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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1990

MARCH 4 THROUGH APRIL 23, 1991

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATUM

395 U. S. 540, n. 74, penultimate line: "or religious faith" should be "of religious faith".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief 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.
DAVID H. SOUTER, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.

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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 9, 1990, viz.:

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

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

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

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, 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.

October 9, 1990.

(For next previous allotment, and modifications, see 484 U. S., p. VII, and 497 U. S., p. IV.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1988 edition.

Cases reported before page 901 are those decided with opinions of the Court. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 is that written in chambers by an individual Justice.

TABLE OF CASES CITED

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1990

PACIFIC MUTUAL LIFE INSURANCE CO. *v.* HASLIP ET AL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 89–1279. Argued October 3, 1990—Decided March 4, 1991

After respondents' health insurance lapsed when one Ruffin, an agent for petitioner insurance company and another, unaffiliated insurance company, misappropriated premiums issued by respondents' employer for payment to the other insurer, respondents filed an action for damages in state court, claiming fraud by Ruffin and seeking to hold petitioner liable on a *respondeat superior* theory. Following the trial court's charge instructing the jury that it could award punitive damages if, *inter alia*, it determined there was liability for fraud, the jury, among other things, returned a verdict for respondent Haslip of over $1 million against petitioner and Ruffin, which sum included a punitive damages award that was more than four times the amount of compensatory damages Haslip claimed. The Supreme Court of Alabama affirmed, specifically upholding the punitive damages award.

Held: The punitive damages award in this case did not violate the Due Process Clause of the Fourteenth Amendment. Pp. 9–24.

(a) Holding petitioner responsible for Ruffin's acts did not violate substantive due process. The jury's finding that Ruffin was acting within the scope of his apparent authority as an agent of petitioner when he defrauded respondents was not disturbed by the State Supreme Court and is amply supported by the record. Moreover, Alabama's longstanding common-law rule that an insurer is liable for both compensatory and punitive damages for the intentional fraud of its agent effected within the scope of his employment rationally advances the State's interest in mini-

mizing fraud, since that rule creates a strong financial incentive for vigilance by insurers. Thus, imposing liability on petitioner under the *respondeat superior* doctrine is not fundamentally unfair. Pp. 12–15.

(b) Since every state and federal court considering the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be *per se* unconstitutional. The method was well established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it. Pp. 15–18.

(c) Nevertheless, unlimited jury or judicial discretion in the fixing of punitive damages may invite extreme results that are unacceptable under the Due Process Clause. Although a mathematical bright line cannot be drawn between the constitutionally acceptable and the constitutionally unacceptable that would fit every case, general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. P. 18.

(d) The punitive damages assessed against petitioner, although large in comparison to the compensatory damages claimed by Haslip, did not violate due process, since the award did not lack objective criteria and was subject to the full panoply of procedural protections. First, the trial court's instructions placed reasonable constraints on the exercise of the jury's discretion by expressly describing punitive damages' purposes of retribution and deterrence, by requiring the jury to consider the character and degree of the particular wrong, and by explaining that the imposition of punitive damages was not compulsory. Second, the trial court conducted a postverdict hearing that conformed with *Hammond* v. *Gadsden*, 493 So. 2d 1374 (Ala.), which sets forth standards that ensure meaningful and adequate review of punitive awards. Third, petitioner received the benefit of appropriate review by the State Supreme Court, which applied the *Hammond* standards, approved the verdict thereunder, and brought to bear all relevant factors recited in *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala.), for ensuring that punitive damages are reasonable. Pp. 18–24.

553 So. 2d 537, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined. SCALIA, J., *post*, p. 24, and KENNEDY, J., *post*, p. 40, filed opinions concurring in the judgment. O'CONNOR, J., filed a dissenting opinion, *post*, p. 42. SOUTER, J., took no part in the consideration or decision of the case.

1 Counsel

Bruce A. Beckman argued the cause for petitioner. With him on the briefs were *J. Mark Hart* and *Bert S. Nettles*.

Bruce J. Ennis, Jr., argued the cause for respondents. With him on the brief were *Donald B. Verrilli, Jr.*, *Charles E. Sharp*, *John F. Whitaker*, *Robert H. Adams*, and *Andrew T. Citrin*.*

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*Briefs of *amici curiae* urging reversal were filed for the City of New York by *Victor A. Kovner*, *Leonard J. Koerner*, and *John Hogrogian;* for the Alliance of American Insurers et al. by *Erwin N. Griswold*, *Patricia A. Dunn*, *Kenneth H. Nails*, *James H. Bradner, Jr.*, *Richard E. Goodman*, *Richard E. Barnsback*, *Phillip E. Stano*, *Joe W. Peel*, *Theresa L. Sorota*, *Patrick J. McNally*, and *John J. Nangle;* for the American Institute of Architects et al. by *Rex E. Lee*, *Carter G. Phillips*, *Benjamin W. Heineman, Jr.*, *Philip A. Lacovara*, and *Thomas Schmidt;* for Arthur Andersen & Co. et al. by *Leonard P. Novello*, *Jon N. Ekdahl*, and *Harris J. Amhowitz;* for the Association for California Tort Reform by *Ellis J. Horvitz*, *S. Thomas Todd*, and *Fred J. Hiestand;* for the Business Roundtable et al. by *Andrew L. Frey*, *Kenneth S. Geller*, *Mark I. Levy*, and *Andrew J. Pincus;* for Bethlehem Steel Corp. et al. by *Martin S. Kaufman;* for the Center for Claims Resolution by *John D. Aldock*, *Laura S. Wertheimer*, and *Edmund K. John;* for the Chamber of Commerce of the United States et al. by *Malcolm E. Wheeler*, *Stephen A. Bokat*, *Jan S. Amundson*, and *Nancy Nord;* for the Defense Research Institute by *John Calvin Jeffries, Jr.*, and *George Clemon Freeman, Jr.;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Ann Elizabeth Reesman;* for the Hospital Authority of Gwinnett County, Georgia, by *Harold N. Hill, Jr.*, and *E. Clayton Scofield III;* for Liability Insurance Underwriters by *Thomas P. Kane* and *Donald V. Jernberg;* for the Pharmaceutical Manufacturers Association et al. by *Richard F. Kingham*, *Bruce N. Kuhlik*, and *Kirk B. Johnson;* for the Southeastern Legal Foundation, Inc., by *Robert L. Barr, Jr.*, and *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Don Siegelman*, Attorney General of Alabama, and *George E. Jones III*, Assistant Attorney General, *John K. Van de Kamp*, Attorney General of California, and *Michael J. Strumwasser*, Special Assistant Attorney General, and *Jim Mattox*, Attorney General of Texas; for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Russ M. Herman;* for the California Trial Lawyers Association by *Roland Wrin-*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case is yet another that presents a challenge to a punitive damages award.

I

In 1981, Lemmie L. Ruffin, Jr., was an Alabama-licensed agent for petitioner Pacific Mutual Life Insurance Company. He also was a licensed agent for Union Fidelity Life Insurance Company. Pacific Mutual and Union are distinct and nonaffiliated entities. Union wrote group health insurance for municipalities. Pacific Mutual did not.

Respondents Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun, and Eddie Hargrove were employees of Roosevelt City, an Alabama municipality. Ruffin, presenting himself as an agent of Pacific Mutual, solicited the city for both health and life insurance for its employees. The city was interested. Ruffin gave the city a single proposal for both coverages. The city approved and, in August 1981, Ruffin prepared separate applications for the city and its employees for group health with Union and for individual life policies with Pacific Mutual. This packaging of health insurance with life

kle; for the Consumers Union of United States by *Andrew F. Popper;* and for Trial Lawyers for Public Justice by *Michael V. Ciresi.*

Briefs of *amici curiae* were filed for Aetna Life Insurance Co. et al. by *Theodore B. Olson, Larry L. Simms,* and *George R. Katosic;* for the Alabama Defense Lawyers Association by *Davis Carr;* for the Alabama Trial Lawyers Association by *John W. Haley* and *Bruce J. McKee;* for CBS Inc. et al. by *P. Cameron DeVore, Marshall J. Nelson, Douglas P. Jacobs, Richard J. Tofel, John C. Fontaine, Richard M. Schmidt, Jr., Jane E. Kirtley, Bruce W. Sanford,* and *J. Laurent Scharff;* for the Church of Scientology of California by *Eric M. Lieberman* and *Michael Lee Hertzberg;* for the Mid-America Legal Foundation by *Martha A. Churchill;* for the National Association of Mutual Insurance Companies by *Forrest S. Latta* and *Geoffrey C. Hazard, Jr.;* for the National Association of Wholesaler-Distributors et al. by *Clifton S. Elgarten* and *James T. McIntyre;* for the National Council of Churches of Christ in the U. S. A. et al. by *Michael J. Woodruff* and *Forest D. Montgomery;* and for the National Insurance Consumer Organization by *Roger O'Sullivan.*

insurance, although from different and unrelated insurers, was not unusual. Indeed, it tended to boost life insurance sales by minimizing the loss of customers who wished to have both health and life protection. The initial premium payments were taken by Ruffin and submitted to the insurers with the applications. Thus far, nothing is claimed to have been out of line. Respondents were among those with the health coverage.

An arrangement was made for Union to send its billings for health premiums to Ruffin at Pacific Mutual's Birmingham office. Premium payments were to be effected through payroll deductions. The city clerk each month issued a check for those premiums. The check was sent to Ruffin or picked up by him. He, however, did not remit to Union the premium payments received from the city; instead, he misappropriated most of them. In late 1981, when Union did not receive payment, it sent notices of lapsed health coverage to respondents in care of Ruffin and Patrick Lupia, Pacific Mutual's agent-in-charge of its Birmingham office. Those notices were not forwarded to respondents. Although there is some evidence to the contrary, see Reply Brief for Petitioner B1–B4, the trial court found, App. to Pet. for Cert. A2, that respondents did not know that their health policies had been canceled.

