither approval nor notification is required only with respect to "casual use operations," § 3809.1–2, defined as "activities ordinarily resulting in only negligible disturbance of the Federal lands and resources," § 3809.0–5. (Activities are considered "casual" if "they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in areas designated as closed to off-road vehicles . . . ." *Ibid.*) Thus, before any mining use ordinarily involving more than "negligible disturbance" can take place, there must occur either agency action in response to a submitted plan or agency inaction in response to a submitted notice.

In one of the four new affidavits, Peggy Peterson, one of the original affiants, states that a corporation has filed a mine permit application with the BLM covering a portion of the land to which her original affidavit pertained. App. to Brief in Opposition for Respondent National Wildlife Federation 16. If that permit is granted, there is no doubt that agency action ripe for review will have occurred; nor any doubt that, in the course of an otherwise proper court challenge, affiant Peterson, and through her respondent, would be able to call into question the validity of the classification order authorizing the permit. However, before the grant of such a permit, or (when it will suffice) the filing of a notice to engage in mining

certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.[4]

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activities, or (when only "negligible disturbance" will occur) actual mining of the land, it is impossible to tell where or whether mining activities will occur. Indeed, it is often impossible to tell from a classification order alone whether mining activities will even be permissible. As explained in the uncontested affidavit of the BLM's Assistant Director of Land Resources:

"The lands may be subject to another withdrawal of comparable scope or they may be subject to classification segregations tantamount to such a withdrawal. In that case, the lands would not be opened to the operation of the public land laws so that the removal of one of the withdrawals has no practical effect. Another reason why there may not be any change is that before the revocation occurred, the lands may have been transferred into private ownership. Consequently, the withdrawal revocation amounts to nothing more than a paper transaction . . . . In the alternative, a revoked withdrawal may open the lands to the operation of the public land and mineral laws. . . . Some withdrawal revocations are made without prior knowledge as to what subsequent disposition may be made of the lands. After the lands are opened, they might be transferred out of federal ownership by sale, exchange, or some other discretionary mode of disposal, not anticipated when the withdrawal was revoked. These subsequent discretionary actions require separate and independent decisionmaking that, obviously, are divorced from the prior revocation decision. Environmental and other management concerns and public participation are taken into account in relation to the post-revocation decisionmaking." Affidavit of Frank Edwards, Aug. 18, 1985, App. 61–62.

[4] Nothing in this is contrary to our opinion in *Automobile Workers* v. *Brock*, 477 U. S. 274 (1986), cited by the Court of Appeals. That opinion did not discuss, and the respondent Secretary of Labor did not rely upon, the requirements of 5 U. S. C. § 702 and our ripeness jurisprudence in cases such as *Abbott Laboratories* v. *Gardner*, 387 U. S. 136 (1967); *Gardner* v. *Toilet Goods Assn., Inc.*, 387 U. S. 167 (1967); and *Toilet Goods Assn., Inc.* v. *Gardner*, 387 U. S. 158 (1967). The only challenge made and decided, with respect to the individuals' right to sue, relied upon 19 U. S. C. § 2311(d) (1982 ed.), which according to the Secretary of Labor made entertainment of that suit "'contrary to Congress's incorporation of

The case-by-case approach that this requires is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife and the streams and forests that support it. But this is the traditional, and remains the normal, mode of operation of the courts. Except where Congress explicitly provides for our correction of the administrative process at a higher level of generality, we intervene in the administration of the laws only when, and to the extent that, a specific "final agency action" has an actual or immediately threatened effect. *Toilet Goods Assn.*, 387 U. S., at 164–166. Such an intervention may ultimately have the effect of requiring a regulation, a series of regulations, or even a whole "program" to be revised by the agency in order to avoid the unlawful result that the court discerns. But it is assuredly not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

B

The Court of Appeals' reliance upon the supplemental affidavits was wrong for a second reason: The District Court did not abuse its discretion in declining to admit them. Petitioners filed their motion for summary judgment in September 1986; respondent filed an opposition but did not submit any new evidentiary materials at that time. On June 27, 1988, after the case had made its way for the first time through the Court of Appeals, the District Court announced that it would hold a hearing on July 22 on "the outstanding motions for summary judgment," which included petitioners' motion challenging respondent's § 702 standing. The hearing was held and, as noted earlier, the District Court issued an order directing respondent to file "a supplemental memorandum re-

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the state system into the administration of the Trade Act, and an affront to the integrity and authority of the state courts.'" 477 U. S., at 283, quoting Brief for Respondent in *Automobile Workers*, O. T. 1985, No. 84–1777, p. 16.

garding the issue of its standing to proceed." Record, Doc. No. 274. Although that plainly did not call for the submission of new evidentiary materials, it was in purported response to this order, on August 22, 1988, that respondent submitted (along with the requested legal memorandum) the additional affidavits. The only explanation for the submission (if it can be called an explanation) was contained in a footnote to the memorandum, which simply stated that "NWF now has submitted declarations on behalf of other members of NWF who have been injured by the challenged actions of federal defendants." Record, Doc. No. 278, p. 18, n. 21. In its November 4, 1988, ruling granting petitioners' motion, the District Court rejected the additional affidavits as "untimely and in violation of [the court's briefing] Order." 699 F. Supp., at 328, n. 3.

Respondent's evidentiary submission was indeed untimely, both under Rule 56, which requires affidavits in opposition to a summary judgment motion to be served "prior to the day of the hearing," Fed. Rule Civ. Proc. 56(c), and under Rule 6(d), which states more generally that "[w]hen a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." Rule 6(b) sets out the proper approach in the case of late filings:

> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . . ."

This provision not only specifically confers the "discretion" relevant to the present issue, but also provides the mecha-

nism by which that discretion is to be invoked and exercised. First, any extension of a time limitation must be "for cause shown." Second, although extensions before expiration of the time period may be "with or without motion or notice," any *post*deadline extension must be "upon motion made," and is permissible only where the failure to meet the deadline "was the result of excusable neglect." Thus, in order to receive the affidavits here, the District Court would have had to regard the very filing of the late document as the "motion made" to file it;[5] it would have had to interpret "cause

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[5] The dissent asserts that a footnote in respondent's reply memorandum to the District Court was a "motion" within the meaning of Rule 6(b)(2), and was so obviously so that the District Court committed reversible error in failing to construe it that way. *Post*, at 909–910, n. 10. We cannot agree. Rule 6(b) establishes a clear distinction between "requests" and "motions," and the one cannot be converted into the other without violating its provisions—or at least cannot be converted on the basis of such lax criteria that conversion would be not only marginally permissible but positively mandatory in the present case. Rule 6(b)(1) allows a court ("for cause shown" and "in its discretion") to grant a "request" for an extension of time, whether the request is made "with or without motion or notice," *provided* the request is made before the time for filing expires. *After* the time for filing has expired, however, the court (again "for cause shown" and "in its discretion") may extend the time only "upon motion." To treat all postdeadline "requests" as "motions" (if indeed any of them can be treated that way) would eliminate the distinction between predeadline and postdeadline filings that the Rule painstakingly draws. Surely the postdeadline "request," to be even *permissibly* treated as a "motion," must contain a high degree of formality and precision, putting the opposing party on notice that a motion is at issue and that he therefore ought to respond. The request here had not much of either characteristic. As for formality, it was not even made in a separate filing or in a separate appearance before the court, but was contained in a single sentence at the end of the first paragraph of one of the 18 single-spaced footnotes in a 20-page memorandum of law. Our district judges must read footnotes with new care if they are to be reversed for failing to recognize motions buried in this fashion. And as for precision, the request not only did not ask for any *particular* extension of time (7 days, 30 days), it did not specifically ask for an extension of time *at all*, but merely said that respondent "should be given adequate opportunity to supplement the record." Even this, moreover,

shown" to mean merely "cause," since respondent made no "showing" of cause at all; and finally, it would have had to find as a substantive matter that there was indeed "cause" for the late filing, and that the failure to file on time "was the result of excusable neglect."

This last substantive obstacle is the greatest of all. The Court of Appeals presumably thought it was overcome because "the papers on which the trial court relied were two years old by the time it requested supplemental memoranda" and because "there was no indication prior to the trial court's request that [respondent] should have doubted the adequacy of the affidavits it had already submitted." 278 U. S. App. D. C., at 331, 878 F. 2d, at 433. We do not understand the relevance of the first point; the passage of so long a time as two years suggests, if anything, that respondent had more than the usual amount of time to prepare its response to the motion, and was more than moderately remiss in waiting until after the last moment. As to the suggestion of unfair surprise: A litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect, and a litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk. In any case, whatever erroneous expectations respondent may have had were surely dispelled by the District Court's order in June 1988 announcing that the hearing on petitioners' motion would be held one month later. At least when that order issued, respondent was on notice that its right to sue was at issue, and that (absent proper motion) the time for filing any additional evidentiary materials was, at the latest, the day before the hearing.

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was not requested (much less moved for) unconditionally, but only "[i]f the court intends to reverse its prior ruling [regarding NWF standing]." Record, Doc. No. 294, p. 17, n. 16. We think it quite impossible to agree with the dissent that the District Judge not only *might* treat this request as a motion, but that he was compelled to do so.

Perhaps it is true that the District Court could have overcome all the obstacles we have described—apparent lack of a motion, of a showing, and of excusable neglect—to admit the affidavits at issue here. But the proposition that it was *compelled* to receive them—that it was an abuse of discretion to *reject* them—cannot be accepted.

V

Respondent's final argument is that we should remand this case for the Court of Appeals to decide whether respondent may seek § 702 review of petitioners' actions in its own right, rather than derivatively through its members. Specifically, it points to allegations in the amended complaint that petitioners unlawfully failed to publish regulations, to invite public participation, and to prepare an environmental impact statement with respect to the "land withdrawal review program" as a whole. In order to show that it is a "person . . . adversely affected or aggrieved" by these failures, it submitted to the District Court a brief affidavit (two pages in the record) by one of its vice presidents, Lynn A. Greenwalt, who stated that respondent's mission is to "inform its members and the general public about conservation issues" and to advocate improvements in laws and administrative practices "pertaining to the protection and enhancement of federal lands," App. to Pet. for Cert. 193a–194a; and that its ability to perform this mission has been impaired by petitioners' failure "to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program." *Id.*, at 194a. The District Court found this affidavit insufficient to establish respondent's right to seek judicial review, since it was "conclusory and completely devoid of specific facts." 699 F. Supp., at 330. The Court of Appeals, having reversed the District Court on the grounds discussed above, did not address the issue.

We agree with the District Court's disposition. Even assuming that the affidavit set forth "specific facts," Fed. R.

Civ. Proc. 56(e), adequate to show injury to respondent through the deprivation of information; and even assuming that providing information to organizations such as respondent was one of the objectives of the statutes allegedly violated, so that respondent is "aggrieved within the meaning" of those statutes; nonetheless, the Greenwalt affidavit fails to identify any particular "agency action" that was the source of these injuries. The only sentences addressed to that point are as follows:

> "NWF's ability to meet these obligations to its members has been significantly impaired by the failure of the Bureau of Land Management and the Department of the Interior to provide adequate information and opportunities for public participation with respect to the Land Withdrawal Review Program. These interests of NWF have been injured by the actions of the Bureau and the Department and would be irreparably harmed by the continued failure to provide meaningful opportunities for public input and access to information regarding the Land Withdrawal Review Program." App. to Pet. for Cert. 194a.

As is evident, this is even more deficient than the Peterson and Erman affidavits, which contained geographical descriptions whereby at least an action as general as a particular classification decision could be identified as the source of the grievance. As we discussed earlier, the "land withdrawal review program" is not an identifiable action or event. With regard to alleged deficiencies in providing information and permitting public participation, as with regard to the other illegalities alleged in the complaint, respondent cannot demand a general judicial review of the BLM's day-to-day operations. The Greenwalt affidavit, like the others, does not set forth the specific facts necessary to survive a Rule 56 motion.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is reversed.

It is so ordered.

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

In my view, the affidavits of Peggy Kay Peterson and Richard Loren Erman, in conjunction with other record evidence before the District Court on the motions for summary judgment, were sufficient to establish the standing of the National Wildlife Federation (Federation or NWF) to bring this suit. I also conclude that the District Court abused its discretion by refusing to consider supplemental affidavits filed after the hearing on the parties' cross-motions for summary judgment. I therefore would affirm the judgment of the Court of Appeals.

I

The Federation's asserted injury in this case rested upon its claim that the Government actions challenged here would lead to increased mining on public lands; that the mining would result in damage to the environment; and that the recreational opportunities of NWF's members would consequently be diminished. Abundant record evidence supported the Federation's assertion that on lands newly opened for mining, mining in fact would occur.[1] Similarly, the record furnishes ample support for NWF's contention that mining activities can be expected to cause severe environ-

[1] Prior to the District Court's entry of the preliminary injunction, 406 mining claims had been staked in the South Pass-Green Mountain area alone. App. 119. An exhibit filed by the federal parties indicated that over 7,200 claims had been filed in 12 Western States. Exh. 1 to Affidavit of Joseph Martyak (Apr. 11, 1986).

mental damage to the affected lands.[2] The District Court held, however, that the Federation had not adequately identified particular members who were harmed by the consequences of the Government's actions. Although two of NWF's members expressly averred that their recreational activities had been impaired, the District Court concluded that these affiants had not identified with sufficient precision the particular sites on which their injuries occurred. The majority, like the District Court, holds that the averments of Peterson and Erman were insufficiently specific to withstand a motion for summary judgment. Although these affidavits were not models of precision, I believe that they were adequate at least to create a genuine issue of fact as to the organization's injury.

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[2] A Bureau of Land Management (BLM) draft of a Resource Management Plan/Environmental Impact Statement for the Lander, Wyo., Resource Area stated: "In the Green Mountain Management Unit . . . significant long-term impacts to elk and mule deer herds could occur from habitat losses caused by oil and gas activities over the next 60 years. . . . In the South Pass Management Unit, significant acreages of lodgepole pine forest and aspen conifer woodland habitat types could be disturbed, which would cause significant long-term impacts to moose and elk. . . . If gold mining activities continued to erode these high-value habitats, trout fisheries, the Lander moose herd, the beaver pond ecosystems, and the populations of many other wildlife species would suffer significant cumulative negative effects." Draft RMP/EIS, pp. 226–228 (Exh. 3 to Defendant-Intervenors' Reply to Plaintiff's Opposition to Defendants' Motions for Stay Pending Appeal (May 14, 1986)).

A BLM Mineral Report issued June 17, 1982, concluded that mining and associated activities "could have an adverse impact on crucial moose habitat, deer habitat, some elk habitat, and a variety of small game and bird species. Improvements at campgrounds, as well as land in the immediate vicinity, could either be damaged or destroyed. These activities could make it difficult for the BLM to manage the forest production and harvesting in the South Pass area. Historical and cultural resources which have and have not been identified could be either damaged or destroyed." Defendant-Intervenors' Exh. 7 (attached as Appendix 1 to Plaintiff National Wildlife Federation's Statement of Points and Authorities in Support of Its Standing To Proceed (Aug. 22, 1988)).

As the Court points out, the showing (whether as to standing or the merits) required to overcome a motion for summary judgment is more extensive than that required in the context of a motion to dismiss. The principal difference is that in the former context *evidence* is required, while in the latter setting the litigant may rest upon the allegations of his complaint. See *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 324 (1986) (Federal Rule of Civil Procedure 56(e) "requires the nonmoving party to go beyond the pleadings"). In addition, Rule 56(e) requires that the party opposing summary judgment "must set forth *specific* facts showing that there is a genuine issue for trial" (emphasis added). Thus, Courts of Appeals have reiterated that "conclusory" allegations unsupported by "specific" evidence will be insufficient to establish a genuine issue of fact.[3]

The requirement that evidence be submitted is satisfied here: The Federation has offered the sworn statements of two of its members. There remains the question whether the allegations in these affidavits were sufficiently precise to satisfy the requirements of Rule 56(e). The line of demarcation between "specific" and "conclusory" allegations is hardly a bright one. But, to my mind, the allegations contained in the Peterson and Erman affidavits, in the context of the record as a whole, were adequate to defeat a motion for summary judgment. These affidavits, as the majority acknowledges, were at least sufficiently precise to enable Bureau of Land Management (BLM) officials to identify the particular termination orders to which the affiants referred. See *ante*, at 885–886. And the affiants averred that their "recreational use and aesthetic enjoyment of federal lands . . . have been and continue to be adversely affected in fact by the unlawful

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[3] See, *e. g.*, *May* v. *Department of Air Force*, 777 F. 2d 1012, 1016 (CA5 1985); *First Commodity Traders, Inc.* v. *Heinold Commodities, Inc.*, 766 F. 2d 1007, 1011 (CA7 1985); *Maldonado* v. *Ramirez*, 757 F. 2d 48, 51 (CA3 1985); *Galindo* v. *Precision American Corp.*, 754 F. 2d 1212, 1216 (CA5 1985).

actions of the Bureau and the Department." App. to Pet. for Cert. 188a (Erman affidavit), 191a (Peterson affidavit). The question, it should be emphasized, is not whether the NWF has *proved* that it has standing to bring this action, but simply whether the materials before the District Court established "that there is a genuine issue for trial," see Rule 56(e), concerning the Federation's standing. In light of the principle that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [evidentiary] materials must be viewed in the light most favorable to the party opposing the motion," *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655 (1962), I believe that the evidence before the District Court raised a genuine factual issue as to NWF's standing to sue.