II

Respondent Haslip was hospitalized on January 23, 1982. She incurred hospital and physician's charges. Because the hospital could not confirm health coverage, it required Haslip, upon her discharge, to make a payment upon her bill. Her physician, when he was not paid, placed her account with a collection agency. The agency obtained a judgment against Haslip, and her credit was adversely affected.

In May 1982, respondents filed this suit, naming as defendants Pacific Mutual (but not Union) and Ruffin, individually and as a proprietorship, in the Circuit Court for Jef-

ferson County, Ala. It was alleged that Ruffin collected premiums but failed to remit them to the insurers so that respondents' respective health insurance policies lapsed without their knowledge. Damages for fraud were claimed. The case against Pacific Mutual was submitted to the jury under a theory of *respondeat superior*.

Following the trial court's charge on liability, the jury was instructed that if it determined there was liability for fraud, it could award punitive damages. That part of the instructions is set forth in the margin.[1] Pacific Mutual made no objection on the ground of lack of specificity in the instructions, and it did not propose a more particularized charge. No evidence was introduced as to Pacific Mutual's financial worth. The jury returned general verdicts for respondents against Pacific Mutual and Ruffin in the following amounts:

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[1] "Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.

"This amount of money is awarded to the plaintiff but it is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.

"Now, the purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiffs, it does to the plaintiff, by way of punishment to the defendant and for the added purpose of protecting the public by detering *[sic]* the defendant and others from doing such wrong in the future. Imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless this jury feels that you should do so.

"Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 105–106.

Haslip:	$1,040,000[2]	Calhoun:	$15,290
Craig:	$12,400	Hargrove:	$10,288

Judgments were entered accordingly.

On Pacific Mutual's appeal, the Supreme Court of Alabama, by a divided vote, affirmed. 553 So. 2d 537 (1989). In addition to issues not now before us, the court ruled that, while punitive damages are not recoverable in Alabama for misrepresentation made innocently or by mistake, they are recoverable for deceit or willful fraud, and that on the evidence in this case a jury could not have concluded that Ruffin's misrepresentations were made either innocently or mistakenly. *Id.*, at 540. The majority then specifically upheld the punitive damages award. *Id.*, at 543.

One justice concurred in the result without opinion.[3] *Ibid.* Two justices dissented in part on the ground that the award of punitive damages violated Pacific Mutual's due process rights under the Fourteenth Amendment. *Id.*, at 544–545.

Pacific Mutual, but not Ruffin, then brought the case here. It challenged punitive damages in Alabama as the product of unbridled jury discretion and as violative of its due process rights. We stayed enforcement of the Haslip judgment, 493 U. S. 1014 (1990), and then granted certiorari, 494 U. S.

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[2] Although there is controversy about the matter, it is probable that the general verdict for respondent Haslip contained a punitive damages component of not less than $840,000. In Haslip's counsel's argument to the jury, compensatory damages of $200,000 (including out-of-pocket expenditures of less than $4,000) and punitive damages of $3,000,000 were requested. Tr. 810–814. For present purposes, we accept this description of the verdict.

[3] This justice, in a later case, appears to have rethought his position with respect to punitive damages under Alabama law. See *Charter Hospital of Mobile, Inc.* v. *Weinberg*, 558 So. 2d 909, 913 (1990) (Houston, J., concurring specially). He did not address the question of the constitutionality of punitive damages in Alabama under the United States Constitution. *Id.*, at 914.

1065 (1990), to review the punitive damages procedures and award in the light of the long-enduring debate about their propriety.[4]

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[4] Compare, *e. g.*, *Fay* v. *Parker*, 53 N. H. 342, 382 (1872) ("The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law"), with *Luther* v. *Shaw*, 157 Wis. 234, 238, 147 N. W. 18, 19–20 (1914) (Timlin, J., "Speaking for myself only in this paragraph . . . . The law giving exemplary damages is an outgrowth of the English love of liberty regulated by law. It tends to elevate the jury as a responsible instrument of government, discourages private reprisals, restrains the strong, influential, and unscrupulous, vindicates the right of the weak, and encourages recourse to and confidence in the courts of law by those wronged or oppressed by acts or practices not cognizable in or not sufficiently punished by the criminal law").

This debate finds replication in the many *amicus* briefs filed here. See, *e. g.*, Brief for Alliance of American Insurers et al. 5 ("The Due Process Clause imposes substantive limits on the amounts of punitive damages that civil juries can award. This conclusion is evident from history"); Brief for American Institute of Architects et al. 4 ("Punitive damages are today awarded with a frequency and in amounts that are startling . . . . This system of punitive damages—where punitive awards are routine and fantastic verdicts receive little attention—is entirely a product of the last 20 years"); Brief for Business Roundtable et al. 2 ("[A]n award that is not rationally related to the retributive and deterrent purposes of punitive damages is unconstitutionally excessive"); Brief for Defense Research Institute 2 ("No society concerned for fairness and regularity in the administration of justice can afford to tolerate an essentially lawless regime of punishment"); Brief for Pharmaceutical Manufacturers Association et al. 4 ("[A]ny award of punitive damages for lawful conduct approved in advance by the [Food and Drug Administration] must be deemed arbitrary and excessive"); Brief for Aetna Life Insurance Co. et al. 6 ("[A] State may impose punishment on its citizens only pursuant to standards established in advance"); Brief for Hospital Authority of Gwinnett County, Georgia, 2 ("[I]n the absence of a statute . . . an award of punitive damages . . . violates the defendant's right to due process . . . unless it is shown by clear and convincing evidence that the act constituted a crime . . . . [A]wards of punitive damages in excess of twice the amount of actual damages (that is, awards in excess of treble damages) . . . violate . . . due process . . ."); Brief for Mid-America Legal Foundation 8 ("[S]ystem as applied today merely introduces a wildcard into the legal process . . ."); Brief for As-

III

This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages awards.

In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), all nine participating Members of the Court noted concern. In that case, punitive damages awarded on a state-law claim were challenged under the Eighth and Fourteenth Amendments and on federal common-law grounds. The majority held that the Excessive Fines Clause of the Eighth Amendment did not apply to a punitive damages award in a civil case between private parties; that the claim of excessiveness under the Due Process Clause of the Fourteenth Amendment had not been raised in either the District Court or the Court of Appeals and therefore was not to be considered here; and that federal common law did not provide a basis for disturbing the jury's punitive damages award. The Court said:

> "The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, they seek

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sociation for California Tort Reform 2 ("Until state legislatures do their job and set maximum limits for punitive awards and establish meaningful criteria for juries to use, punitive damages are *per se* a violation of due process"); Brief for Association of Trial Lawyers of America 3 ("There is no 'explosion' . . . . [P]unitive damages neither deter innovation nor place American businesses at a competitive disadvantage . . ."); Brief for National Insurance Consumer Organization 3 ("Punitive damages have developed as the most effective means by which the states can protect their citizens against corporate misconduct"); Brief for State of Alabama et al. 1 ("[T]he States—and not this Court—should decide how and when punitive damages may be assessed in civil cases between private litigants").

further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme . . . but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit . . . . That inquiry must await another day." *Id.*, at 276–277.

Justice Brennan, joined by JUSTICE MARSHALL, wrote separately:

"I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties. . . .

. . . . . .

"Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. . . .

. . . . . .

"Since the Court correctly concludes that Browning-Ferris' challenge based on the Due Process Clause is not properly before us, however, I leave fuller discussion of these matters for another day." *Id.*, at 280–282.

JUSTICE O'CONNOR, joined by JUSTICE STEVENS, concurring in part and dissenting in part, observed:

"Awards of punitive damages are skyrocketing. . . .

. . . . . .

". . . I do . . . agree with the Court that no due process claims—either procedural or substantive—are properly presented in this case, and that the award of punitive damages here should not be overturned as a matter of

federal common law. . . . Moreover, I share JUSTICE BRENNAN'S view, *ante*, at 280–282, that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed . . . ." *Id.*, at 282–283.

In *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71 (1988), a challenge to a punitive damages award was made. The Court, however, refused to reach claims that the award violated the Due Process Clause and other provisions of the Federal Constitution since those claims had not been raised and passed upon in state court. *Id.*, at 76–80. JUSTICE O'CONNOR, joined by JUSTICE SCALIA, concurring in part and concurring in the judgment, said:

"Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

. . . . . .

"This due process question, serious as it is, should not be decided today. . . . I concur in the Court's judgment on this question and would leave for another day the consideration of these issues." *Id.*, at 87–89.

In *Aetna Life Ins. Co.* v. *Lavoie*, 475 U. S. 813 (1986), another case that came here from the Supreme Court of Alabama, the appellant argued that the imposition of punitive damages was impermissible under the Eighth Amendment and violated the Due Process Clause of the Fourteenth Amendment. The Court stated: "These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them." *Id.*, at 828–829.

See also *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981) ("The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial . . ."); *Electrical Workers* v. *Foust*, 442 U. S. 42, 50–51 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 82–84 (1971) (MARSHALL, J., joined by Stewart, J., dissenting); *Missouri Pacific R. Co.* v. *Tucker*, 230 U. S. 340, 351 (1913); *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U. S. 482, 491 (1915); *St. Louis, I. M. & S. R. Co.* v. *Williams*, 251 U. S. 63, 67 (1919).

The constitutional status of punitive damages, therefore, is not an issue that is new to this Court or unanticipated by it. Challenges have been raised before; for stated reasons, they have been rejected or deferred. For example, in *Browning-Ferris*, *supra*, we rejected the claim that punitive damages awarded in a civil case could violate the Eighth Amendment and refused to consider the tardily raised due process argument. But the Fourteenth Amendment due process challenge is here once again.