No contrary conclusion is compelled by the fact that Peterson alleged that she uses federal lands "in the vicinity of South Pass-Green Mountain, Wyoming," App. to Pet. for Cert. 191a, rather than averring that she uses the precise tract that was recently opened to mining. The agency itself has repeatedly referred to the "South Pass-Green Mountain area" in describing the region newly opened to mining.[4] Peterson's assertion that her use and enjoyment of federal lands *have been* adversely affected by the agency's decision to permit more extensive mining is, as the Court of Appeals stated, *National Wildlife Federation* v. *Burford*, 278 U. S. App. D. C. 320, 329, 878 F. 2d 422, 431 (1989), "meaningless, or perjurious" if the lands she uses do not include those harmed by mining undertaken pursuant to termination order W–6228.[5] To read particular assertions within the affidavit in light of the document as a whole is, as the majority might put it, "a world apart" from "presuming" facts that are neither stated nor implied simply because without them the

[4] See, *e. g.*, App. 123–139 (declaration of Jack Kelly).

[5] The areas harmed or threatened by mining and associated activities may extend well beyond the precise location where mining occurs. See n. 2, *supra*.

plaintiff would lack standing. The Peterson and Erman affidavits doubtless could have been more artfully drafted, but they definitely were sufficient to withstand the federal parties' summary judgment motion.

II

I also conclude that the District Court abused its discretion in refusing to consider the supplemental affidavits filed by NWF after the hearing on the summary judgment motion.[6] The court's decision abruptly derailed the Federation's lawsuit after three years of proceedings involving massive time and expense. The District Court and Court of Appeals both had concluded that NWF's claims were sufficiently substantial to warrant the entry of a nationwide injunction. Whatever the ultimate merits of the Federation's claims, litigation of this magnitude should not be aborted on technical grounds if that result legitimately can be avoided. The majority's approach reflects an insufficient appreciation both of the realities of complex litigation and of the admonition that the Federal Rules of Civil Procedure "shall be construed to secure

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[6] Five supplemental affidavits were filed. The first was submitted by Peggy Kay Peterson, in clarification of her earlier affidavit: "A substantial portion of the lands which I use . . . are identical to those lands" newly opened to mining in the South Pass-Green Mountain area. Peterson Supplemental Affidavit, App. in No. 88–5397 (CADC), p. 356. Ms. Peterson also asserted that "U. S. Energy Corporation has filed a mine permit application with the Bureau and Department, (U. S. Energy Application, TFN 2 4/86), which includes a proposal to mine a significant portion of the federal lands which I use for recreational purposes and aesthetic enjoyment." *Id.*, at 355–356. The other affiants were NWF members David Doran, Merlin McColm, Stephen Blomeke, and Will Ouellette. These individuals identified termination orders that had opened to mining particular tracts of land used by the affiants for recreation and aesthetic enjoyment.

The federal parties do not concede that the supplemental affidavits established with certainty the Federation's standing; they contend that further discovery might show the affiants' allegations to be untrue. The federal parties do concede, however, that the supplemental affidavits were not facially deficient. Tr. of Oral Arg. 19.

the just, speedy, and inexpensive determination of every action." Rule 1.

That a requirement is "technical" does not, of course, mean that it need not be obeyed. And an appeal to the "spirit" of the Federal Rules is an insufficient basis for ignoring the import of their text. If the Rules imposed an absolute deadline for the submission of evidentiary materials, the District Court could not be faulted for strictly enforcing that deadline, even though the result in a particular case might be unfortunate. But, as the Court acknowledges, the Rules expressly permit the District Court to exercise discretion in deciding whether affidavits in opposition to a summary judgment motion may be submitted after the hearing.[7] Once the District Court's *power* to accept untimely affidavits is recognized, the question whether that power should be exercised in a particular instance must be answered by reference to the explanation for the litigant's omission and the purposes the Rules are designed to serve. In my view, NWF showed adequate cause for its failure to file the supplemental affidavits prior to the hearing. Moreover, the organization's untimely filing in no way disserved the purposes of Rule 56(c), and the federal parties suffered no prejudice as a consequence of the

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[7] Rule 56(c) provides that when a motion for summary judgment is filed, the "adverse party prior to the day of hearing may serve opposing affidavits." Under Rule 56(e), the district court "may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Rule 6(d) states: "When a motion is supported by affidavit, . . . opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." The district court's authority to permit service "at some other time" is governed in turn by Rule 6(b), which provides that when an act is required to be performed by a specified time, the district court may "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." See 4A C. Wright & A. Miller, Federal Practice and Procedure § 1165, p. 475 (2d ed. 1987) (Rule 6(b) "gives the court extensive flexibility to modify the fixed time periods found throughout the rules, whether the enlargement is sought before or after the actual termination of the allotted time").

delay. Under these circumstances, I believe that the District Court's refusal to consider these submissions constituted an abuse of discretion.

The Federal Rules require that affidavits in opposition to a motion ordinarily must be served at least one day prior to the hearing; the Rules provide, however, that the affidavits may be filed at a later time "where the failure to act was the result of excusable neglect." Rule 6(b); see n. 7, *supra*. Prior to the July 22, 1988, hearing on the parties' cross-motions for summary judgment, NWF had been assured repeatedly that its prior submissions were sufficient to establish its standing to sue. In its memorandum opinion granting the Federation's motion for a preliminary injunction, the District Court stated: "We continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action." *National Wildlife Federation* v. *Burford*, 676 F. Supp. 280, 281 (DC 1986).

Later that year the federal parties sought additional discovery on the question of standing. NWF sought to quash discovery, arguing that "[t]he Court should bar any additional discovery on this issue because (1) it has already found that plaintiff has standing; (2) plaintiff has already produced affidavits which demonstrate standing and therefore any additional discovery would be unreasonably cumulative, duplicative, burdensome and expensive within the meaning of Rule 26(c)(1); and (3) contrary to the government defendants' apparent theory, plaintiff need not demonstrate injury as to each and every action that is part of the program." Memorandum of Points and Authorities in Support of Plaintiff's Motion To Quash and for a Protective Order 5–6 (July 1, 1986). In the alternative, NWF argued that if additional discovery on standing was to be ordered, it should be confined to the requirement that a limited number of additional affidavits be submitted. *Id.*, at 22. The District Court, on July 14, 1986, granted in full the Federation's motion to quash and ordered "that no further discovery of plaintiff or

its members, officers, employees, agents, servants, or attorneys shall be permitted until subsequent order of this court, if any." App. to Pet. for Cert. 170a–171a. When the District Court's grant of a preliminary injunction was subjected to appellate review, the Court of Appeals concluded that the Peterson and Erman affidavits "provide a concrete indication that the Federation's members use specific lands covered by the agency's Program and will be adversely affected by the agency's actions." *National Wildlife Federation* v. *Burford*, 266 U. S. App. D. C. 241, 249, 835 F. 2d 305, 313 (1987).[8] The majority's statement that "a litigant is never justified in assuming that the court has made up its mind until the court expresses itself to that effect," *ante*, at 897, is therefore simply irrelevant to the present case: The District Court and the Court of Appeals repeatedly had indicated that the Federation had offered sufficient evidence of its standing.

Nor did the District Court's order of June 27, 1988, scheduling a motion hearing for the following July 22, place NWF on notice that its claim of standing might be reconsidered. That order made clear that the hearing would consider the summary judgment motions of both the federal parties and

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[8] The Court of Appeals' discussion of standing occurred in the context of a motion to dismiss and therefore, by itself, might not assure NWF that it had made a sufficient showing to withstand a motion for summary judgment. But the Court of Appeals, like the District Court before it, also held that the Federation's showing of injury, as reflected in the Peterson and Erman affidavits, provided an adequate basis for a *preliminary injunction*. As the second Court of Appeals panel concluded, "the burden of establishing irreparable harm to support a request for a preliminary injunction is, if anything, at least as great as the burden of resisting a summary judgment motion on the ground that the plaintiff cannot demonstrate 'injury-in-fact.'" *National Wildlife Federation* v. *Burford*, 278 U. S. App. D. C. 320, 330, 878 F. 2d 422, 432 (1989) (emphasis omitted). When the first panel affirmed the District Court's entry of a preliminary injunction, Judge Williams' separate opinion, concurring and dissenting, stated that "the specificity required for standing allegations to secure a preliminary injunction will normally be no less than that required on a motion for summary judgment." 266 U. S. App. D. C., at 264, 835 F. 2d, at 328.

the Federation. The principal submission of the federal parties relevant to the hearing was the Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment and/or for Dissolution of the Preliminary Injunction Issued on February 10, 1986; that memorandum was filed on September 12, 1986. This 86-page memorandum included only 9½ pages devoted to standing, and half of that discussion set forth the federal parties' claim that no broad programmatic challenge could succeed even if the Peterson and Erman affidavits adequately alleged injury from Government decisions as to particular tracts of land. Moreover, even the attack on the Peterson and Erman affidavits did not purport to show that summary judgment for the federal parties should be entered on the ground that the Federation lacked standing. Rather, the federal parties argued principally that summary judgment *for NWF* would be inappropriate because a genuine factual dispute existed as to the Federation's standing to sue. See Defendants' Memorandum, at 45–47. In fact, the 86-page memorandum included only *two sentences* arguing that the federal parties should be awarded summary judgment on standing grounds. *Id.*, at 11–12, 85. The District Court's decision to schedule a hearing on the parties' cross-motions for summary judgment provided no hint that previous assurances concerning standing were open to reconsideration.[9]

Certainly the Federation *could* have submitted additional evidentiary materials in support of its claim of standing, even though it had no reason to believe that further submissions were necessary. But it would hardly enhance the efficiency

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[9] At the hearing itself Fred R. Disheroon, the federal parties' attorney, argued at length on other points before turning to the issue of standing. He began that portion of his argument by observing that "perhaps the court doesn't want to hear me argue standing, but I think it is imperative that I address that in the context of this case." Tr. of Motions Hearing 43 (July 22, 1988).

of the adjudicative process to encourage litigants to reargue questions previously settled in their favor. In my view, NWF established sufficient cause for its failure to submit the supplemental affidavits prior to the hearing.[10]

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[10] The supplemental affidavits were submitted as an attachment to the supplemental legal memorandum on standing requested by the District Court. At the time of their submission, NWF stated only that "NWF now has submitted declarations on behalf of other members of NWF who have been injured by the challenged actions of federal defendants." Plaintiff National Wildlife Federation's Statement of Points and Authorities in Support of Its Standing To Proceed 18, n. 21 (Aug. 22, 1988). However, in its reply memorandum on the issue, NWF addressed the contention of the federal parties and the defendant-intervenor that the affidavits should be ignored as untimely filed. NWF stated: "Plaintiff heretofore, has relied on the court's previous rulings on NWF's standing. In its motion for a protective order against additional discovery, NWF argued that its standing had already been proven on the basis of the affidavits of Mr. Greenwalt, Ms. Peterson, and Mr. Erman. The court agreed and entered the requested protective order. If the court intends to reverse its prior ruling, then NWF respectfully requests that it should be given adequate opportunity to supplement the record." Plaintiff National Wildlife Federation's Reply Memorandum in Support of Its Standing To Proceed 17, n. 16 (Sept. 14, 1988). The Federation also noted that Circuit precedent permitted the filing of supplemental affidavits on standing issues, even on appeal. *Ibid.*, citing *National Wildlife Federation* v. *Hodel*, 268 U. S. App. D. C. 15, 24, 839 F. 2d 694, 703 (1988). NWF offered the further explanation: "Ms. Peterson has supplemented her affidavit to include new information regarding a mine application which has been filed by U. S. Energy Corporation that includes a proposal to mine lands within the area of South Pass/Green Mountain previously closed to mining. For the record, NWF initially was told by officials of the Bureau of Land Management that the U. S. Energy mine application did not include any lands covered by the court's preliminary injunction. Otherwise, NWF would have supplemented Ms. Peterson's affidavit earlier." Reply Memorandum, at 12–13, n. 13.

Along with its Reply Memorandum, NWF submitted an additional filing entitled Plaintiff National Wildlife Federation's Memorandum in Opposition to Defendant-Intervenors' Motion To Strike Plaintiff's Supplementation of the Record (Sept. 14, 1988). That filing stated: "For the reasons stated in [the reply memorandum] at page 17, n. 16, plaintiff requests that defendant-intervenors' motion to strike be denied." (In light of this sepa-

Moreover, the District Court's refusal to consider the additional submissions in this case did not significantly advance the interests that Rule 56(c) is designed to serve. The Rule requires that affidavits in opposition to a motion for summary judgment must be served "prior to the day of hearing." The Courts of Appeals consistently have recognized, however, that "Rule 56 does not necessarily contemplate an oral hearing. Rather, 10-day advance notice to the adverse party that the motion and all materials in support of or in opposition to the motion will be taken under advisement by the trial court as of a certain day satisfies the notice and hearing

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rate submission, addressed solely to the question whether the supplemental affidavits should be considered, and expressly referring to n. 16 of the reply memorandum, it is difficult to fathom the Court's assertion that NWF's request was "buried" in the Federation's filings. See *ante*, at 896–897, n. 5.) This separate filing, in conjunction with the reply memorandum, satisfied Rule 6(b)'s requirement that the request for enlargement of time be made "upon motion." Though neither of these filings was expressly denominated a "motion," they met the requirements of Rule 7(b): They were submitted in writing, were signed by counsel, "state[d] with particularity the grounds therefor," and unambiguously "set forth the relief . . . sought." See *Campos* v. *LeFevre*, 825 F. 2d 671, 676 (CA2 1987) ("[N]o particular form of words is necessary to render a filing a 'motion.' Any submission signed by a party that may fairly be read as a request to the district court to exercise its discretionary powers . . . should suffice"), cert. denied, 484 U. S. 1014 (1988); *Smith* v. *Danyo*, 585 F. 2d 83, 86 (CA3 1978) ("Rule 7(b) requires no more than that . . . a motion 'state with particularity the grounds' upon which it is based. Plainly, an affidavit which is filed to obtain an order disqualifying a judge satisfies the requirements of Rule 7(b). . . . The . . . failure to type in the word 'motion' above the word 'affidavit' in no way detracts from the notice which the affidavit gave of the nature of the application"). Cf. *Snyder* v. *Smith*, 736 F. 2d 409, 419 (CA7) ("The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril"), cert. denied, 469 U. S. 1037 (1984); *Miller* v. *Transamerican Press, Inc.*, 709 F. 2d 524, 527 (CA9 1983) ("The court will construe [a motion], however styled, to be the type proper for the relief requested"); 2A J. Moore & J. Lucas, Moore's Federal Practice ¶ 7.05, pp. 7–16 to 7–17 (1989) ("[I]t is the motion's substance, and not merely its linguistic form, that determines its nature and legal effect").

dictates of Rule 56." *Moore* v. *Florida*, 703 F. 2d 516, 519 (CA11 1983).[11] Rule 56(c)'s requirement that a summary judgment motion be filed 10 days in advance of a scheduled hearing serves to ensure that the nonmoving party is afforded adequate notice of the motion. Similarly, the requirement that opposing affidavits be submitted prior to the day of the hearing reflects the fact that the district court may rule on the summary judgment motion at the hearing or at any time thereafter; submission of affidavits prior to that day is thus essential if the moving party is to be assured the opportunity to respond at a time when a response is meaningful. The requirement also allows the district court to establish a deadline by which time all evidence and arguments must be submitted; thereafter, the court may deliberate with the assurance that no subsequent filings will alter the terms of the dispute.

These are pressing concerns when the hearing on a summary judgment motion represents the parties' last opportunity to set forth their legal arguments. In the present case, however, the District Court concluded the July 22, 1988, hearing by requesting supplemental briefing on the issue of standing.[12] NWF's supplemental affidavits, filed on August 22 as an attachment to its legal memorandum, were submitted at a time when the federal parties had ample opportunity to respond. (Indeed, the opportunity to respond here—10 days—was far greater than would have been the case if NWF had filed (timely) affidavits the day before the hearing and no

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[11] Accord, *Allied Chemical Corp.* v. *Mackay*, 695 F. 2d 854, 856 (CA5 1983) ("Rule 56(c) does not require an oral hearing in open court. Rather, it contemplates notice to the party opposing the motion and an adequate opportunity to respond to the movant's arguments"); *Bratt* v. *International Business Machines Corp.*, 785 F. 2d 352, 363 (CA1 1986).