IV

Two preliminary and overlapping due process arguments raised by Pacific Mutual deserve attention before we reach the principal issue in controversy. Did Ruffin act within the scope of his apparent authority as an agent of Pacific Mutual? If so, may Pacific Mutual be held responsible for Ruffin's fraud on a theory of *respondeat superior?*

Pacific Mutual was held responsible for the acts of Ruffin. The insurer mounts a challenge to this result on substantive due process grounds, arguing that it was not shown that either it or its Birmingham manager was aware that Ruffin

was collecting premiums contrary to his contract; that Pacific Mutual had no notice of the actions complained of prior to the filing of the complaint in this litigation; that it did not authorize or ratify Ruffin's conduct; that his contract with the company forbade his collecting any premium other than the initial one submitted with an application; and that Pacific Mutual was held liable and punished for unauthorized actions of its agent for acts performed on behalf of another company. Thus, it is said, when punitive damages were imposed on Pacific Mutual, the focus for determining the amount of those damages shifted from Ruffin, where it belonged, to Pacific Mutual, and obviously and unfairly contributed to the amount of the punitive damages and their disproportionality. Ruffin was acting not to benefit Pacific Mutual but for his own benefit, and to hold Pacific Mutual liable is "beyond the point of fundamental fairness," Brief for Petitioner 29, embodied in due process, *id.*, at 32. It is said that the burden of the liability comes to rest on Pacific Mutual's other policyholders.

The jury found that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents. The Supreme Court of Alabama did not disturb that finding. There is no occasion for us to question it, for it is amply supported by the record. Ruffin had actual authority to sell Pacific Mutual life insurance to respondents. The insurer derived economic benefit from those life insurance sales. Ruffin's defalcations related to the life premiums as well as to the health premiums. Thus, Pacific Mutual cannot plausibly claim that Ruffin was acting wholly as an agent of Union when he defrauded respondents.

The details of Ruffin's representation admit of no other conclusion. He gave respondents a single proposal—not multiple ones—for both life and health insurance. He used Pacific Mutual letterhead, which he was authorized to use on Pacific Mutual business. There was, however, no indication that Union was a nonaffiliated company. The trial court found that Ruffin "spoke only of Pacific Mutual and indicated

that Union Fidelity was a subsidiary of Pacific Mutual." App. to Pet. for Cert. A2. Pacific Mutual encouraged the packaging of life and health insurance. Ruffin worked exclusively out of a Pacific Mutual branch office. Each month he presented to the city clerk a single invoice on Pacific Mutual letterhead for both life and health premiums.

Before the frauds in this case were effectuated, Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud identical to those perpetrated against respondents. There were complaints to the Birmingham office about the absence of coverage purchased through Ruffin. The Birmingham manager was also advised of Ruffin's receipt of noninitial premiums made payable to him, a practice in violation of company policy.

Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See *British General Ins. Co.* v. *Simpson Sales Co.*, 265 Ala. 682, 688, 93 So. 2d 763, 768 (1957).

Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented." *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U. S. 112, 116 (1927). If an insurer were liable for such damages only upon proof that it was at fault independently, it would have an incentive to minimize oversight of its agents. Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot say this is a violation of Fourteenth Amendment due process. See *American Society of Mechanical Engineers, Inc.* v. *Hydro-*

level Corp., 456 U. S. 556 (1982); *Pizitz*, 274 U. S., at 115. These and other cases in a broad range of civil and criminal contexts make clear that imposing such liability is not fundamentally unfair and does not in itself violate the Due Process Clause. See *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57 (1910); *United States* v. *Balint*, 258 U. S. 250, 252 (1922); *United States* v. *Park*, 421 U. S. 658, 670 (1975).

We therefore readily conclude that Ruffin was acting as an employee of Pacific Mutual when he defrauded respondents, and that imposing liability upon Pacific Mutual for Ruffin's fraud under the doctrine of *respondeat superior* does not, on the facts here, violate Pacific Mutual's due process rights.

V

"Punitive damages have long been a part of traditional state tort law." *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 255 (1984). Blackstone appears to have noted their use. 3 W. Blackstone, Commentaries *137–*138. See also *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (C. P. 1763) (The Lord Chief Justice validating exemplary damages as compensation, punishment, and deterrence). Among the first reported American cases are *Genay* v. *Norris*, 1 Bay 6 (S. C. 1784), and *Coryell* v. *Colbaugh*, 1 N. J. L. 77 (1791).[5]

Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

This Court more than once has approved the common-law method for assessing punitive awards. In *Day* v. *Woodworth*, 13 How. 363 (1852), a case decided before the adoption

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[5] For informative historical comment, see Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1262–1264, and nn. 17–23 (1976).

of the Fourteenth Amendment, Justice Grier, writing for a unanimous Court, observed:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.
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> ". . . This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case." *Id.*, at 371.

In *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512 (1885), the Court stated: "The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of the practice." *Id.*, at 521. See also *Barry* v. *Edmunds*, 116 U. S. 550, 565 (1886) ("For nothing is better settled than that, in such cases as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict"); *Minneapolis & St. Louis R. Co.* v. *Beckwith*, 129 U. S. 26, 36 (1889) ("The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized . . . by

repeated judicial decisions for more than a century. Its authorization by the law in question . . . cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States"); *Standard Oil Co.* v. *Missouri*, 224 U. S. 270, 285 (1912) ("Nor, from a Federal standpoint, is there any invalidity in the judgment because there was no statute fixing a maximum penalty, no rule for measuring damages, and no hearing"); *Louis Pizitz Dry Goods Co.* v. *Yeldell*, *supra* (although the issue was raised in the briefs, the Court did not discuss the claim); *Memphis Community School Dist.* v. *Stachura*, 477 U. S. 299, 306, n. 9 (1986). Recently, in *Smith* v. *Wade*, 461 U. S. 30 (1983), this Court affirmed the assessment of punitive damages pursuant to 42 U. S. C. § 1983, where the trial court used the common-law method for determining the amount of the award.[6]

So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. But see *New Orleans, J. & G. N. R. Co.* v. *Hurst*, 36 Miss. 660 (1859). In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. "'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 730 (1988), quoting *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922). As the Court in *Day* v. *Woodworth*, 13 How. 363 (1852), made clear, the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted. Nothing in that Amendment's

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[6] Congress by statute in a number of instances has provided for punitive damages. See, *e. g.*, 11 U. S. C. §§ 303(i)(2)(B), 362(h), and 363(n); 12 U. S. C. § 3417(a)(3); 15 U. S. C. §§ 78u(h)(7)(A)(iii), 298(c), 1116(d)(11), and 1681n(2); 26 U. S. C. § 7431(c)(1)(B)(ii); 33 U. S. C. § 1514(c).

text or history indicates an intention on the part of its drafters to overturn the prevailing method. See *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604 (1990); *Snyder* v. *Massachusetts*, 291 U. S. 97, 111 (1934) ("The Fourteenth Amendment has not displaced the procedure of the ages").[7]

This, however, is not the end of the matter. It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional. See *Williams* v. *Illinois*, 399 U. S. 235, 239 (1970) ("[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . ."). We note once again our concern about punitive damages that "run wild." Having said that, we conclude that our task today is to determine whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable.

VI

One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. See *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 111 (1909).[8] We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus. With these concerns in mind, we

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[7] See RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages—Empirical Findings (1987).

[8] See also Owen, The Moral Foundations of Punitive Damages, 40 Ala. L. Rev. 705, 739 (1989) ("Yet punitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values").

review the constitutionality of the punitive damages awarded in this case.

We conclude that the punitive damages assessed by the jury against Pacific Mutual were not violative of the Due Process Clause of the Fourteenth Amendment. It is true, of course, that under Alabama law, as under the law of most States, punitive damages are imposed for purposes of retribution and deterrence. *Aetna Life Ins. Co.* v. *Lavoie*, 470 So. 2d 1060, 1076 (Ala. 1984). They have been described as quasi-criminal. See *Smith* v. *Wade*, 461 U. S. 30, 59 (1983) (REHNQUIST, J., dissenting). But this in itself does not provide the answer. We move, then, to the points of specific attack.

1. We have carefully reviewed the instructions to the jury. By these instructions, see n. 1, *supra*, the trial court expressly described for the jury the purpose of punitive damages, namely, "not to compensate the plaintiff for any injury" but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." App. 105–106. Any evidence of Pacific Mutual's wealth was excluded from the trial in accord with Alabama law. See *Southern Life & Health Ins. Co.* v. *Whitman*, 358 So. 2d 1025, 1026–1027 (Ala. 1978).

To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." App. 106. The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish.[9] As long as the discretion is exercised within reasonable constraints, due process is satisfied. See, *e. g.*, *Schall* v. *Martin*, 467 U. S. 253, 279 (1984); *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U. S. 1, 16 (1979). See also *McGautha* v. *California*, 402 U. S. 183, 207 (1971).

2. Before the trial in this case took place, the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. In *Hammond* v. *Gadsden*, 493 So. 2d 1374 (1986), it stated that trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.*, at 1379. Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties." *Ibid.* The *Hammond* test ensures meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages.

3. By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial

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[9] The Alabama Legislature recently enacted a statute that places a $250,000 limit on punitive damages in most cases. See 1987 Ala. Acts, No. 87–185, §§ 1, 2, and 4. The legislation, however, became effective only on June 11, 1987, see § 12, after the cause of action in the present case arose and the complaint was filed.

court's discretion. It first undertakes a comparative analysis. See, *e. g.*, *Aetna Life Ins. Co.* v. *Lavoie*, 505 So. 2d 1050, 1053 (1987). It then applies the detailed substantive standards it has developed for evaluating punitive awards.[10] In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 222 (1989); *Wilson* v. *Dukona Corp.*, 547 So. 2d 70, 73 (1989). This appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.