[12] The District Court subsequently established a schedule for the supplemental briefing. NWF was requested to file its opening memorandum by August 22, 1988; the federal parties and intervenors were to file memoranda in opposition by September 1; and NWF's reply was due by September 14. Order of July 27, 1988.

supplemental briefing had been allowed.) The affidavits, moreover, were filed well before the time when the case was to be taken under advisement. The record in this case is voluminous, currently filling six large boxes; consideration of five more affidavits would not have added significantly to the complexity of the issues before the District Court. Under these circumstances, submission of the supplemental affidavits neither disserved the purposes of the Rule nor prejudiced the federal parties in any respect.

The District Court discussed none of these factors in explaining its refusal to consider the supplemental affidavits. Indeed, the District Court offered no justification at all for its action beyond the assertion that the affidavits were untimely.[13] Similarly, the Court today fails to assess the District Court's action by reference to the excuse for NWF's untimely filing or the absence of prejudice to the federal parties. The District Court and today's majority fail to recognize the guiding principle of the Federal Rules of Civil Procedure, the principle that procedural rules should be construed pragmatically, so as to ensure the just and efficient resolution of legal disputes. Some provisions of the Rules strip the district courts of discretion, and the courts have no choice but to enforce these requirements with scrupulous precision.[14] But where the Rules expressly confer a range of

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[13] The District Court mentioned these affidavits in a single footnote: "Plaintiff, in addition to its memorandum filed August 22, 1988 has submitted additional evidentiary material, including declarations from four of its members. These submissions are untimely and in violation of our Order. We decline to consider them. *See* Federal Defendants' Reply to Plaintiff's Statement of Points and Authorities in Support of Its Standing to Proceed, at 1 n. 1." *National Wildlife Federation* v. *Burford*, 699 F. Supp. 327, 328–329, n. 3 (DC 1988).

[14] Rule 6(b), for example, which generally gives the district court broad authority to grant enlargements of time, establishes the limitation that the court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them."

discretion, a district court may abuse its authority by refusing to take account of equitable concerns, even where its action violates no express command. In my view, such an abuse of discretion occurred here.

III

In Part IV–A, *ante*, at 890–894, the majority sets forth a long and abstract discussion of the scope of relief that might have been awarded had the Federation made a sufficient showing of injury from environmental damage to a particular tract of land. Since the majority concludes in other portions of its opinion that the Federation lacks standing to challenge *any* of the land-use decisions at issue here, it is not clear to me why the Court engages in the hypothetical inquiry contained in Part IV–A. In any event, I agree with much of the Court's discussion, at least in its general outline. The Administrative Procedure Act permits suit to be brought by any person "adversely affected or aggrieved by agency action." 5 U. S. C. § 702. In some cases the "agency action" will consist of a rule of broad applicability; and if the plaintiff prevails, the result is that the rule is invalidated, not simply that the court forbids its application to a particular individual. Under these circumstances a single plaintiff, so long as he is injured by the rule, may obtain "programmatic" relief that affects the rights of parties not before the court. On the other hand, if a generally lawful policy is applied in an illegal manner on a particular occasion, one who is injured is not thereby entitled to challenge other applications of the rule.

Application of these principles to the instant case does not turn on whether, or how often, the Bureau's land-management policies have been described as a "program." [15] In one sense,

[15] The term "withdrawal review program" repeatedly has been used in BLM documents. See, *e. g.*, Plaintiff's Exhs. 1, 3, 10, 11, 15, 18, 19 (filed July 15, 1985). At oral argument on the cross-motions for summary judgment, counsel for the federal parties acknowledged: "It is true, BLM referred to this review process as a land withdrawal review program." Tr. of Motion Hearing 40 (July 22, 1988). Counsel went on to say, "but I sug-

of course, there is no question that a "program" exists. Everyone associated with this lawsuit recognizes that the BLM, over the past decade, has attempted to develop and implement a comprehensive scheme for the termination of classifications and withdrawals. The real issue is whether the actions and omissions that NWF contends are illegal are themselves part of a plan or policy. For example: If the agency had published a regulation stating that an environmental impact statement (EIS) should never be developed prior to the termination of a classification or withdrawal, NWF could challenge the regulation (which would constitute an "agency action"). If the reviewing court then held that the statute required a pretermination EIS, the relief (invalidation of the rule) would directly affect tracts other than the ones used by individual affiants. At the other extreme, if the applicable BLM regulation stated that an EIS *must* be developed, and NWF alleged that the administrator in charge of South Pass/Green Mountain had inexplicably failed to develop one, NWF should not be allowed (on the basis of the Peterson affidavit) to challenge a termination in Florida on the ground that an administrator there made the same mistake.

The majority, quoting the District Court, characterizes the Bureau's land management program as "'1250 or so individual classification terminations and withdrawal revocations.'" *Ante*, at 890; see *National Wildlife Federation* v. *Burford*, 699 F. Supp. 327, 332 (DC 1988). The majority offers no argument in support of this conclusory assertion, and I am far from certain that the characterization is an accurate one. Since this issue bears on the scope of the relief ultimately to be awarded should the plaintiff prevail, rather than on the ju-

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gest that using a word, calling it a program, doesn't make a program in the sense that it is being challenged here." *Ibid.* That assertion, though inelegant, seems essentially correct: An agency's terminology is not decisive in determining whether an alleged illegality is systemic or site-specific.

risdiction of the District Court to entertain the suit, I would allow the District Court to address the question on remand.[16]

IV

Since I conclude that the Peterson and Erman affidavits provided sufficient evidence of NWF's standing to withstand a motion for summary judgment, and that the District Court abused its discretion by refusing to consider the Federation's supplemental affidavits, I would affirm the judgment of the Court of Appeals. I respectfully dissent.

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[16] The majority also suggests that the agency actions challenged in this suit may not be ripe for review. See *ante*, at 891–893. Since the issue of ripeness has not been briefed or argued in this Court, nor passed on by the courts below, I need not address it. I do note, however, that at the outset of this case the federal parties made precisely the opposite argument, asserting that a preliminary injunction should be denied on the ground that NWF's claims were barred by laches. The federal parties contended: "The Federation offers no explanation why, despite its detailed knowledge of BLM's revocation and termination activities, it has waited so long to institute litigation." Defendants' Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction 26 (Aug. 22, 1985).

I also decline to address the adequacy of the affidavit submitted by Lynn Greenwalt, since the Court of Appeals did not pass on that issue.

ASHLAND OIL, INC. *v.* CARYL, TAX COMMISSIONER OF WEST VIRGINIA

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 88–421. Decided June 28, 1990

During the years at issue, West Virginia imposed a gross receipts tax on persons selling tangible property wholesale, but exempted local manufacturers. The State Tax Commissioner upheld the tax assessed on sales by appellant Ashland Oil, Inc., a Kentucky corporation, finding that the tax was constitutional. While Ashland's appeal was pending in the State Circuit Court, this Court, in *Armco Inc.* v. *Hardesty*, 467 U. S. 638, invalidated the State's tax scheme as discriminatory against interstate commerce. The Circuit Court granted Ashland summary judgment on the basis of *Armco*, but the State Supreme Court of Appeals reversed, holding that *Armco* did not apply retroactively. On remand, the Circuit Court affirmed the Tax Commissioner's decision.

Held: Armco applies retroactively to the taxes assessed against Ashland under the rule advocated by either the dissent or the plurality in *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167. Under the dissent's reasoning, *Armco* applies retroactively because constitutional decisions apply retroactively to all cases on direct review. Under the plurality's approach, the same result obtains because *Armco* neither overruled clear past precedent nor decided a wholly new issue of first impression and, thus, fails to meet the first prong of the retroactivity test of *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107.

Reversed and remanded.

PER CURIAM.

Appellant Ashland Oil, Inc., a Kentucky corporation, is an integrated oil company that maintains business locations worldwide, including in West Virginia. During the years at issue here, West Virginia imposed a gross receipts tax on persons selling tangible property at wholesale. W. Va. Code § 11–13–2c (1983). Local manufacturers were exempt from the tax. § 11–13–2. The West Virginia Tax Department conducted a detailed audit of Ashland's tax returns for fiscal years ending September 1975 and 1976 and assessed a

deficiency in tax payments of $181,313.22 for wholesale sales with West Virginia destinations. Ashland filed a timely petition for reassessment, primarily contending that the tax was unconstitutional as applied because there was an insufficient connection between its in-state activities and the transactions sought to be taxed. Juris. Statement 38a. After the State Tax Commissioner rejected Ashland's petition, Ashland appealed to the Circuit Court of Kanawha County. While the appeal was pending, this Court decided *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), which invalidated the West Virginia tax scheme that had also been applied against Ashland as discriminatory against interstate commerce. The State Circuit Court granted Ashland summary judgment on the basis of our decision in *Armco*.

The West Virginia Supreme Court of Appeals reversed, holding that *Armco* did not apply retroactively, and remanded for further proceedings. Relying on its state-law criteria for retroactivity, see *Bradley* v. *Appalachian Power Co.*, 163 W. Va. 332, 256 S. E. 879 (1979), which it considered to "follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–[1]07 . . . (1971)," *Ashland Oil, Inc.* v. *Rose*, 177 W. Va. 20, 23, n. 6, 350 S. E. 2d 531, 534, n. 6 (1986), the court determined that *Armco* "represented a reversal of prior precedent, and that retroactive application of the *Armco* rule would cause severe hardship." *Id.*, at 25, 350 S. E. 2d, at 536. Accordingly, the court held that the State was not precluded from collecting the gross receipts taxes due for the fiscal years preceding the date of decision in *Armco*. *Id.*, at 25–26, 350 S. E. 2d, at 536–537. We dismissed Ashland's appeal of this decision for want of a final judgment. *Ashland Oil, Inc.* v. *Rose*, 481 U. S. 1025 (1987). On remand, the Circuit Court rejected Ashland's remaining claim, and the State Supreme Court of Appeals denied Ashland's request for review.

In its appeal to this Court, Ashland contends, among other claims, that the State Supreme Court of Appeals erred in determining that *Armco* applied prospectively only. Because "[t]he determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law," *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 177 (1990), we must examine the state court's determination that *Armco* is not retroactive in light of our nonretroactivity doctrine.

Applying the view of retroactivity delineated by either the dissent or the plurality in *American Trucking Assns.*, we must reverse the state court's decision. Under the reasoning of the dissent in *American Trucking Assns.*, *Armco* applies retroactively to the taxes assessed against Ashland because constitutional decisions apply retroactively to all cases on direct review. *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 212 (STEVENS, J., dissenting). Under the approach of the plurality in *American Trucking Assns.*, the same result obtains, because *Armco* fails to satisfy the first prong of the plurality's test for determining nonretroactivity. See *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), quoted in *American Trucking Assns., Inc.* v. *Smith*, *supra*, at 179 (plurality opinion).

The first prong of the *Chevron Oil* test requires that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U. S., at 106–107 (citation omitted). In *Armco*, an Ohio corporation contested the applicability of West Virginia's wholesale tax on its in-state sales of steel and wire rope. In ruling that the tax violated the Commerce Clause, the Court relied on *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 332, n. 12 (1977), which held that a State "may not discriminate between transactions on the basis of some interstate element." On its face, West Virgin-

ia's statutory scheme had just such a discriminatory effect, as it "provides that two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Armco, supra,* at 642.

The Court next considered the argument that the State's wholesale tax exemption did not discriminate against out-of-state taxpayers because it served as compensation for the imposition of a heavy manufacturing tax on in-state taxpayers. In *Maryland* v. *Louisiana,* 451 U. S. 725 (1981), we held that a tax on an out-of-state event may be considered a nondiscriminatory compensation for a tax on an in-state event when the State "is attempting to impose a tax on a substantially equivalent event to assure uniform treatment of goods and materials to be consumed in the State." *Id.,* at 759. Applying this test to the West Virginia tax scheme, the Court determined that "manufacturing and wholesaling are not 'substantially equivalent events' such that the heavy tax on in-state manufacturers can be said to compensate for the admittedly lighter burden placed on wholesalers from out of State." *Armco, supra,* at 643. The Court distinguished *Alaska* v. *Arctic Maid,* 366 U. S. 199 (1961), and *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117 (1941), two cases that predated the compensatory tax doctrine enunciated in *Boston Stock Exchange* and *Maryland* v. *Louisiana. Armco, supra,* at 643, n. 7.

Finally, the Court rejected the argument that Armco should be required to prove the tax had actual discriminatory impact. Instead, the Court asserted that the "internal consistency" test, enunciated in *Container Corp. of America* v. *Franchise Tax Bd.,* 463 U. S. 159, 169 (1983), was applicable "where the allegation is that a tax on its face discriminates against interstate commerce." *Armco, supra,* at 644.

Armco unquestionably contributed to the development of our dormant Commerce Clause jurisprudence. See, *e. g.,* Judson & Duffy, An Opportunity Missed: *Armco, Inc.* v.

Hardesty, A Retreat from Economic Reality in Analysis of State Taxes, 87 W. Va. L. Rev. 723, 740–743 (1985) (suggesting that *Armco*'s invalidation of a facially discriminatory tax statute signaled a retreat from the economically realistic approach adopted by *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), and a return to a more formalistic analysis); Lathrop, *Armco*—A Narrow and Puzzling Test for Discriminatory State Taxes Under the Commerce Clause, 63 Taxes 551, 558–559 (1985). In adopting the internal consistency test, *Armco* extended that doctrine beyond the context in which it had originated. See 467 U. S., at 648 (REHNQUIST, J., dissenting). Nevertheless, *Armco* neither overturned established precedent* nor decided "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, *supra*, at 106. To be sure, *Armco* paved the way for *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232 (1987), which arguably "overturn[ed] a lengthy list of settled decisions" and "revolutionize[d] the law of state taxation," *id.*, at 257 (SCALIA, J., concurring in part and dissenting in part), by extending the internal consistency test. *Armco* itself, however, was not revolutionary. See *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 303 (1987) (O'CONNOR, J., dissenting) ("At most, *Armco* may be read for the proposition that a tax that is facially discriminatory is unconstitutional if it is not 'internally consistent'").

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*The Court's dismissal for want of a substantial federal question of *Columbia Gas Transmission Corp.* v. *Rose*, 459 U. S. 807 (1982), a case raising a nearly identical challenge to the state tax, see 467 U. S., at 644, n. 7, a year prior to deciding *Armco*, does not amount to the "overruling [of] clear past precedent on which litigants may have relied." *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971). The Court gives less deference to summary dispositions, see, *e. g.*, *Caban* v. *Mohammed*, 441 U. S. 380, 390, n. 9 (1979), and it is unlikely that West Virginia relied upon the 1982 dismissal of *Columbia Gas*, given that the statute struck down in *Armco* had been in effect for more than 50 years.

Because *Armco* did not overrule clear past precedent nor decide a wholly new issue of first impression, it does not meet the first prong of the *Chevron Oil* test. *Armco* thus applies retroactively under either the rule advocated by the plurality or the rule advocated by the dissent in *American Trucking Assns., Inc.* v. *Smith.* Accordingly, the State Supreme Court of Appeals erred in declining to apply *Armco* retroactively to determine the constitutionality of the State's imposition of taxes on Ashland for the years at issue. The motion of the Committee on State Taxation of the Council of State Chambers of Commerce for leave to file a brief as *amicus curiae* is granted. We reverse the judgment of the State Circuit Court and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

NATIONAL MINES CORP. *v.* CARYL, TAX COMMISSIONER OF WEST VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. 89–337. Decided June 28, 1990

During the years at issue, West Virginia imposed a gross receipts tax on wholesale sales of tangible property by out-of-state producers, but not in-state producers. The State Tax Commissioner upheld the tax assessed on sales by appellant National Mines Corp., rejecting National's claim that the tax was unconstitutional. Before National filed an appeal in the State Circuit Court, this Court, in *Armco Inc.* v. *Hardesty*, 467 U. S. 638, invalidated the State's tax scheme as discriminatory against interstate commerce. After the State Supreme Court of Appeals ruled, in another case, that *Armco* did not apply retroactively, the Circuit Court upheld the State's collection of the assessed taxes.

Held: For the reasons stated in *Ashland Oil, Inc.* v. *Caryl*, *ante*, p. 916, *Armco* applies retroactively to the taxes assessed against National.

Certiorari granted; reversed and remanded.

PER CURIAM.

Petitioner National Mines Corp. (National) is principally engaged in the business of producing and selling coal. Among its other activities, National mines coal in Kentucky and Pennsylvania and sells it wholesale in West Virginia. During the period relevant here, West Virginia imposed a gross receipts tax on wholesale sales of tangible property. W. Va. Code § 11–13–2c (1983). Local producers were subject to taxes on their production activities, but exempt from the tax on wholesale activities. § 11–13–2.

On December 22, 1980, the State Tax Department of West Virginia assessed $475,345.02 in business and occupation tax (plus interest and penalties) for the period January 1, 1975, through December 31, 1979, on National's wholesale sales of coal in West Virginia. National filed a petition for reassessment, asserting that the tax violated the Due Process Clause

of the Fourteenth Amendment and the Commerce Clause of the Federal Constitution. The State Tax Commissioner upheld the assessment, concluding that the tax was fairly apportioned, that the measure of the tax was reasonably related to the benefits conferred by the State, and that the tax did not discriminate against interstate commerce.

A few days before National appealed to the State Circuit Court, this Court issued its opinion in *Armco Inc.* v. *Hardesty*, 467 U. S. 638 (1984), which held that the West Virginia business and occupation tax sought to be collected from petitioner was unconstitutional. National's action was held in abeyance while the West Virginia Supreme Court of Appeals considered a similar challenge to the state tax in light of *Armco*. See *Ashland Oil, Inc.* v. *Rose*, 177 W. Va. 20, 350 S. E. 2d 531 (1986). After analyzing the retroactivity of *Armco* under a state-law test that it considered to "follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971)," 177 W. Va., at 23, n. 6, 350 S. E. 2d, at 534, n. 6, the court concluded that *Armco* applied prospectively only. The State Supreme Court thus permitted the State to collect the gross receipts taxes due for fiscal years prior to the date of decision in *Armco*. 177 W. Va., at 25–26, 350 S. E. 2d, at 536–537.

The State Circuit Court in this case followed *Ashland Oil* to uphold the State's collection of the assessed taxes. The West Virginia Supreme Court of Appeals refused to consider National's petition for appeal.

In its petition for certiorari to this Court, National contends, among other claims, that the state court erred in following *Ashland Oil*'s nonretroactivity decision and allowing the State to enforce an unconstitutional tax statute. We agree. For the reasons stated today in *Ashland Oil, Inc.* v. *Caryl*, *ante*, p. 916, we hold that *Armco* applies retroactively under the reasoning of either the plurality or the dissent in *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167

(1990). Because the State Circuit Court failed to consider the constitutionality of the taxes assessed against National in light of our decision in *Armco*, we grant the petition for certiorari, reverse the judgment of the State Circuit Court, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 924 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 25 THROUGH SEPTEMBER 28, 1990

Certiorari Granted—Vacated and Remanded. (See also No. 89–6985, *ante*, p. 543.)

No. 89–761. RICE *v.* OHIO DEPARTMENT OF TRANSPORTATION ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rutan* v. *Republican Party of Ill.*, *ante*, p. 62. Reported below: 887 F. 2d 716.

No. 89–936. INF, LTD. *v.* SPECTRO ALLOYS CORP. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, *ante*, p. 116. Reported below: 881 F. 2d 546.

No. 89–944. GEORGIA *v.* STEWART ET UX. Ct. App. Ga. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Illinois* v. *Rodriguez*, *ante*, p. 177. JUSTICE STEVENS dissents. Reported below: 191 Ga. App. 750, 382 S. E. 2d 677.

No. 89–1575. VASTOLA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ojeda Rios*, 495 U. S. 257 (1990). Reported below: 899 F. 2d 211.

No. 89–5849. MESSER ET AL. *v.* CURCI ET AL. C. A. 6th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rutan* v. *Republican Party of Ill.*, *ante*, p. 62. Reported below: 881 F. 2d 219.

Miscellaneous Orders

No. A–850 (89–1947). GRAHAM *v.* WERNZ. Sup. Ct. Minn. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–868. IN RE DISBARMENT OF MOLONY. Disbarment entered. [For earlier order herein, see 494 U. S. 1002.]

No. D–871. IN RE DISBARMENT OF PRICE. Disbarment entered. [For earlier order herein, see 494 U. S. 1002.]

No. D–885. IN RE DISBARMENT OF SANDERS. Disbarment order amended. [See 495 U. S. 954.]

No. D–895. IN RE DISBARMENT OF DINEFF. Disbarment entered. [For earlier order herein, see 495 U. S. 902.]

No. D–913. IN RE DISBARMENT OF WILLIAMS. It is ordered that Isaiah White Williams, of St. Petersburg, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–914. IN RE DISBARMENT OF WATKINS. It is ordered that William W. Watkins, Sr., of Columbia, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1391. RUST ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES; and

No. 89–1392. NEW YORK ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. [Certiorari granted, 495 U. S. 956.] Motion of Alan Ernest for leave to represent children unborn and born alive denied. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 89–5900. RUST *v.* GUNTER ET AL., 496 U. S. 914. Motion of Alvin J. Bronstein for reimbursement of travel expenses granted.

No. 89–7347. IN RE BROOKS. Petition for writ of prohibition denied.

Certiorari Granted

No. 89–1500. BUSINESS GUIDES, INC. *v.* CHROMATIC COMMUNICATIONS ENTERPRISES, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 892 F. 2d 802.

No. 89–1541. DOLE, SECRETARY OF LAEOR *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 891 F. 2d 1495.

Certiorari Denied

No. 89–56. ALLEVATO, PERSONAL REPRESENTATIVE OF THE ESTATE OF FERRANTINO, ET AL. *v.* COUNTY OF OAKLAND ET AL.;

No. 89–79. CITY OF DETROIT *v.* COUNTY OF OAKLAND ET AL.; and

No. 89–101. YOUNG, MAYOR OF THE CITY OF DETROIT *v.* COUNTY OF OAKLAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 866 F. 2d 839.

No. 89–933. CARPENTER ET AL. *v.* THOMAS. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 828.

No. 89–1287. JACQUIN *v.* STENZIL, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 506.

No. 89–1296. OKLAHOMA NATURAL GAS CO. *v.* WILLIAMS NATURAL GAS CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 255.

No. 89–1377. JOHNSTON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 89–1413. HERNANDEZ-ESCARSEGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1560.

No. 89–1511. AMERICAN MINING CONGRESS ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 373, 886 F. 2d 390.

No. 89–1527. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 1024.

No. 89–1611. REESE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 389 Pa. Super. 652, 560 A. 2d 829.

No. 89–1617. BERNARD ET AL. *v.* GULF OIL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 735.

No. 89–1641. NEWS/SUN SENTINEL CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 313, 890 F. 2d 430.

No. 89–1660. CASTIGLIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 2d 533.

No. 89–1674. CAROTA *v.* CELOTEX CORP. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 448.

No. 89–1687. COMMUNICATIONS SATELLITE CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–1688. GATES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 434 Mich. 146, 452 N. W. 2d 627.

No. 89–1695. LAW ENGINEERING, INC. *v.* GEORGETOWN STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 1041.

No. 89–1702. MENNEN CO. ET AL. *v.* MARTIN. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 141.

No. 89–1703. SNYDER *v.* LEWIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 470, 574 A. 2d 57.

No. 89–1704. ILLINOIS HUMAN RIGHTS COMMISSION ET AL. *v.* BABCOCK & WILCOX CO. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 189 Ill. App. 3d 827, 545 N. E. 2d 799.

No. 89–1712. NORTHWEST FOOD PROCESSORS ASSN. ET AL. *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1075.

No. 89–1730. FINK *v.* FINK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1739. U. S. GOLD & SILVER INVESTMENTS, INC. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 620.

No. 89–1749. PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK ET AL. *v.* NATIONAL FUEL GAS SUPPLY CORP. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 2d 571.

No. 89–1764. MILLER *v.* PRUDENTIAL BACHE SECURITIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 128.

No. 89–1776. FONTHAM *v.* COMMITTEE ON PROFESSIONAL RESPONSIBILITY, LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied.

No. 89–1791. LAMBORN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 574 A. 2d 263.

No. 89–1796. HASSO ET AL. *v.* DUGGAN. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–1812. ESPINUEVA *v.* GARRETT, SECRETARY OF THE NAVY. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 1164.

No. 89–1826. CHURCH BY MAIL, INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–1830. JACKSON ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (WESTERN FARM CREDIT BANK ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1338.

No. 89–1839. BLUE CROSS & BLUE SHIELD OF KANSAS, INC., ET AL. *v.* REAZIN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 899 F. 2d 951.

No. 89–1841. NORDSTROM ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1418.

No. 89–1851. DONOFRIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 1301.

No. 89–1858. EASTERN AUTO DISTRIBUTORS, INC. *v.* PEUGEOT MOTORS OF AMERICA, INC. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 355.

No. 89–1860. MAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 89–1864. ARBOLEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 882 F. 2d 417.

No. 89–1870. UTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1148.

No. 89–5654. REDMOND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 1324.

No. 89–6618. BARNETT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–6959. SHAFFER *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7047. BUCKLEY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 2d 715.

No. 89–7081. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 580.

No. 89–7100. GIFFORD *v.* UNITED STATES; and
No. 89–7294. KELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 89–7100, 892 F. 2d 263; No. 89–7294, 892 F. 2d 255.

No. 89–7153. WATSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 2d 970.

No. 89–7166. PARIS *v.* YOUNG. Cir. Ct. Md., Baltimore City. Certiorari denied.

No. 89–7238. AMIRI *v.* JOHNSON, JUDGE, UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 89–7255. SANTIAGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 1029.

No. 89–7274. LEE *v.* MCCAUGHTRY, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 1318.

No. 89–7337. GALLION *v.* ZINN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1573.

No. 89–7338. BELLE *v.* FREEMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7339. WILLIS *v.* FIRST BANK NATIONAL ASSN. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–7340. WHITAKER *v.* BAY AREA RAPID TRANSIT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–7342. DEMING *v.* RICHNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1045.

No. 89–7344. FIXEL *v.* DEEDS, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1022, 835 P. 2d 37.

No. 89–7353. CHRISTOPHERSON ET UX. *v.* SHAWANO COUNTY. Ct. App. Wis. Certiorari denied.

No. 89–7358. THOMAS ET UX. *v.* SOUTHTRUST BANK OF ALABAMA, AS ASSIGNEE OF SOUTHTRUST MOBILE SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 883 F. 2d 991.

No. 89–7365. SHUMAN *v.* CELESTE, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1337.

No. 89–7368. LONG ET AL. *v.* FAUVER, COMMISSIONER, NEW JERSEY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 141.

No. 89–7371. MOORE *v.* DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS. Ct. App. D. C. Certiorari denied.

No. 89–7372. KERNS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89–7373. KLACSMANN *v.* CASTELLANO. C. A. 11th Cir. Certiorari denied.

No. 89–7374. KLACSMANN *v.* FEDAK. C. A. 11th Cir. Certiorari denied.

No. 89–7375. KURTZ *v.* EDMISTON, SUPERINTENDENT, SOUTHERN STATE CORRECTIONAL FACILITY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7381. BROWN *v.* TOOMBS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 89–7384. COSBY *v.* DOYLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 545.

No. 89–7389. BROWN *v.* SHERMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 89–7404. POTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1231.

No. 89–7407. BRYANT *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1086.

No. 89–7415. SUN *v.* KESSLER ET AL. Ct. App. Ga. Certiorari denied.

No. 89–7422. BELL *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 774 S. W. 2d 371.

No. 89–7428. DEMOS *v.* COURT OF APPEALS OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 89–7429. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 89–7431. BENSON *v.* BARRASSO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 1392.

No. 89–7435. DAVIS ET AL. *v.* COUNTY OF JEFFERSON, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 411.

No. 89–7471. POORMAN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 782 S. W. 2d 603.

No. 89–7497. DEMOS *v.* BONAMY, SUPERINTENDENT, SPECIAL OFFENDER CENTER. Sup. Ct. Wash. Certiorari denied.

No. 89–7499. DEMOS *v.* BONAMY, SUPERINTENDENT, SPECIAL OFFENDER CENTER. Sup. Ct. Wash. Certiorari denied.

No. 89–7501. DOUGHERTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7506. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 256.

No. 89–7508. MCMILLAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7514. HUYNH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1411.

No. 89-7515. BLOCK *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-7516. BETANCOURT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 89-7524. BECERRA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89-7532. MATHIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-7533. LIBREROS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 26.

No. 89-7544. REINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1220.

No. 89-7545. RAMOS-BENAVIDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89-7552. PROCTOR *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-7553. CORPUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 882 F. 2d 546.

No. 89-7556. GAMBLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1566.

No. 89-7557. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89-7560. SIERRA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 525.

No. 89-7563. PULLIAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-7566. BARBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 157.

No. 89-7567. BEAULIEU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1531.

No. 89-7568. BEAULIEU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1537.

No. 89–7573. FRANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 143.

No. 89–7575. SANCHEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1115.

No. 89–7579. MUKHTAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 550.

No. 89–7585. ROMERO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 47.

No. 89–7590. HOLSEY *v.* NUTH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 145.

No. 89–7611. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89–7620. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 264.

No. 89–7622. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1115.

No. 89–7624. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 1012.

No. 88–1958. SUPREME BEEF PROCESSORS, INC. *v.* YAQUINTO, TRUSTEE FOR CARAVAN REFRIGERATED CARGO, INC. C. A. 5th Cir. Motions of Shippers National Freight Claims Council, Inc., and National Industrial Transportation League et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 864 F. 2d 388.

No. 88–7318. CAIN *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 88–7432. WEST *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 89–516. EVANS *v.* THOMPSON, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. C. A. 4th Cir.;

No. 89–6062. MURTISHAW *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 89–6091. RANSOM *v.* TEXAS. Ct. Crim. App. Tex.;

No. 89–6324. MOORE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;

No. 89–6509. HOPKINSON *v.* SHILLINGER, WARDEN, ET AL. C. A. 10th Cir.;

No. 89–7007. BAREFIELD *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–7307. CALLINS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–7308. PICKENS *v.* ARKANSAS. Sup. Ct. Ark.;
No. 89–7322. BARNES *v.* THOMPSON, WARDEN. Sup. Ct. Va.;
No. 89–7380. BARROW *v.* ILLINOIS. Sup. Ct. Ill.; and
No. 89–7442. HUFFMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: No. 88–7318, 297 S. C. 497, 377 S. E. 2d 556; No. 88–7432, 767 S. W. 2d 387; No. 89–516, 881 F. 2d 117; No. 89–6062, 48 Cal. 3d 1001, 773 P. 2d 172; No. 89–6091, 789 S. W. 2d 572; No. 89–6324, 885 F. 2d 1497; No. 89–6509, 866 F. 2d 1185 and 888 F. 2d 1286; No. 89–7007, 784 S. W. 2d 38; No. 89–7307, 780 S. W. 2d 176; No. 89–7308, 301 Ark. 244, 783 S. W. 2d 341; No. 89–7380, 133 Ill. 2d 226, 549 N. E. 2d 240; No. 89–7442, 543 N. E. 2d 360.

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. 89–1756. ROYAL CROWN COLA CO. *v.* COCA-COLA CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 887 F. 2d 1480.

No. 89–1759. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* HILL. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 894 F. 2d 1009.

No. 89–5346. BRADLEY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 3d 136, 538 N. E. 2d 373.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court held that "the prosecution may not use statements, whether exculpa-

tory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. Consistent with the need for a bright-line rule, the Court adopted a straightforward definition of "custodial interrogation": "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Ibid.* In this case, petitioner, a prison inmate, challenged the admission of statements he made in response to direct questioning by prison officials following the murder of a prison employee on the ground that they had not given him the *Miranda* warnings. Notwithstanding *Miranda*'s clear language, the State Court of Appeals held that petitioner was not in custody for purposes of *Miranda*, see No. 1583 (Sept. 22, 1987), App. to Pet. for Cert. A-129–A-130, and the Ohio Supreme Court affirmed this point without discussion, 42 Ohio St. 3d 136, 148, 538 N. E. 2d 373, 385 (1989). Because the Courts of Appeals have approached the issue of what constitutes custody in the prison setting in differing ways,* this Court should grant the petition for certiorari to state clearly when *Miranda* applies in this context.

On February 2, 1984, the supervisor of the Southern Ohio Correctional Facility's sheet metal shop was beaten to death. Immediately after the murder, prison officials closed off the shop area and began to conduct a strip search of the inmates there. During the search, the officials found blood on one inmate's clothing. When he was asked for an explanation, another inmate, petitioner William Bradley, told the officials that the first prisoner "had nothing to do with this." 42 Ohio St. 3d, at 138, 538 N. E. 2d, at 376. The officials then searched petitioner and found blood on his clothing. The state court described the questioning that ensued:

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*See *United States* v. *Cooper*, 800 F. 2d 412, 414–415 (CA4 1986) (holding that prison inmate was not in custody for *Miranda* purposes because his freedom of movement was not restricted more than it would normally be in the prison environment); *Flittie* v. *Solem*, 751 F. 2d 967, 974 (CA8 1985) ("Incarceration does not ipso facto make a statement involuntary"); *Cervantes* v. *Walker*, 589 F. 2d 424, 427–429 (CA9 1978) (refusing to apply *Miranda* to questioning of a prison inmate that the court characterized as "on-the-scene questioning" and holding that prison inmate's freedom of movement was not diminished more than usual in the prison context); *United States* v. *Scalf*, 725 F. 2d 1272, 1276 (CA10 1984) (same).