Also before its ruling in the present case, the Supreme Court of Alabama had elaborated and refined the *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. *Hornsby*, 539 So. 2d, at 223–224; *Central Alabama*, 546 So. 2d, at 376–377. It was announced that the following could be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;

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[10] See *Central Alabama Electric Cooperative* v. *Tapley*, 546 So. 2d 371, 377–378 (Ala. 1989). This, we feel, distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), and in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71 (1988). In those respective schemes, an amount awarded would be set aside or modified only if it was "manifestly and grossly excessive," *Pezzano* v. *Bonneau*, 133 Vt. 88, 91, 329 A. 2d 659, 661 (1974), or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience," *Bankers Life & Casualty Co.* v. *Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985).

(c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

The application of these standards, we conclude, imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, the factfinder must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

These standards have real effect when applied by the Alabama Supreme Court to jury awards. For examples of their application in trial practice, see *Hornsby*, 539 So. 2d, at 219, and *Williams* v. *Ralph Collins Ford-Chrysler, Inc.*, 551 So. 2d 964, 966 (1989). And postverdict review by the Alabama Supreme Court has resulted in reduction of punitive awards. See, *e. g.*, *Wilson* v. *Dukona Corp.*, 547 So. 2d, at 74; *United Services Automobile Assn.* v. *Wade*, 544 So. 2d 906, 917 (1989). The standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter. They surely are as specific as those adopted legislatively in Ohio Rev. Code

Ann. § 2307.80(B) (Supp. 1989) and in Mont. Code Ann. § 27–1–221 (1989).[11]

Pacific Mutual thus had the benefit of the full panoply of Alabama's procedural protections. The jury was adequately instructed. The trial court conducted a postverdict hearing that conformed with *Hammond*. The trial court specifically found that the conduct in question "evidenced intentional malicious, gross, or oppressive fraud," App. to Pet. for Cert. A14, and found the amount of the award to be reasonable in light of the importance of discouraging insurers from similar conduct, *id.*, at A15. Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the *Hammond* standards and approved the verdict thereunder. It brought to bear all relevant factors recited in *Hornsby*.

We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip, see n. 2, *supra*, and, of course, is much in excess of the fine that could be imposed for insurance fraud under Ala. Code §§ 13A–5–11 and 13A–5–12(a) (1982), and Ala. Code §§ 27–1–12, 27–12–17, and 27–12–23 (1986). Imprisonment, however, could also be required of an individual in the criminal context. While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consider-

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[11] We have considered the arguments raised by Pacific Mutual and some of its *amici* as to the constitutional necessity of imposing a standard of proof of punitive damages higher than "preponderance of the evidence." There is much to be said in favor of a State's requiring, as many do, see, *e. g.*, Ohio Rev. Code Ann. § 2307.80 (Supp. 1989), a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," see Colo. Rev. Stat. § 13–25–127(2) (1987), as in the criminal context. We are not persuaded, however, that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama—"reasonably satisfied from the evidence"—when buttressed, as it is, by the procedural and substantive protections outlined above, is constitutionally sufficient.

ation, that in this case it does not cross the line into the area of constitutional impropriety.[12] Accordingly, Pacific Mutual's due process challenge must be, and is, rejected.

The judgment of the Supreme Court of Alabama is affirmed.

It is so ordered.

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

JUSTICE SCALIA, concurring in the judgment.

In *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257 (1989), we rejected the argument that the Eighth Amendment limits punitive damages awards, but left for "another day" the question whether "undue jury discretion to award punitive damages" violates the Due Process Clause of the Fourteenth Amendment, *id.*, at 277. That day has come, the due process point has been thoroughly briefed and argued, but the Court chooses to decide only that the jury discretion in the present case was not undue. It says that Alabama's particular procedures (at least as applied here) are not so "unreasonable" as to "cross the line into the area of constitutional impropriety," *ante* this page. This jury-like verdict provides no guidance as to whether any *other* procedures are sufficiently "reasonable," and thus perpetuates the uncertainty that our grant of certiorari in this case was intended to resolve. Since it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements

[12] Pacific Mutual also makes what it calls a void-for-vagueness argument and, in support thereof, cites *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966). That case, however, is not helpful. The Court there struck down a Pennsylvania statute allowing costs to be awarded against a defendant acquitted of a misdemeanor. The statute did not concern jury discretion in fixing the amount of costs. Decisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred.

for imposing them) to the discretion of the jury; and since in my view a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes "due" process; I would approve the procedure challenged here without further inquiry into its "fairness" or "reasonableness." I therefore concur only in the judgment of the Court.

I

As the Court notes, punitive or "exemplary" damages have long been a part of Anglo-American law. They have always been controversial. As recently as the mid-19th century, treatise writers sparred over whether they even existed. One respected commentator, Professor Simon Greenleaf, argued that no doctrine of authentically "punitive" damages could be found in the cases; he attempted to explain judgments that ostensibly included punitive damages as in reality no more than full compensation. 2 Law of Evidence 235, n. 2 (13th ed. 1876). This view was not widely shared. In his influential treatise on the law of damages, Theodore Sedgwick stated that "the rule" with respect to the "salutary doctrine" of exemplary damages is that "where gross fraud, malice, or oppression appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community." Measure of Damages 522 (4th ed. 1868). The doctrine, Sedgwick noted, "seems settled in England, and in the general jurisprudence of this country," *id.*, at 35. See also G. Field, Law of Damages 66 (1876) ("[The] doctrine [of punitive damages] seems to be sustained by at least a great preponderance of authorities, both in England and this country"); J. Sutherland, Law of Damages 721–722, 726–727, n. 1 (1882) ("The doctrine that [punitive] damages may be allowed for the purpose of example and punishment, in addition to compensation, in certain cases, is held in nearly all the states of the Union and in England." "Since the time of the controversy between Professor

Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick . . ."). In *Day* v. *Woodworth*, 13 How. 363, 371 (1852), this Court observed:

> "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

Even fierce opponents of the doctrine acknowledged that it was a firmly established feature of American law. Justice Foster of the New Hampshire Supreme Court, in a lengthy decision disallowing punitive damages, called them "a perversion of language and ideas so ancient and so common as seldom to attract attention," *Fay* v. *Parker*, 53 N. H. 342, 343 (1873). The opinion concluded, with more passion than even petitioner in the present case could muster:

> "Undoubtedly this pernicious doctrine has become so fixed in the law . . . that it may be *difficult* to get rid of it. But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly.
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> ". . . [N]ot reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim—'I have no need of thee.'" *Id.*, at 397 (internal quotation marks omitted).

In 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts. It is just as clear

that no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount. As this Court noted in *Barry* v. *Edmunds*, 116 U. S. 550, 565 (1886), "nothing is better settled than that, in cases such as the present, and other actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." See also *Missouri Pacific R. Co.* v. *Humes*, 115 U. S. 512, 521 (1885) ("The discretion of the jury in such cases is not controlled by any very definite rules"). Commentators confirmed that the imposition of punitive damages was not thought to require special procedural safeguards, other than—at most—some review by the trial court. "[I]n cases proper for exemplary damages, it would seem impracticable to set any bounds to the discretion of the jury, though in cases where the wrong done, though with malicious intent, is greatly disproportioned to the amount of the verdict, the court may exercise the power it always possesses to grant a new trial for excessive damages." Sedgwick, *supra*, at 537–538, n. 1. See also Field, *supra*, at 65 ("[T]he amount of damages by way of punishment or example, are necessarily largely within the discretion of the jury; the only check . . . being the power of the court to set aside the verdict where it is manifest that the jury were unduly influenced by passion, prejudice, partiality, or corruption, or where it clearly evinces a mistake of the law or the facts of the case"); Sutherland, *supra*, at 742 ("Whether [punitive damages] shall be allowed, and their amount, are left to the discretion of the jury, but subject to the power of the court to set aside the verdict if it is so excessive that the court may infer that the jury have been influenced by passion or prejudice" (footnote omitted)).

Although both the majority and the dissenting opinions today concede that the common-law system for awarding punitive damages is firmly rooted in our history, both reject the proposition that this is dispositive for due process purposes.

Ante, at 17–18; *post*, at 60. I disagree. In my view, it is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is "due" process, nor do I believe such a rootless analysis to be dictated by our precedents.

II

Determining whether common-law procedures for awarding punitive damages can deny "due process of law" requires some inquiry into the meaning of that majestic phrase. Its first prominent use appears to have been in an English statute of 1354: "[N]o man of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law." 28 Edw. III, ch. 3. Although historical evidence suggests that the word "process" in this provision referred to specific writs employed in the English courts (a usage retained in the phrase "service of process"), see Jurow, Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law, 19 Am. J. Legal Hist. 265, 272–275 (1975), Sir Edward Coke had a different view. In the second part of his Institutes, see 2 Institutes 50 (5th ed. 1797), Coke equated the phrase "due process of the law" in the 1354 statute with the phrase "Law of the Land" in Chapter 29 of Magna Charta (Chapter 39 of the original Magna Charta signed by King John at Runnymede in 1215), which provides: "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." 9 Hen. III, ch. 29 (1225). In Coke's view, the phrase "due process of law" referred to the customary procedures to which freemen were entitled by "the old law of England," 2 Institutes 50.

The American colonists were intimately familiar with Coke, see R. Mott, Due Process of Law 87–90, 107 (1926); A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America 117–125 (1968), and when, in their Constitutions, they widely adopted Magna Charta's "law of the land" guarantee, see, *e. g.*, N. C. Const., Art. XII (1776) ("[N]o freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land"); Mass. Const., Art. XII (1780) ("[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land"), they almost certainly understood it as Coke did. It was thus as a supposed affirmation of Magna Charta according to Coke that the First Congress (without recorded debate on the issue) included in the proposed Fifth Amendment to the Federal Constitution the provision that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." Early commentaries confirm this. See, *e. g.*, 2 W. Blackstone, Commentaries 133, nn. 11, 12 (S. Tucker ed. 1803); 2 J. Kent, Commentaries on American Law 10 (1827); 3 J. Story, Commentaries on the Constitution of the United States 661 (1833).