> "Corrections Officer Richard Taylor . . . asked for an explanation. [Petitioner] pointed to where [the] body had been and stated that it was the foreman's blood. Officer Taylor called the spot to the attention of Deputy Superintendent Seth, who repeated the questions to [petitioner] and received the same answers. Officer Taylor then asked [petitioner], '[D]id you do it?' [Petitioner] replied, '[Y]eah, I did it.'" *Ibid.*

Although petitioner was not apprised of his *Miranda* rights before this questioning, the trial court denied his motion to suppress the incriminating responses. Petitioner was convicted of aggravated murder and sentenced to death. On this direct appeal, the State Court of Appeals found that "the detention of [petitioner] and other inmates here was similar to those restrictions imposed with every incident that would take place at the prison, [so] it did not necessarily place an added imposition on his freedom of movement such as to make a reasonable person believe there had been a restriction of his freedom over and above that in his normal prisoner setting." App. to Pet. for Cert. A-130. Thus, although it acknowledged that petitioner had been interrogated, the court found that petitioner had not been in custody, as defined by *Miranda*. The court therefore held that *Miranda* warnings were not required. The Supreme Court affirmed the conviction. 42 Ohio St. 3d, at 148, 538 N. E. 2d, at 385.

To determine whether a person is in custody for purposes of *Miranda*, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)* (quoting *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977)). This Court recently left open the question whether "[t]he bare fact of custody [would] in every instance require a warning even when the suspect is aware that he is speaking to an official." *Illinois* v. *Perkins*, 496 U. S. 292, 299 (1990). In my view, *Miranda* and its progeny have already answered that question. In this case, petitioner was clearly in custody because he had been formally arrested. Moreover, his incarceration resulted in a severe restraint on his freedom of movement. That his incarceration was the result of a conviction for a crime unrelated to the murder of the prison employee is irrelevant. See *Mathis* v. *United States*, 391 U. S. 1, 4–5 (1968) (holding that a person serving a prison sentence for one crime was in custody

when he was interrogated about another, unrelated crime). His familiarity with the prison environment is also irrelevant to the *Miranda* analysis. See *Orozco* v. *Texas*, 394 U. S. 324, 326–327 (1969) (holding that suspect who had been arrested in his home and questioned in his bedroom was in custody, notwithstanding his familiarity with his surroundings).

The state courts here, like some Courts of Appeals, see note, *supra*, nevertheless maintained that a prison inmate is in custody for purposes of *Miranda* only if some additional restriction on his freedom of movement is imposed. See App. to Pet. for Cert. A-129. Even if this "additional restriction" test were consistent with *Miranda*, petitioner satisfies it: His freedom was curtailed more severely than was usual even in the controlled environment of prison—he was detained in the sheet metal shop, targeted as a suspect in a serious crime, and forcibly strip-searched.

The second requirement for the application of *Miranda*—interrogation—is also present in this case. Prison officials asked petitioner a series of direct questions about a murder in which he was a suspect. Contrary to the State's assertion, Brief in Opposition 10–11, these questions cannot accurately be characterized as "on-the-scene questioning" exempt from the *Miranda* requirements. The *Miranda* Court stated that

> "[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U. S., at 477–478.

Here, though, prison officials had been summoned by a witness to the incident, had seen both the body and the weapon, and had detained those persons who could be responsible for the murder. The questioning of petitioner, directed at discovering whether he had committed the crime, thus went well beyond "on-the-scene questioning." Indeed, the State Court of Appeals acknowledged that this questioning constituted interrogation. App. to Pet. for Cert. A-128.

Under this Court's recent decision in *Perkins*, *supra*, petitioner may also have to establish that his statements were "coerced."

496 U. S., at 299. The type of coercive environment described by the Court in *Perkins* was present in this case. First, the questioning occurred in prison, undoubtedly a "'police-dominated atmosphere.'" *Id.*, at 296. And when the guards rounded up the inmates and strip-searched them, the sense of police domination was increased. Second, the prison officials were openly acting as agents of the State, and petitioner knew that they were responsible for determining the extent of his freedom. See *id.*, at 297 ("Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will"). Given the virtually complete control that prison officials exercise over prisoners' lives, petitioner surely felt compelled to answer questions "by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess." *Ibid.*

Thus, petitioner was in custody, was interrogated by prison officials, and was subjected to police coercion. Because the guards did not inform him of his *Miranda* rights before interrogating him, his responses to their direct questioning could not be used against him at trial. This case represents more than an opportunity to correct an erroneous decision, however; it provides the Court a chance to clarify what constitutes "custody" for *Miranda* purposes in the prison setting. I would therefore grant the petition for certiorari. Even if I did not believe that this case otherwise merited review, I would grant the petition and vacate petitioner's death sentence on the ground 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 (1976) (MARSHALL, J., dissenting).

No. 89–5934. CARTWRIGHT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 778 P. 2d 479.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join the Court's decision except insofar as the judgment, which is without prejudice to further sentencing proceedings, does not expressly preclude the reimposition of the death penalty. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would direct that the resentencing proceed-

ings be circumscribed such that the State may not reimpose the death sentence.

No. 89-7387. DOUGHTY ET AL. *v.* BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF WELD ET AL. C. A. 10th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 89-81. WILSON ET AL. *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, 495 U. S. 923;

No. 89-1465. KOZAK *v.* UNITED STATES DEPARTMENT OF AGRICULTURE, 495 U. S. 905;

No. 89-6914. MEYERS *v.* INDIANA, 495 U. S. 921;

No. 89-6954. MAGWOOD *v.* ALABAMA, 495 U. S. 923; and

No. 89-7028. FRYHOVER *v.* UNITED STATES, 495 U. S. 922. Petitions for rehearing denied.

JUNE 26, 1990

Miscellaneous Order

No. A-917 (89-7838). HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO SMITH *v.* TEXAS. Ct. Crim. App. Tex.; and

No. A-921 (89-7842). HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO SMITH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Applications for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would grant the applications.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Tonight, for the second time within a month, see *Demosthenes* v. *Baal*, 495 U. S. 731 (1990), this Court permits a State to execute a prisoner who has waived further appeals on his behalf when serious doubts remain concerning his mental competence. I believe that we shirk our responsibility if we do not articulate standards by which the adequacy of procedures in state competency hearings may be judged. I would grant the petitions for certiorari and the corresponding applications for stay of execution. Indeed, four Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes,

the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim. Cf. *Watson* v. *Butler*, 483 U. S. 1037, 1038 (1987) (stay denied although four Justices voted to hold, rather than to grant, petition for certiorari).

I

In *Whitmore* v. *Arkansas*, 495 U. S. 149 (1990), this Court held that "one necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity." *Id.*, at 165. Although the Court noted that this prerequisite is not satisfied "where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed," *ibid.*, we did not have occasion in that case to decide the *procedures* that are required when a state court determines that a prisoner is competent to forgo further appeals in his case. We face that issue tonight.

Petitioner, the mother of condemned prisoner James Edward Smith, challenges the decision of the Texas courts, to which the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit have deferred, that Smith is competent to waive further appeal of his case. The state trial court held a hearing to determine Smith's competency, a hearing which seems to have been little more than a nonadversarial, *ex parte* chat among the trial judge, the prosecutor, and Smith. The hearing was scheduled without notice to Smith's mother and next friend, Ms. Alexzene Hamilton, despite the fact that Ms. Hamilton had appeared as petitioner on Smith's behalf as early as May 7, 1988. Indeed, it was upon her application that we granted a stay of execution in *Hamilton* v. *Texas*, 485 U. S. 1042 (1988). Smith was unrepresented by counsel; although the trial judge had arranged for an attorney to be present in the event that Smith wished to consult with him, the judge stated: "I'm not going to force a lawyer to represent you." After Smith indicated that he did not wish to speak with the attorney, that was the end of the matter. There was no cross-examination at the hearing. No evidence was received beyond the bare reports of a Harris County psychiatrist and a Harris County psychologist who did not perform psychological tests and who were not given access to several reports of the history of Smith's mental illness, includ-

ing the fact that he had been found not guilty by reason of insanity of a prior Florida robbery.

Whether Smith is competent to waive his right to appeal may be a complex, fact-intensive question.* But we need not face it tonight. Instead, we need judge only the adequacy of the state procedures used to determine his competency. These, I submit, were dubious procedures indeed. In *Ford* v. *Wainwright*, 477 U. S. 399, 410–418 (1986) (plurality opinion), JUSTICE MARSHALL outlined certain procedures to be used in ascertaining the sanity of a prisoner prior to execution. JUSTICE MARSHALL stressed the importance of an adversarial proceeding, noting that "without any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information." *Id.*, at 414. In addition, JUSTICE MARSHALL observed that "[c]ross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light

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*There is a great deal of evidence casting Smith's competence in doubt. Smith has had a long history of mental illness dating from his discharge from the Navy and his hospitalization for psychiatric evaluation in the Great Lakes Naval Hospital in 1972. In 1978, he was found not guilty by reason of insanity in a robbery prosecution by a Florida state court. In 1981, he attempted suicide and was placed under psychiatric care. In 1985, the Texas trial court determined that Smith was *not* competent to handle his appeal and appointed an attorney to prosecute his appeal. Smith has suffered several head injuries in car accidents and falls. Smith's mother has retained a clinical psychologist—an associate professor at Florida State University—who has sought access to Smith for the purpose of performing neurological tests. Although these tests have not yet been conducted, the psychologist has formed a conclusion on the basis of existing evidence:

"I have formed a professional opinion with a reasonable degree of medical certainty concerning James Edwards Smith's current mental state. My opinion is that Mr. Smith has a history of schizophrenia that appears to be paranoid in nature, marked by suicidal tendencies and religious delusions. There is also the possibility of organic brain damage, indicated by Mr. Smith's history of head injuries, drug and alcohol abuse, and symptoms of neurological damage. At this time, based on Mr. Smith's condition, it is my opinion that he is mentally ill; that this illness prevents Mr. Smith from understanding his actual legal position and the options available to him; and that this illness prevents Mr. Smith from making a rational choice among his options." Pet. for Cert. in No. 89–7838, p. 17.

the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report." *Id.*, at 415. In sum, JUSTICE MARSHALL found that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate" and that "the adversar[ial] presentation of relevant information [must] be as unrestricted as possible." *Id.*, at 414, 417. Although these procedures are not directly applicable in a context in which prisoners seeking to waive their appeals actively resist appointment of counsel on their behalf, they might provide a useful guide. I would grant the petitions for certiorari to examine this important question.

A related issue presented by the instant case results from the failure of the District Court to grant an evidentiary hearing of its own. Both the District Court and the Fifth Circuit accorded the state trial court's findings deference despite the procedural inadequacies of the state-court proceedings. The District Court believed that it was "bound by the state court's findings," Civ. Action No. H–90–2011 (June 24, 1990), p. 7, and the Fifth Circuit maintained that because the findings were "fairly supported by the record," they were "binding" on the Court of Appeals. 905 F. 2d 825, 828 (1990). Regardless of a State's obligation to provide a competency hearing, it is clearly error for a federal court to accord deference to state-court findings when the state hearing is procedurally inadequate. A federal court is obliged to hold its own evidentiary hearing on habeas corpus if, among other factors, "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing," 28 U. S. C. § 2254(d)(2); or "the material facts were not adequately developed at the State court hearing," § 2254(d)(3); or "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding." § 2254(d)(6). This case presents the important legal question of the procedures required to determine the competence of a prisoner to forgo further appeals, a question which has relevance both for state courts and for federal courts reviewing the state-court findings on habeas corpus.

II

Even apart from the merits of the instant case, I would grant the applications for stay of execution pending disposition of the petitions for certiorari. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

JUNE 28, 1990

Reversed and Remanded on Appeal. (See No. 88–421, *ante*, p. 916.)

Certiorari Granted—Reversed and Remanded. (See No. 89–337, *ante*, p. 922.)

Certiorari Granted—Vacated and Remanded

No. 89–628. MOUNTAIN STATES LEGAL FOUNDATION ET AL. *v.* NATIONAL WILDLIFE FEDERATION. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Lujan* v. *National Wildlife Federation*, *ante*, p. 871. Reported below: 278 U. S. App. D. C. 320, 878 F. 2d 422.

No. 89–1052. THREE BUOYS HOUSEBOAT VACATIONS U. S. A., LTD. *v.* MORTS ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sisson* v. *Ruby*, *ante*, p. 358. Reported below: 878 F. 2d 1096.

No. 89–1506. GEDAN ET AL. *v.* PARTINGTON ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384 (1990). Reported below: 880 F. 2d 116.

No. 89–1697. O'RILEY *v.* UNION OIL COMPANY OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tafflin* v. *Levitt*, 493 U. S. 455 (1990). JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR dissent.

No. 89–1754. TEXACO REFINING & MARKETING INC. ET AL. *v.* ESTATE OF DAU VAN TRAN ET AL. Ct. App. Tex., 9th Dist. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted,

judgment vacated, and case remanded for further consideration in light of *Sisson* v. *Ruby*, *ante*, p. 358. JUSTICE STEVENS dissents. Reported below: 777 S. W. 2d 783.

No. 89–1760. IMMUNO, A. G. *v.* MOOR-JANKOWSKI. Ct. App. N. Y. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Milkovich* v. *Lorain Journal Co.*, *ante*, p. 1. Reported below: 74 N. Y. 2d 548, 549 N. E. 2d 129.

No. 89–5396. BOCKTING *v.* NEVADA. Sup. Ct. Nev. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Idaho* v. *Wright*, *ante*, p. 805. Reported below: 105 Nev. 1023, 810 P. 2d 317.

No. 89–6260. HUFF *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). Reported below: 325 N. C. 1, 381 S. E. 2d 635.

No. 89–6289. SPOTTED WAR BONNET *v.* UNITED STATES. C. A. 8th 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 *Idaho* v. *Wright*, *ante*, p. 805. Reported below: 882 F. 2d 1360.

Miscellaneous Orders

No. — – ——. KANEKOA ET AL. *v.* CITY AND COUNTY OF HONOLULU ET AL. Motion of Charles K. Kanekoa for leave to proceed *in forma pauperis* granted. Motion for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners Warren E. Kanekoa and Damien Melemai denied.

No. A–844. JAFFER *v.* GRANET ET AL. C. A. 7th Cir. Application for stay of lower court proceedings, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–881. THOMAS ET UX. *v.* MANUFACTURERS HANOVER MORTGAGE CORP. C. A. 7th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–891. IN RE DISBARMENT OF DAY. Disbarment entered. [For earlier order herein, see 494 U. S. 1076.]

JUSTICE MARSHALL, with whom THE CHIEF JUSTICE joins, dissenting.

After respondent pleaded guilty to various felonies, the State Bar of Texas brought a disciplinary action in state court seeking respondent's disbarment. The state trial court enjoined respondent from practicing law in Texas. This Court then issued an order suspending respondent from the practice of law in this Court and requiring respondent to show cause why he should not be disbarred from such practice. Respondent has appealed the trial court's ruling, and that appeal is currently pending.

In view of the pendency of respondent's appeal, I do not believe it is appropriate that this Court should enter a disbarment order. This Court should not provide fewer procedural protections than the States themselves provide for appealing an adverse disciplinary determination. If the State of Texas affords respondent a means of challenging his suspension from practice, this Court should await the result of that challenge before disbarring respondent in this Court. Unless and until respondent's suspension becomes final under state law, then, I cannot join the Court's disposition. We place great weight on state procedures in determining whether to admit attorneys to practice in this Court. I do not believe that we should ignore those procedures when we decide whether discipline here is appropriate.

No. 89–1889. PINHAS *v.* SUMMIT HEALTH, LTD., ET AL. C. A. 9th Cir. Motion of the parties to expedite consideration of the cross-petition for writ of certiorari or, in the alternative, to delay briefing in No. 89–1679, *Summit Health, Ltd., et al.* v. *Pinhas* [certiorari granted, 496 U. S. 935], denied.

No. 89–1929. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Motion of respondent to consolidate this case with No. 89–1391, *Rust et al.* v. *Sullivan, Secretary of Health and Human Services* [certiorari granted, 495 U. S. 956], and No. 89–1392, *New York et al. v. Sullivan, Secretary of Health and Human Services* [certiorari granted, 495 U. S. 956], denied.

No. 89–7189. WEI *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for reconsideration of May 21, 1990, order denying leave to proceed *in forma pauperis* [495 U. S. 946] denied.

No. 89–7272. HARMELIN *v.* MICHIGAN. Ct. App. Mich. [Certiorari granted, 495 U. S. 956.] Motion for appointment of

counsel granted, and it is ordered that Carla J. Johnson, Esq., of Detroit, Mich., be appointed to serve as counsel for petitioner in this case.

No. 89–7401. CLARKE *v.* WEST VIRGINIA BOARD OF REGENTS ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 19, 1990, within which to pay the docketing fee required by Rule 38(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. 89–7507. IN RE MALLOY. C. A. 11th Cir. Petition for writ of common-law certiorari denied.

No. 89–7581. IN RE HEGWOOD; and
No. 89–7664. IN RE D'AMARIO. Petitions for writs of mandamus denied.

Certiorari Granted

No. 89–1715. BURNS *v.* REED. C. A. 7th Cir. Certiorari granted. Reported below: 894 F. 2d 949.

No. 89–1784. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. Certiorari granted. Reported below: 896 F. 2d 1394.

No. 89–1629. SALVE REGINA COLLEGE *v.* RUSSELL. C. A. 1st Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 890 F. 2d 484.

No. 89–5961. PARKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 876 F. 2d 1470.

No. 89–7260. BURNS *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis*

granted. Certiorari granted. Reported below: 282 U. S. App. D. C. 194, 893 F. 2d 1343.

Certiorari Denied. (See also No. 89–7507, *supra.*)

No. 89–30. ENDSLEY, EXECUTRIX OF THE ESTATE OF ENDSLEY, ET AL. *v.* YOUNG. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 176.

No. 89–1345. BEVERLY HILLS SAVINGS & LOAN ASSN. ET AL. *v.* CARTER. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1186.

No. 89–1366. BULLOCK *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 791 P. 2d 155.

No. 89–1454. HAMILTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 556 So. 2d 685.

No. 89–1567. ASPROMONTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1411.

No. 89–1569. SOLID WASTE SERVICES, INC., ET AL. *v.* DOLE, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 521.

No. 89–1570. HAJECATE ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1466.

No. 89–1593. MCAFEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 89–1642. UNITED TRANSPORTATION UNION *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 38, 891 F. 2d 908.

No. 89–1643. STRUBE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 130.

No. 89–1710. IRON WORKERS MID-SOUTH PENSION FUND ET AL. *v.* BORDEN CHEMICAL. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 548.

No. 89–1719. PANTOJA ET AL. *v.* TEXAS GAS TRANSMISSION CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 890 F. 2d 955.

No. 89–1720. DOUGLAS *v.* STONE, SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1416.

No. 89–1724. CELEBRITY WORLD, INC., ET AL. *v.* CELEBRITY SERVICE INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied.

No. 89–1725. PERRON *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 344.

No. 89–1733. FOREMAN *v.* AETNA CASUALTY & SURETY CO. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 89–1741. HAYSE *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 782 S. W. 2d 609.

No. 89–1742. CHRISTMAS *v.* MARSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 521.

No. 89–1746. RELIANCE INSURANCE CO. *v.* GLADOS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1309.

No. 89–1747. CHURCHILL, INFORMAL ADMINISTRATOR OF THE ESTATE OF CHURCHILL, ET AL. *v.* F/V FJORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 763.

No. 89–1750. LOCAL 4501, COMMUNICATIONS WORKERS OF AMERICA *v.* OHIO STATE UNIVERSITY ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 49 Ohio St. 3d 1, 550 N. E. 2d 164.

No. 89–1751. EASTERN PUBLISHING & ADVERTISING, INC., T/A ARMED FORCES NEWS *v.* CHESAPEAKE PUBLISHING & ADVERTISING, INC., T/A THE MILITARY NEWS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 971.

No. 89–1752. MASON *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE, APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 2d 512.

No. 89–1761. BARNETT ET AL. *v.* PETRO-TEX CHEMICAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 800.

No. 89–1762. MYERS ET AL. *v.* AP PROPANE, INC. C. A. 6th Cir. Certiorari denied.

No. 89–1763. CORNWELL *v.* CRAWFORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 398.

No. 89–1766. UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, UNION NO. 1149, ET AL. *v.* SEAVIEW INDUSTRIES, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–1783. MEYER *v.* STATE BAR OF TEXAS; and MEYER *v.* LOWRY, DISTRICT JUDGE, 261ST JUDICIAL DISTRICT, TRAVIS COUNTY, TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 89–1792. POLLACK *v.* GRUIS ET AL. Ct. App. D. C. Certiorari denied.

No. 89–1803. SCHAEFER *v.* GALLEGO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1809. TOWNSEND ET AL. *v.* CRAMBLETT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 80.

No. 89–1823. KOPCHO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1218.

No. 89–1825. RAMIREZ *v.* WOODS, JUDGE, DISTRICT COURT OF TEXAS, WEBB COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 151.

No. 89–1844. MCLENDON *v.* PETTEY. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 89–1872. CITY OF SANSOM PARK, TEXAS, ET AL. *v.* PEELMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1334.

No. 89–6917. GALLION *v.* ZINN. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–6988. CLARK *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 188 Ill. App. 3d 79, 544 N. E. 2d 100.

No. 89–7044. LLOYD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 1425, 265 Cal. Rptr. 422.

No. 89–7051. LEE *v.* FLANNIGAN, ADMINISTRATOR, MENARD PSYCHIATRIC CENTER, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 884 F. 2d 945.

No. 89–7069. ETLIN *v.* ETLIN; and IN RE ETLIN. Ct. App. Va. Certiorari denied.

No. 89–7104. NUNN ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 184 Ill. App. 3d 253, 541 N. E. 2d 182.

No. 89–7182. MYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 89–7306. WINSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 96, 892 F. 2d 112.

No. 89–7364. HAUGES *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1422.

No. 89–7394. LEPISCOPO *v.* ESQUIBEL ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7395. JOHNSON *v.* LEAPLEY ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–7410. TURNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 193 Ill. App. 3d 1108, 578 N. E. 2d 332.

No. 89–7416. ACCOLLA *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7417. WATKINS *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 89–7418. CURTIS *v.* AMERICAN BAKERIES CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 151.

No. 89–7419. SANDS *v.* CRIST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1046.

No. 89–7420. FRANKLIN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1571.

No. 89–7424. SPILLERS *v.* BURNS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–7426. WOOD ET UX. *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied. Reported below: 63 Ohio App. 3d 855, 580 N. E. 2d 484.

No. 89–7434. DAVIS *v.* BUSH ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–7440. REED *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 254.

No. 89–7445. LITTLEJOHN *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 253.

No. 89–7446. MARTIN *v.* FARNAN. C. A. 3d Cir. Certiorari denied.

No. 89–7449. MARTIN *v.* HUYETT. C. A. 3d Cir. Certiorari denied.

No. 89–7450. LEPISCOPO *v.* SANNICKS. C. A. 10th Cir. Certiorari denied.

No. 89–7453. EVANS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 522 Pa. 594, 562 A. 2d 319.

No. 89–7454. WALKER *v.* JONES, SUPERINTENDENT, GREAT MEADOWS CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89–7457. HILLIARD *v.* FULCOMER, SUPERINTENDENT, HUNTINGDON CORRECTIONAL INSTITUTION. C. A. 3d Cir. Certiorari denied.

No. 89–7458. KLACSMANN *v.* JENSEN. C. A. 11th Cir. Certiorari denied.

No. 89–7459. LEPISCOPO *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–7460. MORGAN *v.* ROWE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 531.

No. 89–7461. O'MELIA *v.* SANTA MONICA MUNICIPAL COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–7466. ROGERS *v.* SLANSKY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1418.

No. 89–7467. RAMSEY *v.* GARRAGHTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89–7470. CARTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 782 S. W. 2d 597.

No. 89–7472. TAYLOR *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 147.

No. 89–7500. WILLIAMS ET UX. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1573.

No. 89–7504. MOERLIEN *v.* GRGURINOVICH ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7505. HERRERA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–7510. LUSSY *v.* TICOR TITLE INSURANCE CO. Sup. Ct. Mont. Certiorari denied.

No. 89–7523. BOREN *v.* N. L. INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1463.

No. 89–7529. KLACSMANN *v.* LOCKHEED SPACE OPERATIONS CO. C. A. 11th Cir. Certiorari denied.

No. 89–7538. MANCHESTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 253.

No. 89–7562. WEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 429.

No. 89–7580. LEVINE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1245.

No. 89–7601. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 89–7608. CONNOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 942.

No. 89–7612. WILSON *v.* KASSICIEH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 15.

No. 89–7630. SAAHIR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7635. HARRIS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7636. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1226.

No. 89–7646. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 260.

No. 89–7650. COVINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 256.

No. 89–7651. FITZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7660. SHEFFIELD *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34.

No. 89–7666. HINOJOSA-RAMOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7670. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 895 F. 2d 722.

No. 89–7673. LAROQUE *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1565.

No. 89–7677. SULLIVAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7680. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1563.

No. 89–7688. CIALONI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 898 F. 2d 1218.

No. 89–7690. GARCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1575.

No. 89–7693. GOREE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–7709. HODGDON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 900 F. 2d 247.

No. 88–1553. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMSON. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SCALIA would grant the petition for writ of certiorari, vacate the judgment, and remand the case for further consideration in light of *Walton* v. *Arizona*, *ante*, p. 639, *Lewis* v. *Jeffers*, *ante*, p. 764, and *Alabama* v. *Smith*, 490 U. S. 794 (1989). JUSTICE O'CONNOR and JUSTICE KENNEDY took no part in the consideration or decision of this motion and this petition. Reported below: 865 F. 2d 1011.

No. 88–6512. SUTTON *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–7332. JIMERSON *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–7444. THOMPSON *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–7451. OTEY *v.* GRAMMER, WARDEN. C. A. 8th Cir.;
No. 89–5008. SALAZAR *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5016. LIBBERTON *v.* ARIZONA. Sup. Ct. Ariz.;
No. 89–5121. HAMBLEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 89–5133. MCCALL *v.* ARIZONA. Sup. Ct. Ariz.;
No. 89–5146. ODLE *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5219. YOUNG *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5232. PHILLIPS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5265. NASH *v.* ARIZONA. Sup. Ct. Ariz.;
No. 89–5435. MAHAFFEY *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5443. FLORES *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–5470. TAYLOR *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 89–5513. HENLEY *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 89–5545. BRACY *v.* ARIZONA. Sup. Ct. Ariz.;
No. 89–5616. MCKINNEY *v.* IDAHO. Sup. Ct. Idaho;
No. 89–5633. HOOPER *v.* ARIZONA. Sup. Ct. Ariz.;
No. 89–5635. MILLER *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 89–5704. ALLEN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Super. Ct. Ga., Butts County;

No. 89–5848. FOSTER *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 89–5990. KENNEDY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 89–6298. STEWART *v.* FLORIDA. Sup. Ct. Fla.;

No. 89–6317. COLEMAN *v.* ILLINOIS. Sup. Ct. Ill.;

No. 89–6459. OWENS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 89–6461. JACKSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 89–6600. BUXTON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir.;

No. 89–6626. LANKFORD *v.* IDAHO. Sup. Ct. Idaho;

No. 89–6778. SIDEBOTTOM *v.* MISSOURI. Sup. Ct. Mo.;

No. 89–6870. HOLMAN *v.* ILLINOIS. Sup. Ct. Ill.;

No. 89–6953. KOKORALEIS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 89–7080. BERTOLOTTI *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 89–7178. COLLINS *v.* MARYLAND. Ct. App. Md.;

No. 89–7474. LUSK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;

No. 89–7512. ISAACS *v.* GEORGIA. Sup. Ct. Ga.; and

No. 89–7528. SIEBERT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 88–6512, 761 S. W. 2d 763; No. 88–7332, 127 Ill. 2d 12, 535 N. E. 2d 889; No. 88–7444, 768 S. W. 2d 239; No. 88–7451, 859 F. 2d 575; No. 89–5008, 126 Ill. 2d 424, 535 N. E. 2d 766; No. 89–5133, 160 Ariz. 119, 770 P. 2d 1165; No. 89–5146, 128 Ill. 2d 111, 538 N. E. 2d 428; No. 89–5219, 128 Ill. 2d 1, 538 N. E. 2d 453 and 461; No. 89–5232, 127 Ill. 2d 499, 538 N. E. 2d 500; No. 89–5435, 128 Ill. 2d 388, 539 N. E. 2d 1172; No. 89–5443, 128 Ill. 2d 66, 538 N. E. 2d 481; No. 89–5470, 771 S. W. 2d 387; No. 89–5513, 774 S. W. 2d 908; No. 89–5616, 115 Idaho 1125, 772 P. 2d 1219; No. 89–5635, 771 S. W. 2d 401; No. 89–5848, 779 P. 2d 591; No. 89–5990, 551 So. 2d 461; No. 89–6298, 549 So. 2d 171; No. 89–6317, 129 Ill. 2d 321, 544 N. E. 2d 330; No. 89–6459, 129 Ill. 2d 303, 544 N. E. 2d 276; No. 89–6461, 554 So. 2d 1168; No. 89–6600, 879 F. 2d 140; No. 89–6626, 116 Idaho 860, 781 P. 2d 197; No. 89–6778, 781 S. W. 2d 791; No. 89–6870, 132 Ill. 2d 128, 547 N. E. 2d 124; No. 89–6953, 132 Ill. 2d 235, 547 N. E. 2d 202; No. 89–7080, 883 F. 2d 1503; No. 89–7178, 318 Md. 269, 568 A. 2d 1; No. 89–7474,

890 F. 2d 332; No. 89–7512, 259 Ga. 717, 386 S. E. 2d 316; No. 89–7528, 555 So. 2d 780.

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. 88–7629. VICKERS *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 159 Ariz. 532, 768 P. 2d 1177.

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, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not hold this view, I would grant the petition to decide whether the Constitution requires a State to provide an indigent defendant access to diagnostic testing necessary to prepare an effective defense based on his mental condition, when the defendant demonstrates that his sanity at the time of the offense will be a significant issue at trial. I believe that our decision in *Ake* v. *Oklahoma*, 470 U. S. 68 (1985), compels us to answer that question in the affirmative.

Petitioner Robert Wayne Vickers was convicted of murdering a prison inmate and sentenced to death. His only defense at trial was insanity. Specifically, Vickers claimed that he suffered from temporal lobe epilepsy, a brain disorder that can cause violent behavior and render a person unable to appreciate the nature and wrongfulness of his acts. Vickers' court-appointed psychiatrist, Dr. Paul Bindelglas, determined, after a lengthy interview and an exhaustive review of Vickers' medical records, that Vickers suffered from "definite dissociative reactions" possibly due to temporal lobe epilepsy. App. to Pet. for Cert. B–7. Dr. Bindelglas based his opinion on Vickers' history of cerebral trauma and seizures, neurological deficits reported by a psychologist when Vickers was a child, improvement in Vickers' condition when he was placed on anti-convulsive and psychotropic medications and

reversion when he was taken off the medication, and an abnormal electroencephalogram (EEG) performed four years before the murder. *Ibid.* Dr. Bindelglas further opined that Vickers probably was in a dissociative state at the time of the offense, which made him "incapable of rendering any judgement and . . . unable to know right from wrong." *Id.*, at B–9. Dr. Bindelglas stated that he could not make a definitive diagnosis, however, without certain neuropsychological testing. *Ibid.*

Based on Dr. Bindelglas' recommendation, petitioner requested that the trial court provide access to diagnostic testing. Petitioner included with his request an affidavit from a second psychiatrist, Dr. David Bear, who, after reviewing petitioner's records and examining him for five hours, agreed that there was a "substantial possibility" that Vickers suffered from temporal lobe epilepsy, which may have impaired his ability to "appreciate the quality and nature of the act and its wrongfulness." *Id.*, at C–4, C–9. Dr. Bear also stated that diagnostic testing, including a careful neurological examination and multiple EEG's, was necessary "before professional judgment can be rendered regarding Mr. Vickers' mental state at the time of the subject offense." *Id.*, at C–12. In addition, the State's own expert, Dr. Maier Tuchler, testified at petitioner's competency hearing that diagnostic testing was necessary to determine definitely whether Vickers suffered from temporal lobe epilepsy. Finally, petitioner supplied the court with the affidavits of two other psychiatrists who testified that strong evidence indicated that Vickers suffered from a mental disorder which impaired his capacity to make rational judgments, but that diagnostic testing was necessary before a firm conclusion could be reached. App. to Pet. for Cert. D and E.

Despite the consensus of these medical experts that diagnostic testing was necessary, the court denied petitioner's request. The court relied on a two-paragraph letter from a psychiatrist appointed at the State's request, Dr. William Masland. Dr. Masland concluded, on the basis of a quick review of petitioner's medical records, conversations with prisoners and prison staff, and a brief interview with Vickers, that "there is absolutely nothing to suggest that this man is epileptic" and that "further diagnostic testing . . . would be totally superfluous." *Id.*, at F. The court refused to reconsider its order after receiving additional affidavits from Dr. Bindelglas and Dr. Bear and two neurologists

that vehemently contested Dr. Masland's opinion and reemphasized the need for diagnostic testing.

Because of the lack of diagnostic testing, Dr. Bindelglas could testify at trial only that there was a "definite probability" of temporal lobe epilepsy. 159 Ariz. 532, 536, 768 P. 2d 1177, 1181 (1989). Before sentencing, petitioner again requested diagnostic testing to establish the brain disorder as a mitigating circumstance; again the court denied his motion.