This Court did not engage in any detailed analysis of the Due Process Clause until *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1856). That case involved the validity of a federal statute authorizing the issuance of distress warrants, a mechanism by which the Government collected debts without providing the debtor notice or an opportunity for hearing. The Court noted that the words "due process of law" conveyed "the same meaning as the words 'by the law of the land,' in *Magna Charta*" (referring to Coke's commentary and early State Constitutions), and that

they were "a restraint on the legislature as well as on the executive and judicial powers of the government," *id.*, at 276. This brought the Court to the critical question:

> "To what principles, then, are we to resort to ascertain whether this process enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Id.*, at 276–277.

Reviewing the history of the distress warrant, the Court concluded that the procedure could not deny due process of law because "there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues," *id.*, at 277, and these summary procedures had been replicated, with minor modifications, in the laws of the various American colonies and, after independence, the States, *id.*, at 278–280.

Subsequent to the decision in *Murray's Lessee*, of course, the Fourteenth Amendment was adopted, adding another Due Process Clause to the Constitution. The Court soon reaffirmed the teaching of *Murray's Lessee* under the new provision:

> "A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met *if the trial is had according to the settled course of judicial proceedings.* Due process of law is

process due according to the law of the land." *Walker* v. *Sauvinet*, 92 U. S. 90, 92–93 (1876) (emphasis added; citation omitted).

Not until *Hurtado* v. *California*, 110 U. S. 516 (1884), however, did the Court significantly elaborate upon the historical test for due process advanced in *Murray's Lessee*. In that case, a man convicted of murder in California contended that the State had denied him due process of law by omitting grand-jury indictment. Relying upon *Murray's Lessee*, he argued that because that procedure was firmly rooted in the Anglo-American common-law tradition, it was an *indispensable* element of due process. The Court disagreed.

> "The real syllabus of [the relevant portion of *Murray's Lessee*] is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado* v. *California*, *supra*, at 528–529.

Hurtado, then, clarified the proper role of history in a due process analysis: If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it

does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process. *Hurtado* provided scant guidance. It merely suggested that due process could be assessed in such cases by reference to "those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions," 100 U. S., at 535 (emphasis added).

The concept of "fundamental justice" thus entered the due process lexicon not as a description of what due process entails in general, but as a description of what it entails when traditional procedures are dispensed with. As the Court reiterated in *Twining* v. *New Jersey*, 211 U. S. 78 (1908), "consistently with the requirements of due process, no *change* in ancient procedure can be made which disregards those *fundamental principles*, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." *Id.*, at 101 (emphasis added). See also *Maxwell* v. *Dow*, 176 U. S. 581, 602–605 (1900) (eight-member jury does not violate due process because it is not "a denial of fundamental rights").[1]

Ownbey v. *Morgan*, 256 U. S. 94 (1921), provides a classic expression of the Court's "settled usage" doctrine. The Delaware statute challenged in that case provided that a creditor could attach the in-state property of an out-of-state debtor and recover against it without the debtor's being given an opportunity to be heard unless he posted a bond. This procedure could be traced back to 18th-century London, and had been followed in Delaware and other States since colonial days. The Court acknowledged that in general the due proc-

[1] During the late 19th century the Court also advanced the view that laws departing from *substantive* common law might violate due process if they denied "fundamental" rights. See, *e. g.*, *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897). The present analysis deals only with the Court's so-called "procedural" due process jurisprudence.

ess guarantee "includ[es] the right to be heard where liberty or property is at stake in judicial proceedings." *Id.*, at 111. But, it said, "[a] procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law." *Ibid.*

> "The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. . . .
>
> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Id.*, at 110–112.

See also *Corn Exchange Bank* v. *Coler*, 280 U. S. 218, 222–223 (1930).

By the time the Court decided *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934), its understanding of due process had shifted in a subtle but significant way. That case rejected a criminal defendant's claim that he had been denied due process by being prevented from accompanying his jury on a visit to the scene of the crime. Writing for the Court, Justice Cardozo assumed that due process required "fundamental justice," *id.*, at 108, or "fairness," see *id.*, at 116, in *all* cases, and not merely when evaluating nontraditional procedures. The opinion's analysis began from the premise that "Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness *unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.*" *Id.*, at 105 (emphasis added). Even so,

however, only the mode of analysis and not the content of the Due Process Clause had changed, since in assessing whether some principle of "fundamental justice" had been violated, the Court was willing to accord historical practice dispositive weight. Justice Cardozo noted that the practice of showing evidence to the jury outside the presence of the defendant could be traced back to 18th-century England, and had been widely adopted in the States. "The Fourteenth Amendment," he wrote, "has not displaced the procedure of the ages." *Id.*, at 111.

In the ensuing decades, however, the concept of "fundamental fairness" under the Fourteenth Amendment became increasingly decoupled from the traditional historical approach. The principal mechanism for that development was the incorporation within the Fourteenth Amendment of the Bill of Rights guarantees. Although the Court resisted for some time the idea that "fundamental fairness" necessarily included the protections of the Bill of Rights, see, *e. g.*, *Adamson* v. *California*, 332 U. S. 46, 54–58 (1947); *Betts* v. *Brady*, 316 U. S. 455, 462 (1942); *Palko* v. *Connecticut*, 302 U. S. 319, 323–325 (1937), it ultimately incorporated virtually all of them, see, *e. g.*, *Malloy* v. *Hogan*, 378 U. S. 1, 4–6 (1964); *Gideon* v. *Wainwright*, 372 U. S. 335, 341–345 (1963). Of course, most of the procedural protections of the Federal Bill of Rights simply codified traditional common-law privileges and had been widely adopted by the States. See *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897) ("The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors"); T. Cooley, Constitutional Limitations, ch. X (4th ed. 1878). However, in the days when they were deemed to apply only to the Federal Government and not to impose uniformity upon the States, the Court had interpreted several provisions

of the Bill of Rights in a way that departed from their strict common-law meaning. Thus, by the mid-20th century there had come to be some considerable divergence between historical practice followed by the States and the guarantees of the Bill of Rights. *Gideon*, *supra*, established that no matter how strong its historical pedigree, a procedure prohibited by the Sixth Amendment (failure to appoint counsel in certain criminal cases) violates "fundamental fairness" and must be abandoned by the States. *Id.*, at 342–345.

To say that unbroken historical usage cannot save a procedure that violates one of the explicit procedural guarantees of the Bill of Rights (applicable through the Fourteenth Amendment) is not necessarily to say that such usage cannot demonstrate the procedure's compliance with the more general guarantee of "due process." In principle, what is important enough to have been included within the Bill of Rights has good claim to being an element of "fundamental fairness," whatever history might say; and as a practical matter, the invalidation of traditional state practices achievable through the Bill of Rights is at least limited to enumerated subjects. But disregard of "the procedure of the ages" for incorporation purposes has led to its disregard more generally. There is irony in this, since some of those who most ardently supported the incorporation doctrine did so in the belief that it was a means of avoiding, rather than producing, a subjective due-process jurisprudence. See, for example, the dissent of Justice Black, author of *Gideon*, from the Court's refusal to replace "fundamental fairness" with the Bill of Rights as the *sole* test of due process:

> "[T]he 'natural law' formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution lim-

its legislative power." *Adamson*, *supra*, at 75 (Black, J., dissenting).

In any case, our due process opinions in recent decades have indiscriminately applied balancing analysis to determine "fundamental fairness," without regard to whether the procedure under challenge was (1) a traditional one and, if so, (2) prohibited by the Bill of Rights. See, *e. g.*, *Ake* v. *Oklahoma*, 470 U. S. 68, 76–87 (1985); *Lassiter* v. *Department of Social Services of Durham Cty.*, 452 U. S. 18, 24–25 (1981); *Mathews* v. *Eldridge*, 424 U. S. 319, 332–335 (1976). Even so, however, very few cases have used the Due Process Clause, without the benefit of an accompanying Bill of Rights guarantee, to strike down a procedure concededly approved by traditional and continuing American practice. Most notably, in *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337, 340 (1969), over the strenuous dissent of Justice Black, the Court declared unconstitutional the garnishment of wages, saying that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." And in *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), the Court invalidated general *quasi in rem* jurisdiction, saying that "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage," *id.*, at 212. Such cases, at least in their broad pronouncements if not with respect to the particular provisions at issue,[2] were in my view wrongly decided.

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[2] In *Shaffer*, JUSTICE STEVENS' concurrence noted that Delaware was the only State that currently exercised *quasi in rem* jurisdiction in the manner there at issue, viz., on the basis of ownership of stock in a state-chartered corporation, when both owner and custodian of the stock resided elsewhere. See 433 U. S., at 218 (opinion concurring in judgment). It seems not to have been asserted, moreover, that that manner of exercise had *ever* been a common and established American practice.

I might, for reasons of *stare decisis*, adhere to the principle that these cases announce, except for the fact that our later cases give it nothing but lipservice, and by their holdings reaffirm the view that traditional practice (unless contrary to the Bill of Rights) is conclusive of "fundamental fairness." As I wrote last Term in *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 623–625 (1990), nothing but the conclusiveness of history can explain why jurisdiction based upon mere service of process within a State—either generally or on the precise facts of that case—is "fundamentally fair." Nor to my mind can anything else explain today's decision that a punishment whose assessment and extent are committed entirely to the discretion of the jury is "fundamentally fair." The Court relies upon two inconsequential factors. First, the "guidance" to the jury provided by the admonition that it "take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." That is not guidance but platitude. Second, review of the *amount* of the verdict by the trial and appellate courts, which are also governed by no discernible standard except what they have done in other cases (unless, presumably, they announce a change). But it would surely not be considered "fair" (or in accordance with due process) to follow a similar procedure outside of this historically approved context—for example, to dispense with meaningful guidance concerning *compensatory* damages, so long as whatever number the jury picks out of the air can be reduced by the trial judge or on appeal. I can conceive of no test relating to "fairness" in the abstract that would approve this procedure, unless it is whether something even more unfair could be imagined. If the imposition of millions of dollars of liability in this hodge-podge fashion fails to "jar [the Court's] constitutional sensibilities," *ante*, at 18, it is hard to say what would.