The Arizona Supreme Court rejected petitioner's argument that the State violated due process by denying him an adequate opportunity to prove his insanity defense. *Ibid.* The court reasoned that the requested testing would have been expensive and would have posed a "burdensome security problem." *Id.*, at 537, 768 P. 2d, at 1182. The court also claimed that nothing indicated that testing would have helped petitioner prove his insanity defense. *Ibid.*

In *Ake* v. *Oklahoma*, *supra*, at 83, this Court held that when an indigent "defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense." (Emphases added.) The right to a competent psychiatrist necessarily includes the right to have the State provide the psychiatrist with the tools he requires to conduct an adequate examination and evaluation of the defendant. To hold otherwise is analogous to requiring the State to provide an indigent defendant with an attorney, but not requiring it to pay for the attorney's legal research expenses.

This is not to say that an indigent defendant is entitled to every scientific procedure that has only a remote possibility of bolstering his defense. Thus, we recognized in *Ake* that "the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy." 470 U. S., at 77 (citing *Ross* v. *Moffitt*, 417 U. S. 600 (1974)). But when a defendant demonstrates that his sanity will be a significant issue at trial, and his psychiatrist makes a plausible showing that certain testing is necessary for him to perform his *Ake* function, that testing must be considered one of "the raw materials integral to the building of an effective defense" that the State must provide. 470 U. S., at 77.

Petitioner undoubtedly satisfied the threshold requirements. First, his sanity was a significant factor in his defense. Vickers' "sole defense was that of insanity," *id.*, at 86, and six experts testified that there was a substantial possibility that Vickers suffered from a mental disorder at the time of the offense that might have impaired his capacity to understand the nature of his actions. Indeed, the trial court's appointment of Dr. Bindelglas itself shows that petitioner's sanity was a significant issue. Second, Vickers' court-appointed psychiatrist established that testing was necessary for him to perform his *Ake* role adequately. Dr. Bindelglas stated in the clearest terms that he could not make a definitive diagnosis without specific testing. App. to Pet. for Cert. B–9. Six other medical experts, including the State's expert, Dr. Tuchler, affirmed the need for testing. Pet. for Cert. 7. Without such testing, Dr. Bindelglas could offer only a tentative opinion at trial. Clearly, then, Dr. Bindelglas' ability to contribute to petitioner's defense was impaired unreasonably by the State's refusal to provide access to diagnostic testing.

The trial court's reliance on Dr. Masland's opinion that testing would be superfluous—an opinion not shared by *any* of the other doctors—does not justify its denial of access to testing. *Ake* requires the appointment of a psychiatrist who will assist in the preparation of the defense, not one who will merely give an independent assessment to the judge or jury. 470 U. S., at 83. Although a judge or jury may choose to believe the State's experts rather than the defendant's at trial, a court may not permit the State's experts to determine what resources the defendant's experts may use. To allow such a veto power is akin to permitting a prosecutor to decide on what cases defense counsel may rely or what witnesses he may call. As long as the defendant makes the threshold showing of the need for testing, the court must provide access to it.

The Arizona Supreme Court affirmed the trial court's decision in part on the assumption that the necessary testing would have to be performed out of state and would last four to six weeks, thus imposing substantial costs on the State and creating a security problem. 159 Ariz., at 537, 768 P. 2d, at 1182. The court based this assumption on Dr. Bindelglas' request that Vickers be tested in a California hospital "if at all possible" because the Arizona State Hospital might have been prejudiced in favor of its previous diagnosis and might not perform the job adequately. App. to

Pet. for Cert. B–9. The trial court, however, never sought a compromise; it refused to provide for testing altogether. Any problem posed by sending Vickers to California is a red herring, then, to the extent that less burdensome testing would have satisfied the State's obligation. If, however, the testing procedure suggested by Dr. Bindelglas was in fact the only adequate means of arriving at a medically sound diagnosis, the burden on the State does not justify denying that testing. As we held in *Ake*, the State's interest in preserving its fisc is not substantial when compared with the compelling interest of both the defendant and the State in the fair and accurate adjudication of a criminal case, particularly one in which the defendant's life is at stake. 470 U. S., at 78–79.

Finally, the Arizona high court maintained that further testing was of "questionable value" to petitioner's insanity defense and that the risk of an erroneous judgment was minimal because three state experts testified that Vickers was not insane at the time of the offense. 159 Ariz., at 537, 768 P. 2d, at 1182. This reasoning wrongly subjects *Ake* claims to harmless-error analysis. In *Ake*, we did not endeavor to determine whether the petitioner's case had been prejudiced by the lack of a psychiatrist. Rather, we determined that, in general, psychiatric assistance is of extreme importance in cases involving an insanity defense, *id.*, at 79–82, and that without that assistance "the risk of an inaccurate resolution of sanity issues is extremely high," *id.*, at 82. Because the petitioner had made the threshold showing that his sanity was a significant issue at trial and the State had failed to offer psychiatric assistance, we reversed and remanded for a new trial. In this case, then, the trial testimony of the State's experts is irrelevant. Vickers' sanity was a significant issue at trial and testing was necessary for his psychiatrist to perform his *Ake* function. Because the trial court nevertheless refused to require the State to provide access to the requisite testing, Vickers is entitled to a new trial.

Our decision in *Ake* v. *Oklahoma* recognized the right of an indigent defendant to a competent court-appointed psychiatrist when his sanity is seriously in question. To deprive a defendant of diagnostic testing necessary for the psychiatrist to perform adequately his *Ake* function renders that right meaningless. I therefore dissent from the denial of certiorari.

No. 89–867. F. & H. R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM ET AL. *v.* HARZA ENGINEERING CO. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 882 F. 2d 281.

No. 89–1556. WHITACRE *v.* DAVEY. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 281 U. S. App. D. C. 363, 890 F. 2d 1168.

No. 89–1372. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* NEWLON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 885 F. 2d 1328.

No. 89–1757. SCULLY, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY, ET AL. *v.* PETERSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 896 F. 2d 661.

No. 89–1425. MARYLAND *v.* FERRELL. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondent granted. Certiorari denied. Reported below: 318 Md. 235, 567 A. 2d 937.

No. 89–1531. PARTINGTON *v.* GEDAN ET AL. C. A. 9th Cir. Motion of petitioner to strike suggestion of mootness denied. Certiorari denied. Reported below: 880 F. 2d 116.

No. 89–1882. FOLEY *v.* WCCO TV, INC., ET AL. Ct. App. Minn. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 449 N. W. 2d 497.

No. 89–7175. BEAULIEU *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 893 F. 2d 1177.

JUSTICE WHITE, dissenting.

The issue presented is whether a district judge may rely on testimony from the trial of a defendant's co-conspirators in sentencing the defendant. The Tenth Circuit held that the District Court's reliance on such evidence did not violate any constitutional provision. 900 F. 2d 1531 (1990). The Tenth Circuit expressly rejected the position adopted by the Eleventh Circuit which has concluded that reliance on such testimony violates a defendant's

rights. See *United States* v. *Castellanos*, 882 F. 2d 474 (CA11 1989). I would grant certiorari to resolve the conflict.

Rule 10 of the Rules of this Court "indicate the character of reasons" that will be considered in granting or denying petitions for certiorari. Among these considerations is whether there is a conflict between two courts of appeals, between a court of appeals and the highest court of a State, or between two state courts of last resort. These considerations frequently lead to granting certiorari. Just this past Monday, we granted certiorari in two cases that, absent conflict between Courts of Appeals, very likely would not have been granted. *Dole* v. *Occupational Safety and Health Review Comm'n*, *ante*, p. 1002; *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, *ante*, p. 1002. This is a weekly occurrence, but it also regularly happens that certiorari is denied in other cases presenting the kind of conflicts singled out by Rule 10. This case is one of them, and there are many others this Term, as there have been in other Terms.

As of June 21, I had noted my dissent from denial of certiorari 67 times during this Term. My notes on these dissents indicate that on 48 occasions I dissented because in my view there were conflicts among Courts of Appeals sufficiently crystallized to warrant certiorari if the federal law is to be maintained in any satisfactory, uniform condition. In seven other cases, there were differences on the same federal issue between Courts of Appeals and state courts; in another case, state courts of last resort differed with each other. Finally, there were 11 cases that did not involve a conflict between courts but in my view presented important issues that should be settled by this Court.

In some of these cases it is perhaps arguable that the alleged conflict was not "real" or "square." In most of these cases, however, it is very difficult to deny the conflict, especially where, as in this case, the court of appeals expressly differs with another court, yet certiorari is denied because the conflict is "tolerable" or "narrow," or because other courts of appeals should have the opportunity to weigh in on one side or another of the unsettled issue, or for some other unstated reason. In any event, denial underlines the fact that the federal law is being administered in different ways in different parts of the country; citizens in some circuits are subject to liabilities or entitlements that citizens in other circuits are not burdened with or entitled to.

It is surely arguable that we should not grant more cases in one Term than we can decide in one Term. Being current in our docket is a major consideration; and it may not be wise to delay prompt review in every case, even though many of them involve issues of paramount importance, simply to overcrowd our argument docket with many other cases of lesser significance. But I suggest that we should do what we can, and it is plain enough to me that quite a number of the cases involving conflicts have been denied review but could have been granted without presenting any danger of not being current in our docket.

Of course, even if we have taken all of the cases that we could be expected to decide, which is not the fact as I see it, there would remain those unreviewed cases that leave in place the many different interpretations and applications of the federal law as administered in the courts of appeals, an issue that merits the attention of Congress and the legal establishment.

Rehearing Denied

No. 89–333. CALIFORNIA *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL., 495 U. S. 490;

No. 89–1574. GENERAL MOTORS CORP. ET AL. *v.* DEPARTMENT OF REVENUE OF ALABAMA, 496 U. S. 912;

No. 89–1587. REYNOLDS METALS CO. *v.* SIZEMORE, COMMISSIONER OF REVENUE OF ALABAMA, 496 U. S. 912;

No. 89–1592. RAMIREZ *v.* UNITED STATES, 495 U. S. 933;

No. 89–6243. LEAL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 495 U. S. 934;

No. 89–6494. ASANTE *v.* UNITED STATES, 495 U. S. 934;

No. 89–6706. BERBICK *v.* PROVIDENT NATIONAL BANK ET AL., 494 U. S. 1085;

No. 89–6764. SCOTT *v.* DEPARTMENT OF THE ARMY, 495 U. S. 935;

No. 89–6912. TAYLOR *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES, 494 U. S. 1090;

No. 89–6944. COOPER *v.* REMAX WYANDOTTE COUNTY REAL ESTATE, INC., ET AL., 495 U. S. 935;

No. 89–6972. LAKE *v.* CALIFORNIA, 495 U. S. 960;

No. 89–6976. KLEIN *v.* MASSACHUSETTS, 495 U. S. 916;

No. 89–6979. FOX *v.* UNITED STATES DEPARTMENT OF THE INTERIOR, 495 U. S. 936;

No. 89–6991. MIKESELL *v.* DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION SAFETY BOARD, ET AL., 495 U. S. 949;

No. 89–7000. ROE *v.* TEXAS, 495 U. S. 937;

No. 89–7009. CASTILLO ET AL. *v.* UNITED STATES, 495 U. S. 960;

No. 89–7017. CASTILLO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 495 U. S. 937;

No. 89–7057. FLANAGAN *v.* UNITED STATES, 495 U. S. 938;

No. 89–7070. WILLIAMS *v.* GEORGIA, 495 U. S. 950;

No. 89–7111. ALLUSTIARTE ET AL. *v.* COOPER, 495 U. S. 960;

No. 89–7117. BAASCH *v.* UNITED STATES ET AL., 495 U. S. 938;

No. 89–7118. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA ET AL., 495 U. S. 960;

No. 89–7119. MARTIN *v.* SUPREME COURT OF PENNSYLVANIA, 495 U. S. 960;

No. 89–7126. MARTIN *v.* SHANK ET AL., 495 U. S. 961;

No. 89–7129. HAWK-BEY *v.* UNITED STATES, 495 U. S. 938;

No. 89–7173. KELLEY *v.* INTERNATIONAL TOTAL SERVICES, INC., ET AL., 496 U. S. 909;

No. 89–7205. DONALD *v.* UNITED STATES DEPARTMENT OF EDUCATION, 496 U. S. 910;

No. 89–7243. MCLAUGHLIN *v.* LATESSA, 495 U. S. 952;

No. 89–7263. WHIRTY *v.* LATESSA, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, 495 U. S. 952; and

No. 89–7285. COCHRAN *v.* TURNER, WARDEN, 496 U. S. 929. Petitions for rehearing denied.

No. 89–1545. QUARTERMAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 495 U. S. 932. Motion of petitioners for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 89–7280. GOLUB *v.* IBM CORP.; GOLUB *v.* ERNST & WHINNEY ET AL.; GOLUB *v.* WEINER & CO.; and GOLUB *v.* UNIVERSITY OF CHICAGO, 495 U. S. 941. Petition for rehearing denied. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this petition.

JULY 9, 1990

Miscellaneous Order

No. A–929. KAREM *v.* PRIEST ET AL. Application for stay pending appeal to the United States Court of Appeals for the Fifth Circuit, addressed to JUSTICE BRENNAN and referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

JULY 12, 1990

Certiorari Denied

No. 90–5103 (A–35). THOMAS *v.* JONES, 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 BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JULY 16, 1990

Dismissal Under Rule 46

No. 89–7094. IN RE MARSH. Petition for writ of mandamus dismissed under this Court's Rule 46.

JULY 17, 1990

Miscellaneous Order

No. A–43. DERRICK *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for stay of execution of sentence of death and certificate of probable cause, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

JULY 18, 1990

Miscellaneous Order

No. A–46. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HAMBLEN. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JULY 19, 1990

Miscellaneous Orders

No. A–48. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WHITE. Application of the Attorney General of Florida for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. A–54 (90–5195). BOGGS *v.* MUNCY, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

JULY 23, 1990

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that THE CHIEF JUSTICE be, and he is hereby, assigned to the First

Circuit and the Third Circuit as Circuit Justice, effective July 20, 1990, pending further order.

JULY 27, 1990

Miscellaneous Order

No. A–77. BERTOLOTTI *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

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 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

AUGUST 7, 1990

Assignment Order

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE BLACKMUN be, and he is hereby, assigned to the First Circuit as Circuit Justice, effective August 7, 1990, pending further order.

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that JUSTICE STEVENS be, and he is hereby, assigned to the Third Circuit as Circuit Justice, effective August 7, 1990, pending further order.

It is further ordered that the order entered July 23, 1990 [*ante*, p. 1043], assigning THE CHIEF JUSTICE to the First Circuit and to the Third Circuit as Circuit Justice is vacated.

AUGUST 13, 1990

Miscellaneous Orders

No. A–677 (89–6967). BURKE *v.* BEYER. C. A. 3d Cir. Application for bail, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–876. IN RE DISBARMENT OF TOBIN. Disbarment entered. [For earlier order herein, see 494 U. S. 1024.]

No. D–882. IN RE DISBARMENT OF TIERNEY. Disbarment entered. [For earlier order herein, see 494 U. S. 1053.]

No. D–889. IN RE DISBARMENT OF MAZUR. Disbarment entered. [For earlier order herein, see 494 U. S. 1065.]

No. D–898. IN RE DISBARMENT OF KELLY. Disbarment entered. [For earlier order herein, see 495 U. S. 945.]

No. D–903. IN RE DISBARMENT OF HAGMAN. Disbarment entered. [For earlier order herein, see 495 U. S. 955.]

No. D–915. IN RE DISBARMENT OF KOKERNAK. It is ordered that Bruce G. Kokernak, of Sarasota, 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–916. IN RE DISBARMENT OF JOHNSTONE. It is ordered that Robert Bruce Johnstone, of Eagle Creek, Ore., 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–917. IN RE DISBARMENT OF HENDERSON. It is ordered that Barry J. Henderson, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–918. IN RE DISBARMENT OF LOVELL. It is ordered that Howell Lovell, Jr., of San Francisco, 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–919. IN RE DISBARMENT OF NICHOLS. It is ordered that John A. Nichols, of Parchman, Miss., 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–920. IN RE DISBARMENT OF DODGE. It is ordered that James Colvin Dodge, of West Liberty, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–921. IN RE DISBARMENT OF YINGER. It is ordered that David Harrison Yinger, Jr., of Frederick, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–922. IN RE DISBARMENT OF WEISS. It is ordered that Ralph Weiss, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–923. IN RE DISBARMENT OF MORROW. It is ordered that Charles Stanley Morrow, of Mars, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Rehearing Denied

No. 88–1943. OFFICE OF PERSONNEL MANAGEMENT *v.* RICHMOND, 496 U. S. 414;

No. 89–1509. WAGNER *v.* UNITED STATES BANKRUPTCY COURT, 495 U. S. 905;

No. 89–1551. POGUE *v.* WHITE STONE BAPTIST CHURCH ET AL., 495 U. S. 957;

No. 89–1682. STALHEIM *v.* ALBERT LEA MEDICAL SURGICAL CENTER, LTD., ET AL., 496 U. S. 937;

No. 89–1693. NORTON *v.* NICHOLSON ET AL., 496 U. S. 938;

No. 89–1767. WILK ET AL. *v.* JOINT COMMISSION ON ACCREDITATION OF HOSPITALS ET AL., 496 U. S. 927;

No. 89–5962. TAYLOR *v.* UNITED STATES, 496 U. S. 907;

No. 89–6223. BITTAKER *v.* CALIFORNIA, 496 U. S. 931;

No. 89–6778. SIDEBOTTOM *v.* MISSOURI, *ante*, p. 1032;

No. 89–6795. MCCARTER *v.* CALIFORNIA, 496 U. S. 927;

No. 89–6882. ROBERTS *v.* GEORGIA, 495 U. S. 963;

No. 89–6889. IN RE MCFADDEN, 496 U. S. 904;

No. 89–6920. STULL *v.* UNITED STATES, 495 U. S. 959;

No. 89–7048. CARGILL *v.* ZANT, WARDEN, 495 U. S. 963;

No. 89–7095. MCFADDEN *v.* COMMISSIONER OF INTERNAL REVENUE, 496 U. S. 909;

No. 89–7109. ALLUSTIARTE ET AL. *v.* COOPER, 495 U. S. 960;

No. 89–7146. FREEMAN *v.* ALABAMA, 496 U. S. 912;

No. 89–7150. SALSMAN ET UX. *v.* UNITED STATES, 495 U. S. 939;

No. 89–7212. EVERSON *v.* OTT ET AL., 496 U. S. 910;

No. 89–7224. DOWNS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 496 U. S. 928;

No. 89–7238. AMIRI *v.* JOHNSON, JUDGE, UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA, *ante*, p. 1006;

No. 89–7239. AMIRI *v.* DISTRICT OF COLUMBIA ET AL., 496 U. S. 928;

No. 89–7253. ELMORE *v.* SOUTH CAROLINA, 496 U. S. 931;

No. 89–7259. FLUKER *v.* TOWNSEND, 496 U. S. 940;

No. 89–7266. SINDRAM *v.* DISTRICT OF COLUMBIA ET AL., 496 U. S. 940;

No. 89–7273. JACKSON ET UX. *v.* DIXON-BOOKMAN, 496 U. S. 929;

No. 89–7275. MCCOLLUM *v.* INDIANA, 496 U. S. 931;

No. 89–7277. MCCOLPIN *v.* CITY OF WICHITA ET AL., 496 U. S. 940;

No. 89–7314. WHISENHANT *v.* ALABAMA, 496 U. S. 943;

No. 89–7347. IN RE BROOKS, *ante*, p. 1002;

No. 89–7377. WEXLER *v.* DEPARTMENT OF THE INTERIOR, 496 U. S. 929;

No. 89–7423. IN RE SEITU, 496 U. S. 903;

No. 89–7446. MARTIN *v.* FARNAN, *ante*, p. 1028;

No. 89–7449. MARTIN *v.* HUYETT, *ante*, p. 1028; and

No. 89–7474. LUSK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 1032. Petitions for rehearing denied.

No. 89–243. ELI LILLY & CO. *v.* MEDTRONIC, INC., 496 U. S. 661. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 89–6285. CHAMBERS *v.* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS ET AL., 494 U. S. 1032. Motion for leave to file petition for rehearing denied.

AUGUST 14, 1990

Dismissal Under Rule 46

No. 89–7730. FIERRO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari dismissed under this Court's Rule 46.

AUGUST 15, 1990

Certiorari Denied

No. 90–5248 (A–87). WILLIAMS *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 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 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

AUGUST 21, 1990

Miscellaneous Order

No. A–126 (89–6324). MOORE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1010. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending this Court's action on the petition for rehearing. The respondent is invited to file a response to the petition for rehearing within 30 days.

AUGUST 30, 1990

Miscellaneous Orders

No. A–14 (90–272). BROOKS ET AL. *v.* GEORGIA STATE BOARD OF ELECTIONS ET AL. D. C. S. D. Ga. Application for injunction and stay pending appeal, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–910 (89–6967). BURKE *v.* BEYER. C. A. 3d Cir. Application for transfer, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 89–1080. BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA *v.* DOWELL ET AL. C. A. 10th Cir. [Certiorari granted, 494 U. S. 1055.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1149. GROGAN ET AL. *v.* GARNER. C. A. 8th Cir. [Certiorari granted, 495 U. S. 918.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1298. INGERSOLL-RAND CO. *v.* MCCLENDON. Sup. Ct. Tex. [Certiorari granted, 494 U. S. 1078.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1436. UNITED STATES *v.* R. ENTERPRISES, INC., ET AL. C. A. 4th Cir. [Certiorari granted, 496 U. S. 924.] Motion of the Solicitor General to dispense with printing the joint appendix granted. Motion of respondents for divided argument denied.

No. 89–1448. VIRGINIA BANKSHARES, INC., ET AL. *v.* SANDBERG ET AL. C. A. 4th Cir. [Certiorari granted, 495 U. S. 903.] Motions of American Corporate Counsel Association et al. and American Bankers Association et al. for leave to file briefs as *amici curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1646. UNITED STATES ET AL. *v.* SMITH ET AL. C. A. 9th Cir. [Certiorari granted, 496 U. S. 924.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 89–5120. PERRY *v.* LOUISIANA. 19th Jud. Dist. Ct., Crim. Section V, Parish of East Baton Rouge, La. [Certiorari granted, 494 U. S. 1015.] Motion of Coalition for the Fundamental Rights and Equality of Ex-Patients for leave to file a brief as *amicus curiae* granted.

No. 89–6332. MINNICK *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 495 U. S. 903.] Motion of Mississippi State Bar for leave to file a brief as *amicus curiae* granted.

Certiorari Denied

No. 90–5581 (A–157). GILMORE *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or de-

cision of this application and this petition. Reported below: 908 F. 2d 385.

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 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 88–1872. RUTAN ET AL. *v.* REPUBLICAN PARTY OF ILLINOIS ET AL., *ante*, p. 62;

No. 88–2074. FRECH ET AL. *v.* RUTAN ET AL., *ante*, p. 62;

No. 88–7318. CAIN *v.* SOUTH CAROLINA, *ante*, p. 1010;

No. 88–7332. JIMERSON *v.* ILLINOIS, *ante*, p. 1031;

No. 88–7351. WALTON *v.* ARIZONA, *ante*, p. 639;

No. 88–7629. VICKERS *v.* ARIZONA, *ante*, p. 1033;

No. 89–189. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* JEFFERS, *ante*, p. 764;

No. 89–453. METRO BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante*, p. 547;

No. 89–1687. COMMUNICATIONS SATELLITE CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., *ante*, p. 1004;

No. 89–1703. SNYDER *v.* LEWIS, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, *ante*, p. 1004;

No. 89–1783. MEYER *v.* STATE BAR OF TEXAS; and MEYER *v.* LOWRY, DISTRICT JUDGE, 261ST JUDICIAL DISTRICT, TRAVIS COUNTY, TEXAS, ET AL., *ante*, p. 1026;

No. 89–5008. SALAZAR *v.* ILLINOIS, *ante*, p. 1031;

No. 89–5016. LIBBERTON *v.* ARIZONA, *ante*, p. 1031;

No. 89–5146. ODLE *v.* ILLINOIS, *ante*, p. 1031;

No. 89–5219. YOUNG *v.* ILLINOIS, *ante*, p. 1031;

No. 89–5232. PHILLIPS *v.* ILLINOIS, *ante*, p. 1031;

No. 89–5346. BRADLEY *v.* OHIO, *ante*, p. 1011;

No. 89–5443. FLORES *v.* ILLINOIS, *ante*, p. 1031;

No. 89–5616. MCKINNEY *v.* IDAHO, *ante*, p. 1031;

No. 89–5635. MILLER *v.* TENNESSEE, *ante*, p. 1031;

No. 89–5704. ALLEN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1031;

No. 89–5809. SAWYER *v.* SMITH, INTERIM WARDEN, *ante*, p. 227;

No. 89–5934. CARTWRIGHT *v.* OKLAHOMA, *ante*, p. 1015;

No. 89–6317. COLEMAN *v.* ILLINOIS, *ante*, p. 1032;

No. 89–6459. OWENS *v.* ILLINOIS, *ante*, p. 1032;

No. 89–6626. LANKFORD *v.* IDAHO, *ante*, p. 1032;

No. 89–6870. HOLMAN *v.* ILLINOIS, *ante*, p. 1032;

No. 89–6953. KOKORALEIS *v.* ILLINOIS, *ante*, p. 1032;

No. 89–7110. KNAPP *v.* MASCHNER ET AL., 496 U. S. 939;

No. 89–7213. FORD ET AL. *v.* RUTLEDGE ET AL., 496 U. S. 910;

No. 89–7353. CHRISTOPHERSON ET UX. *v.* SHAWANO COUNTY, *ante*, p. 1007;

No. 89–7375. KURTZ *v.* EDMISTON, SUPERINTENDENT, SOUTHERN STATE CORRECTIONAL FACILITY, ET AL., *ante*, p. 1007;

No. 89–7380. BARROW *v.* ILLINOIS, *ante*, p. 1011;

No. 89–7416. ACCOLLA *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY, ET AL., *ante*, p. 1027;

No. 89–7418. CURTIS *v.* AMERICAN BAKERIES CO. ET AL., *ante*, p. 1027;

No. 89–7512. ISAACS *v.* GEORGIA, *ante*, p. 1032; and

No. 89–7579. MUKHTAR *v.* UNITED STATES, *ante*, p. 1010. Petitions for rehearing denied.

No. 89–1380. CRIDER *v.* UNITED STATES, 495 U. S. 956. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

No. 89–1803. SCHAEFER *v.* GALLEGO ET AL., *ante*, p. 1026. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 89–7350. IN RE SWENTEK, 496 U. S. 904. Motion for leave to file petition for rehearing denied.

AUGUST 31, 1990

Miscellaneous Order

No. A–169. GILMORE *v.* MISSOURI. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. JUSTICE SCALIA took no part in the consideration or decision of this application.

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 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

Certiorari Denied

No. 90–5599 (A–167). GILMORE *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

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 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 5, 1990

Miscellaneous Order

No. A–178. LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* FAIRCHILD. Application of the Attorney General of Arkansas for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied.

SEPTEMBER 6, 1990

Certiorari Denied

No. 90–5610 (A–175). FAIRCHILD *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. Reported below: 900 F. 2d 1292.

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 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 9, 1990

Miscellaneous Order

No. A–192. COLEMAN *v.* OKLAHOMA PARDON AND PAROLE BOARD ET AL. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

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 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

Certiorari Denied

No. 90–5669 (A–191). COLEMAN *v.* SAFFLE, WARDEN. C. A. 10th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this application and this petition. Reported below: 912 F. 2d 1217.

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 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

SEPTEMBER 11, 1990

Miscellaneous Order

No. A–193. SILAGY ET AL. *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL. Application for temporary injunction, presented to JUSTICE STEVENS, and by him referred to the Court, denied. JUSTICE MARSHALL would grant the application. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

SEPTEMBER 20, 1990

Miscellaneous Order

No. A–223. HAMBLEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

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 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

SEPTEMBER 21, 1990

Miscellaneous Orders

No. A–900 (90–348). NEW ERA PUBLICATIONS INTERNATIONAL, APS *v.* CAROL PUBLISHING GROUP. C. A. 2d Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–140 (90–5723). STEELEY *v.* ALABAMA. Ct. Crim. App. Ala. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–160. AHMAD *v.* WIGEN, WARDEN. C. A. 2d Cir. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–170. IVEZAJ *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. Application for stay of deportation, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–854. IN RE DISBARMENT OF MCCALLUM. Disbarment entered. [For earlier order herein, see 493 U. S. 1053.]

No. D–878. IN RE DISBARMENT OF SCHWARTZ. Disbarment entered. [For earlier order herein, see 494 U. S. 1052.]

No. D–894. IN RE DISBARMENT OF OSTROWSKY. Disbarment entered. [For earlier order herein, see 495 U. S. 902.]

No. D–900. IN RE DISBARMENT OF SKEVIN. Disbarment entered. [For earlier order herein, see 495 U. S. 954.]

No. D–901. IN RE DISBARMENT OF OLSTER. Disbarment entered. [For earlier order herein, see 495 U. S. 955.]

No. D–906. IN RE DISBARMENT OF ERICKSON. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–912. IN RE DISBARMENT OF BROCKMEIER. Disbarment entered. [For earlier order herein, see 496 U. S. 934.]

No. D–924. IN RE DISBARMENT OF PARKER. It is ordered that Charles Lionel Parker, of Akron, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–925. IN RE DISBARMENT OF MELARO. It is ordered that H. J. M. Melaro, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–926. IN RE DISBARMENT OF MCBRIDE. It is ordered that Willard Carlos McBride, of Hillcrest Heights, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–927. IN RE DISBARMENT OF ISAACSON. It is ordered that Michael Isaacson, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–928. IN RE DISBARMENT OF KEADY. It is ordered that Michael Jennings Keady, of Palo Alto, 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–929. IN RE DISBARMENT OF BRIMBERRY. It is ordered that Robert E. Brimberry, of Brea, 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–930. IN RE DISBARMENT OF HOBSON. It is ordered that Donald L. Hobson, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–931. IN RE DISBARMENT OF RYAN. It is ordered that James P. Ryan, 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–932. IN RE DISBARMENT OF BUSSEY. It is ordered that Charles L. Bussey, Jr., 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. D–933. IN RE DISBARMENT OF ROSS. It is ordered that Arnold L. Ross, of Agoura Hills, 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–934. IN RE DISBARMENT OF STANDARD. It is ordered that R. Michael Standard, 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–935. IN RE DISBARMENT OF ANTICO. It is ordered that Peter J. Antico, of Jersey City, 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–936. IN RE DISBARMENT OF FELDMAN. It is ordered that David Phillip Feldman, of East Amherst, 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–937. IN RE DISBARMENT OF DEAM. It is ordered that William Alan Deam, of Yankton, S. D., 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–938. IN RE DISBARMENT OF IRELAND. It is ordered that Gregory F. Ireland, of Carmel, 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.

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 Eleventh Circuit during the period of September 19 through September 20, 1990, and for such 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 26, 1990

Dismissal Under Rule 46

No. 90–5464. ROMMANN *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 902 F. 2d 1570.

SEPTEMBER 27, 1990

Dismissal Under Rule 46

No. 90–121. PITTSBURGH CORNING CORP. *v.* SIMPSON, INDIVIDUALLY AND AS EXECUTRIX OF ESTATE OF SIMPSON, DECEASED. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 901 F. 2d 277.

SEPTEMBER 28, 1990

Dismissal Under Rule 46

No. 89-1769. REPUBLIC OF CHINA *v.* LIU. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 892 F. 2d 1419.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 1987, 1988 AND 1989

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	1987	1988	1989	1987	1988	1989	1987	1988	1989	1987	1988	1989
Number of cases on dockets	16	14	14	2,577	2,587	2,416	2,675	3,056	3,316	5,268	5,657	5,746
Number disposed of during term	5	2	2	2,131	2,203	2,051	2,251	2,625	2,879	4,387	4,830	4,932
Number remaining on dockets	11	12	12	446	384	365	424	431	437	881	827	814

	TERMS		
	1987	1988	1989
Cases argued during term	167	170	146
Number disposed of by full opinions	151	156	143
Number disposed of by per curiam opinions	9	12	3
Number set for reargument	7	2	0
Cases granted review this term	180	147	123
Cases reviewed and decided without oral argument	95	108	79
Total cases to be available for argument at outset of following term	105	81	57

JUNE 28, 1990

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Maritime jurisdiction—Limitation of liability suit—Vessel fire.—Where a fire erupted on petitioner's pleasure yacht while it was docked, causing extensive property damage to surrounding boats and a marina, District Court had jurisdiction, pursuant to 28 U. S. C. § 1333(1), over his claim that Limited Liability Act provision—which limits a vessel owner's liability for damage done without his privity or knowledge to value of vessel and its freight—limited his liability to his yacht's salvage. Sisson v. Ruby, p. 358.

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2. *State wholesale gross receipts tax—Retroactivity of Supreme Court's decision.*—For reasons stated in *Ashland Oil, Inc.* v. *Caryl,* p. 916, *Armco Inc.* v. *Hardesty,* 467 U. S. 638, applied retroactively to taxes assessed against petitioner. National Mines Corp. v. Caryl, p. 922.

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INTERSTATE COMMERCE ACT.

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ISBN 0-16-045235-X

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