When the rationale of earlier cases *(Sniadach* and *Shaffer)* is contradicted by later holdings—and particularly when that

rationale has no basis in constitutional text and itself contradicts opinions never explicitly overruled—I think it has no valid *stare decisis* claim upon me. Our holdings remain in conflict, no matter which course I take. I choose, then, to take the course that accords with the language of the Constitution and with our interpretation of it through the first half of this century. I reject the principle, aptly described and faithfully followed in JUSTICE O'CONNOR's dissent, that a traditional procedure of our society becomes unconstitutional whenever the Members of this Court "lose . . . confidence" in it, *post*, at 63. And like Justice Cardozo in *Snyder*, I affirm that no procedure firmly rooted in the practices of our people can be so "fundamentally unfair" as to deny due process of law.

Let me be clear about the scope of the principle I am applying. It does not say that every practice sanctioned by history is constitutional. It does not call into question, for example, the case of *Williams* v. *Illinois*, 399 U. S. 235 (1970), relied upon by both the majority and the dissent, where we held unconstitutional the centuries-old practice of permitting convicted criminals to reduce their prison sentences by paying fines. The basis of that invalidation was not denial of due process but denial to indigent prisoners of equal protection of the laws. The Equal Protection Clause and other provisions of the Constitution, unlike the Due Process Clause, are not an explicit invocation of the "law of the land," and might be thought to have some counter-historical content. Moreover, the principle I apply today does not reject our cases holding that procedures demanded by the Bill of Rights—which extends against the States only *through* the Due Process Clause—must be provided despite historical practice to the contrary. Thus, it does not call into question the proposition that punitive damages, despite their historical sanction, can violate the First Amendment. See, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349–350

(1974) (First Amendment prohibits awards of punitive damages in certain defamation suits).

* * *

A harsh or unwise procedure is not necessarily unconstitutional, *Corn Exchange Bank*, 280 U. S., at 223, just as the most sensible of procedures may well violate the Constitution, see *Maryland* v. *Craig*, 497 U. S. 836, 860–861 (1990) (SCALIA, J., dissenting). State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, *e. g.*, Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by "clear and convincing evidence"); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages are limited to three times the amount of compensatory damages); Va. Code Ann. § 8.01–38.1 (Supp. 1990) (punitive damages limited to $350,000). It is through those means—State by State, and, at the federal level, by Congress—that the legal procedures affecting our citizens are improved. Perhaps, when the operation of that process has purged a historically approved practice from our national life, the Due Process Clause would permit this Court to announce that it is no longer in accord with the law of the land. But punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species. They are (regrettably to many) vigorously alive. To effect their elimination may well be wise, but is not the role of the Due Process Clause. "Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." *Ownbey*, 256 U. S., at 112.

We have expended much ink upon the due-process implications of punitive damages, and the fact-specific nature of the Court's opinion guarantees that we and other courts will expend much more in the years to come. Since jury-assessed punitive damages are a part of our living tradition that dates

back prior to 1868, I would end the suspense and categorically affirm their validity.

JUSTICE KENNEDY, concurring in the judgment.

Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair. For this reason, JUSTICE SCALIA's historical approach to questions of procedural due process has much to commend it. I cannot say with the confidence maintained by JUSTICE SCALIA, however, that widespread adherence to a historical practice always forecloses further inquiry when a party challenges an ancient institution or procedure as violative of due process. But I agree that the judgment of history should govern the outcome in the case before us. Jury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary.

Our legal tradition is one of progress from fiat to rationality. The evolution of the jury illustrates this principle. From the 13th or 14th century onward, the verdict of the jury found gradual acceptance not as a matter of *ipse dixit*, the basis for verdicts in trials by ordeal which the jury came to displace, but instead because the verdict was based upon rational procedures. See T. Plucknett, A Concise History of the Common Law 120–131 (5th ed. 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community.

Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity. As we have said in the capital sentencing context:

> "It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 311 (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).

This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case. One must recognize the difficulty of making the showing required to prevail on this theory. In my view, however, it provides firmer guidance and rests on sounder jurisprudential foundations than does the approach

espoused by the majority. While seeming to approve the common-law method for assessing punitive damages, *ante*, at 17–18, the majority nevertheless undertakes a detailed examination of that method as applied in the case before us, *ante*, at 18–24. It is difficult to comprehend on what basis the majority believes the common-law method might violate due process in a particular case after it has approved that method as a general matter, and this tension in its analysis now must be resolved in some later case.

In my view, the principles mentioned above and the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change. We do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination. Were we sitting as state-court judges, the size and recurring unpredictability of punitive damages awards might be a convincing argument to reconsider those rules or to urge a reexamination by the legislative authority. We are confined in this case, however, to interpreting the Constitution, and from this perspective I agree that we must reject the arguments advanced by petitioner.

For these reasons I concur in the judgment of the Court.

JUSTICE O'CONNOR, dissenting.

Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than "do what you think best." See *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U. S. 257, 281 (1989) (Brennan, J., concurring).

In my view, such instructions are so fraught with uncertainty that they defy rational implementation. Instead, they encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim. While I do not question the general legitimacy of punitive damages, I see a strong need to provide juries with standards to constrain their discretion so that they may exercise their power wisely, not capriciously or maliciously. The Constitution requires as much.

The Court today acknowledges that dangers may lurk, but holds that they did not materialize in this case. See *ante*, at 18–24. They did materialize, however. They always do, because such dangers are part and parcel of common-law punitive damages procedures. As is typical, the trial court's instructions in this case provided no meaningful standards to guide the jury's decision to impose punitive damages or to fix the amount. Accordingly, these instructions were void for vagueness. Even if the Court disagrees with me on this point, it should still find that Pacific Mutual was denied procedural due process. Whether or not the jury instructions were so vague as to be unconstitutional, they plainly offered less guidance than is required under the due process test set out in *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). The most modest of procedural safeguards would have made the process substantially more rational without impairing any legitimate governmental interest. The Court relies heavily on the State's mechanism for postverdict judicial review, *ante*, at 20–23, but this is incapable of curing a grant of standardless discretion to the jury. *Post hoc* review tests only the amount of the award, not the procedures by which that amount was determined. Alabama's common-law scheme is so lacking in fundamental fairness that the propriety of any specific award is irrelevant. *Any* award of punitive damages

rendered under these procedures, no matter how small the amount, is constitutionally infirm.

Notwithstanding its recognition of serious due process concerns, the Court upholds Alabama's punitive damages scheme. Unfortunately, Alabama's punitive damages scheme is indistinguishable from the common-law schemes employed by many States. The Court's holding will therefore substantially impede punitive damages reforms. Because I am concerned that the Court today sends the wrong signal, I respectfully dissent.

I

Due process requires that a State provide meaningful standards to guide the application of its laws. See *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983). A state law that lacks such standards is void for vagueness. The void-for-vagueness doctrine applies not only to laws that proscribe conduct, but also to laws that vest standardless discretion in the jury to fix a penalty. See *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979). I have no trouble concluding that Alabama's common-law scheme for imposing punitive damages is void for vagueness.

A

Alabama's punitive damages scheme requires a jury to make two decisions: (1) whether or not to impose punitive damages against the defendant, and (2) if so, in what amount. On the threshold question of whether or not to impose punitive damages, the trial court instructed the jury as follows: "Imposition of punitive damages is *entirely discretionary* with the jury, that means you don't have to award it unless this jury *feels* that you should do so." App. 105–106 (emphasis added).

This instruction is as vague as any I can imagine. It speaks of discretion, but suggests *no* criteria on which to base the exercise of that discretion. Instead of reminding the jury that its decision must rest on a factual or legal predicate, the instruction suggests that the jury may do whatever

it "feels" like. It thus invites individual jurors to rely upon emotion, bias, and personal predilections of every sort. As I read the instruction, it as much permits a determination based upon the toss of a coin or the color of the defendant's skin as upon a reasoned analysis of the offensive conduct. This is not "discretion in the legal sense of that term, but . . . mere will. It is purely arbitrary and acknowledges neither guidance nor restraint." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366–367 (1886).

Giaccio v. *Pennsylvania*, 382 U. S. 399 (1966), offers a compelling analogy. At issue in *Giaccio* was a statute that left to the discretion of the jury whether or not to assess costs against an acquitted criminal defendant. The statute did not set out any standards to guide the jury's determination. *Id.*, at 401. The Court did not hesitate in striking down the statute on vagueness grounds. *Id.*, at 402. It reasoned that the utter lack of standards subjected acquitted defendants to "arbitrary and discriminatory impositions of costs." *Ibid.* Justice Black wrote for the Court:

> "The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors 'shall determine, by their verdict, whether . . . the defendant, shall pay the costs' . . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement." *Id.*, at 403.

Alabama's common-law punitive damages scheme fails for precisely the same reason. It permits a jury to decide whether or not to impose punitive damages "without imposing a single condition, limitation or contingency" on the jury.

Ibid. The State offers no principled basis for distinguishing those tortfeasors who should be liable for punitive damages from those who should not be liable. Instead, the State delegates this basic policy matter to individual juries "for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972). As in *Giaccio*, this grant of unchanneled, standardless discretion "does not even begin to meet th[e] constitutional requirement." *Giaccio*, 382 U. S., at 403.

The vagueness question is not even close. This is not a case where a State has ostensibly provided a standard to guide the jury's discretion. Alabama, making no pretensions whatsoever, gives civil juries complete, unfettered, and unchanneled discretion to determine whether or not to impose punitive damages. Not only that, the State *tells* the jury that it has complete discretion. This is a textbook example of the void-for-vagueness doctrine. Alabama's common-law scheme is unconstitutionally vague because the State entrusts the jury with "such broad and unlimited power . . . that the jurors must make determinations of the crucial issue upon their notions of what the law should be instead of what it is." *Ibid.*

If anything, this is an easier case than *Giaccio*. There, the Court struck down on vagueness grounds a Pennsylvania law, under which the monetary penalty that could be assessed by the jury against the defendant was limited to the costs of prosecution—in that case, $230.95. *Id.*, at 400. Our scrutiny under the vagueness doctrine intensifies, however, in proportion to the severity of the penalty imposed, see *Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 498–499 (1982), and Alabama's punitive damages scheme places no substantive limits on the amount of a jury's award. Pacific Mutual was found liable for punitive damages of $840,000. *Ante*, at 7, n. 2. Even this substantial sum pales by comparison to others handed down by juries

in the State. See App. to Brief for Alabama Defense Lawyers Association as *Amicus Curiae* 1a–19a (listing Alabama jury verdicts including punitive damages awards as high as $10 million, $25 million, and $50 million).

It is no defense to vagueness that this case concerns a jury instruction rather than a statute. The constitutional prohibition against vagueness does not disappear simply because the state law at issue originated in the courts rather than the legislature. "[I]f anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits." *Browning-Ferris*, 492 U. S., at 281 (Brennan, J., concurring). See *ante*, at 20–22. Moreover, the instruction in this case was not an aberration. It tracked virtually word for word Alabama's Pattern Jury Instruction on punitive damages. See Alabama Pattern Jury Instructions, Civil 11.03 (1974).

Nor does it matter that punitive damages are imposed by civil juries rather than criminal courts. The vagueness doctrine is not limited to criminal penalties. See *Hoffman Estates*, *supra*; *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283 (1982). The Court in *Giaccio* expressly repudiated this distinction:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague." 382 U. S., at 402.

Here, as in *Giaccio*, the civil/criminal distinction is blurry. Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment. They operate as "private fines levied by civil juries" to advance governmental objectives. *Gertz* v. *Robert Welch, Inc.*,

418 U. S. 323, 350 (1974). Because Alabama permits juries to inflict these potentially devastating penalties wholly at random, the State scheme is void for vagueness.

B

If an Alabama jury determines that punitive damages are appropriate in a particular case, it must then fix the amount. Here, the trial court instructed the jury: "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by the evidence and [the] necessity of preventing similar wrong." App. 106.

The Court concludes that this instruction sufficiently limited the jury's discretion, *ante*, at 19–20, but I cannot share this conclusion. Although the instruction ostensibly provided some guidance, this appearance is deceiving. As Justice Brennan said of a similar instruction: "Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of [state] law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Browning-Ferris*, *supra*, at 281 (concurring opinion). I agree wholeheartedly. Vague references to "the character and the degree of the wrong" and the "necessity of preventing similar wrong" do not assist a jury in making a reasoned decision; they are too amorphous. They restate the overarching principles of punitive damages awards—to punish and deter—without adding meaning to these terms. For example, the trial court did not suggest what relation, if any, should exist between the harm caused and the size of the award, nor how to measure the deterrent effect of a particular award. It provided no information to the jury about criminal fines for comparable conduct or the range of punitive damages awards in similar cases. Nor did it identify the

limitations dictated by retributive and deterrent principles, or advise the jury to refrain from awarding more than necessary to meet these objectives. In short, the trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort.

Giaccio is instructive in this inquiry. There, the State argued that even if the cost-assessment statute was impermissibly vague as written, subsequent state court decisions had adopted meaningful standards for implementing it. The jury in *Giaccio* was thus instructed that it could assess costs against the defendant if it found that he was guilty of misconduct that, while not a criminal offense, warranted a penalty. See *Giaccio*, 382 U. S., at 404. This Court did not accept that this nebulous instruction cured the statute's vagueness. "It may possibly be that the trial court's charge comes nearer to giving a guide to the jury than those that preceded it, but it still falls short of the kind of legal standard due process requires." *Ibid.*

The trial court's instruction in this case fares no better. In fact, the minimal guidance it offered may well have pushed the jury further away from reasoned decisionmaking. Paraphrased slightly, the court's terse instruction told the jury: "Think about how much you hate what the defendants did and teach them a lesson." This is not the sort of instruction likely to produce a fair, dispassionate verdict. Like most common-law punitive damages instructions, this one has "an open-ended, anything-goes quality that can too easily stoke . . . the vindictive or sympathetic passions of juries." P. Huber, Liability: The Legal Revolution and Its Consequences 118 (1988) (hereinafter Huber). Our cases attest to the wildly unpredictable results and glaring unfairness that characterize common-law punitive damages procedures. See *infra*, at 54–55.

One need not look far to see that these so-called standards provide no guidance to Alabama juries. Consider, for example, a recent Alabama case involving a collision between a train and a tractor-trailer truck, which resulted in the death of the driver of the truck. Notwithstanding that the truck pulled onto the tracks right in front of the train, thereby ignoring a stop sign, three warning signs, and five speed bumps, the administratrix of decedent's estate asked for $3 million in punitive damages. The jury, after receiving instructions no more vague than those at issue here, awarded her $15 million. *Whitt* v. *Burlington Northern R. Co.*, No. CV–85–311 (Cir. Ct. Ala., Aug. 23, 1988), aff'd conditionally, 575 So. 2d 1011 (1990) (remitting award to $5 million), stay granted, No. A–408 (90–1250) (Dec. 5, 1990) (KENNEDY, J., Circuit Justice).

That Alabama's "standards" in fact provide no guidance whatsoever was illustrated quite dramatically by Alabama Supreme Court Justice Houston in his concurring opinion in *Charter Hospital of Mobile, Inc.* v. *Weinberg*, 558 So. 2d 909, 916 (1990). He pointed to two cases involving substantially the same misconduct and jury instructions, but having very different results: *Washington Nat. Ins. Co.* v. *Strickland*, 491 So. 2d 872 (Ala. 1985), and *Land & Associates, Inc.* v. *Simmons*, 562 So. 2d 140 (Ala. 1989). In both cases, an insurance agent misrepresented to a prospective insured that coverage would begin as soon as the insured paid the first premium when, in reality, the agent should have known that coverage was conditioned upon a medical examination that the insured was unlikely to pass. See *Strickland*, *supra*, at 873, 877; *Simmons*, *supra*, at 142. In one case, the jury handed down a punitive damages award of approximately $21,000—15½ times the compensatory damages. See *Strickland*, *supra*, at 874. In the other case, the jury penalized substantially the same conduct with a punitive damages award of $2,490,000—249 times the compensatory award. See *Simmons*, *supra*, at 151 (Houston, J., concurring spe-

cially). These vastly disparate results demonstrate that, under Alabama's common-law scheme, any case-to-case consistency among verdicts is purely fortuitous.

This is not a case where more precise standards are either impossible or impractical. See *Kolender*, 461 U. S., at 361. Just the opposite. The Alabama Supreme Court has already formulated a list of seven factors that it considers relevant to the size of a punitive damages award:

> "'(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> "'(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
>
> "'(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.
>
> "'(4) The financial position of the defendant would be relevant.
>
> "'(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> "'(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> "'(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive dam-

ages award.'" *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223–224 (1989), quoting *Aetna Life Ins. Co.* v. *Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially).

In my view, these standards—the "*Green Oil* factors"—could assist juries to make fair, rational decisions. Unfortunately, Alabama courts do not give the *Green Oil* factors to the jury. See 539 So. 2d, at 224 (Maddox, J., concurring specially). Instead, the jury has standardless discretion to impose punitive damages whenever and in whatever amount it wants. The *Green Oil* factors play a role only *after* the jury has rendered its verdict. The trial court and other reviewing courts may—but are not required to—take these factors into consideration in determining whether a punitive damages award is excessive. *Id.*, at 223.

Obviously, this *post hoc* application of the *Green Oil* factors does not cure the vagueness of the jury instructions. Cf. *Baggett* v. *Bullitt*, 377 U. S. 360, 373 (1964) ("[J]udicial safeguards do not neutralize the vice of a vague law"). See also *Roberts* v. *United States Jaycees*, 468 U. S. 609, 629 (1984). As respondents candidly admit, judicial review in Alabama is limited to the *amount* of the award. The void-for-vagueness doctrine, on the other hand, is concerned with the *procedures* by which the amount is determined. After-the-fact review of the amount in no way diminishes the fact that the State entrusts its juries with standardless discretion. It thus does not matter that the amount settled upon by the jury might have been permissible under a rational system. Even a wholly irrational process may, on occasion, stumble upon a fair result. What is crucial is that the existing system is not rational. "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U. S., at 344. The state court justice who devised the *Green Oil* factors, Justice Houston, has recognized this. Addressing a vagueness chal-

lenge to the State's punitive damages procedures, he wrote: "We have attempted to deal with the issue of the reliability of punitive damages assessments by post-trial review only. *That attempt does not really address the issue.*" *Charter Hospital*, 558 So. 2d, at 915 (opinion concurring specially) (emphasis added; citations omitted).

II

For the reasons stated above, I would hold that Alabama's common-law punitive damages scheme is void for vagueness. But the Court need not agree with me on this point in order to conclude that Pacific Mutual was denied procedural due process. Whether or not the Court agrees that the jury instructions were so vague as to be unconstitutional, there can be no doubt but that they offered substantially less guidance than is possible. Applying the test of procedural due process set out in *Mathews* v. *Eldridge*, *supra*, more guidance was required. Modest safeguards would make the process significantly more rational without impairing any legitimate governmental interest.

A

In *Mathews* v. *Eldridge*, *supra*, at 334, we recognized that "'"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).'" "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Accordingly, *Mathews* described a sliding-scale test for determining whether a particular set of procedures was constitutionally adequate. We look at three factors: (1) the private interest at stake; (2) the risk that existing procedures will wrongly impair this private interest, and the likelihood that additional procedural safeguards can effect a cure; and (3) the governmental interest in avoiding these additional procedures. *Mathews*, *supra*, at 335.

Applying the *Mathews* test to Alabama's common-law punitive damages scheme, it is clear that the state procedures deprive defendants of property without due process of law. The private property interest at stake is enormous. Without imposing any legislative or common-law limits, Alabama authorizes juries to levy civil fines ranging from zero to tens of millions of dollars. Indeed, a jury would not exceed its discretion under state law by imposing an award of punitive damages that was deliberately calculated to bankrupt the defendant. Unlike compensatory damages, which are tied to an actual injury, there is no objective standard that limits the amount of punitive damages. Consequently, "'the impact of these windfall recoveries is unpredictable and potentially substantial.'" *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71, 87 (1988) (O'CONNOR, J., concurring in part and concurring in judgment), quoting *Electrical Workers* v. *Foust*, 442 U. S. 42, 50 (1979).

Compounding the problem, punitive damages are quasi-criminal punishment. Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant's misconduct was especially reprehensible. Hence, there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.

The second *Mathews* prong focuses on the fairness and reliability of existing procedures. This is a question we have spoken to before. Over the last 20 years, the Court has repeatedly criticized common-law punitive damages procedures on the ground that they invite discriminatory and otherwise illegitimate awards. *E. g.*, *Gertz*, 418 U. S., at 350 (common-law procedures leave juries "free to use their discretion selectively to punish expressions of unpopular

views"); *Electrical Workers*, *supra*, at 50–51, and n. 14 ("[P]unitive damages may be employed to punish unpopular defendants"); *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 84 (1971) (MARSHALL, J., dissenting) ("This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others"); *Smith* v. *Wade*, 461 U. S. 30, 59 (1983) (REHNQUIST, J., dissenting) ("[P]unitive damages are frequently based upon the caprice and prejudice of jurors"). For this reason, the Court has forbidden the award of punitive damages in certain defamation suits brought by private plaintiffs, *Gertz*, *supra*, at 349–350, and in unfair representation suits brought against labor unions under the Railway Labor Act, *Electrical Workers*, *supra*, at 52.

Although our cases have not squarely addressed the due process question before us today, see *Browning-Ferris*, 492 U. S., at 276–277, we have strongly hinted at the answer. See *ante*, at 9–12. Justice Brennan and JUSTICE MARSHALL joined the Court's opinion in *Browning-Ferris*, but wrote separately to express their "understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 492 U. S., at 280 (Brennan, J., concurring). In a separate opinion that JUSTICE STEVENS joined, I voiced strong concerns "regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages." *Id.*, at 283 (opinion concurring in part and dissenting in part). This echoed my earlier statement, with which JUSTICE SCALIA joined, in *Bankers Life*, *supra*, at 88: "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process" (opinion concurring in part and concurring in judgment).

As explained above, see *supra*, at 52–53, Alabama's grant of standardless discretion to juries is not remedied by *post hoc* judicial review. At best, this mechanism tests whether the award is grossly excessive. This is an important sub-

stantive due process concern, but our focus here is on the requirements of procedural due process. Cf. *Santosky* v. *Kramer*, 455 U. S. 745, 757 (1982) ("Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard").

Even if judicial review of award amounts could potentially minimize the evils of standardless discretion, Alabama's review procedure is not up to the task. For one thing, Alabama courts cannot review whether a jury properly applied permissible factors, because juries are not told which factors are permissible and which are not. See Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 290 (1983) (hereinafter Wheeler). Making effective review even more unlikely, the primary component of Alabama's review mechanism is deference. The State Supreme Court insists that a jury's award of punitive damages carries a "presumption of correctness" that a defendant must overcome before remittitur is appropriate. *Green Oil*, 539 So. 2d, at 222, 224. Reviewing courts are thus required to uphold the jury's exercise of unbridled, unchanneled, standardless discretion unless the amount happened upon by the jury cannot be reconciled with even the most generous application of the *Green Oil* factors.

That is precisely what happened here. When Pacific Mutual challenged the State's procedures governing awards of punitive damages, the trial court simply deferred to the jury. The judge noted that he "would in all likelihood have rendered a lesser amount," App. to Pet. for Cert. A–15, but that the verdict was not excessive or unfair because "[t]he jury was composed of male and female, white and black and . . . acted conscientiously throughout the trial." *Ibid.* Relying on the trial judge's refusal to disturb the verdict, the State Supreme Court afforded it a double dose of deference, stating that "jury verdicts are presumed correct, and that presump-

tion is strengthened when the presiding judge refuses to grant a new trial." 553 So. 2d 537, 543 (1989).

This strong deference is troubling given that the Alabama Supreme Court has explicitly acknowledged that its current procedures provide for "'unguided discretion,'" *Green Oil*, 539 So. 2d, at 222, and in no way dictate a rational jury verdict: "'The current system furnishe[s] virtually no yardstick for measuring the amount of the award over against the purpose of the award.'" *Ibid.*, quoting *Ridout's-Brown Service, Inc.* v. *Holloway*, 397 So. 2d 125, 127–128 (Ala. 1981) (Jones, J., concurring specially). "[I]t is possible for a jury to hear the evidence in the case, make findings of fact, correctly apply the law, and still, albeit unwittingly, assess damages that bear no reasonable relationship to the accomplishment of [punishment and deterrence] goals." 539 So. 2d, at 222. Thus, the State Supreme Court recognizes that its common-law procedures produce irrational results, yet insists on deferring to these results. Blind adherence to the product of recognized procedural infirmity is not judicial review as I understand it. It is an empty exercise in rationalization that creates only the appearance of evenhanded justice.

Crucial to *Mathews'* second prong, the procedural infirmities here are easily remedied. The Alabama Supreme Court has already given its approval to the *Green Oil* factors. By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion. This would substantially enhance the fairness and rationality of the State's punitive damages system. Other procedural safeguards might prove equally effective. For example, state legislatures could establish fixed monetary limits for awards of punitive damages for particular kinds of conduct. So long as the legislatively determined ranges are sufficiently narrow, they could function as meaningful constraints on jury discretion while at the same time permitting juries to render individualized verdicts.

Another possibility advocated by several commentators, see *ante*, at 23, n. 11; Wheeler 300–301, is that States could bifurcate trials into liability and punitive damages stages. At the punitive damages stage, clear and convincing evidence that the defendant acted with the requisite culpability would be required. This would serve two goals. On a practical level, the clear-and-convincing-evidence requirement would constrain the jury's discretion, limiting punitive damages to the more egregious cases. This would also permit closer scrutiny of the evidence by trial judges and reviewing courts. See Ellis, Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 995–996 (1989). On a symbolic level, the higher evidentiary standard would signal to the jury that it should have a high level of confidence in its factual findings before imposing punitive damages. *Id.*, at 995; Wheeler 297–298. Any of these rudimentary modifications would afford more meaningful guidance to juries, thereby lessening the chance of arbitrary and discriminatory awards, without impairing the State's legitimate interests in punishment and deterrence. Given the existence of several equally acceptable methods, concerns of federalism and judicial restraint counsel that this Court should not legislate to the States which particular method to adopt. I would thus leave it to individual States to decide what method is most consistent with their objectives.

The final *Mathews* factor asks whether the State has a legitimate interest in preserving standardless jury discretion that is so compelling as to render even modest procedural reforms unduly burdensome. The Court effectively answered this question in *Gertz*, 418 U. S., at 349, announcing that "the States have *no substantial interest* in securing for plaintiffs . . . gratuitous awards of money damages far in excess of actual injury." (Emphasis added.)

Respondents do not give up easily. They point out that the State has a substantial interest in deterring wrongful conduct and draw from this a peculiar argument. They con-

tend that, by making jury awards more predictable, procedural safeguards will tend to diminish the deterrent effect of punitive damages. If award amounts are predictable, they argue, corporations will not avoid wrongdoing; instead, they will merely calculate the probability of a punitive damages award and factor it in as a cost of doing business. Accordingly, to best advance the State's interest in deterrence, juries must be given unbridled discretion to render awards that are wildly unpredictable.

This argument goes too far. While the State has a legitimate interest in avoiding rigid strictures so that a jury may tailor its award to specific facts, the Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim. The procedural reforms suggested here in no way intrude on the jury's ability to exercise reasoned discretion, nor do they preclude flexible decisionmaking. Due process requires only that a jury be given a measurable degree of guidance, not that it be straitjacketed into performing a particular calculus.

Similarly, the suggested procedural safeguards do not impair the State's punishment objectives. Admittedly, the State has a strong interest in punishing wrongdoers, but it has no legitimate interest in maintaining in pristine form a common-law system that imposes disproportionate punishment and that subjects defendants guilty of similar misconduct to wholly different punishments. Due process requires, at some level, that punishment be commensurate with the wrongful conduct. See *Solem* v. *Helm*, 463 U. S. 277, 284–290 (1983); *id.*, at 311, n. 3 (Burger, C. J., dissenting). The State can therefore have no valid objection to procedural measures that merely ensure that punitive damages awards

are based on some factual or legal predicate, rather than the personal predilections and whims of individual jurors.

B

In his concurrence, JUSTICE SCALIA offers a very different notion of what due process requires. He argues that a practice with a long historical pedigree is immune to reexamination. *Ante*, at 38. The Court properly rejects this argument. *Ante*, at 18. A static notion of due process is flatly inconsistent with *Mathews*, 424 U. S., at 334–335, in which this Court announced that the requirements of the Due Process Clause are "'flexible'" and may vary with "'time, place and circumstances.'" We have repeatedly relied on the *Mathews* analysis, and our recent cases leave no doubt as to its continued vitality. See, *e. g.*, *Washington* v. *Harper*, 494 U. S. 210, 229 (1990); *Brock* v. *Roadway Express, Inc.*, 481 U. S. 252, 261–262 (1987); *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320–321 (1985); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 542–543 (1985); *Ake* v. *Oklahoma*, 470 U. S. 68, 77 (1985); *Schall* v. *Martin*, 467 U. S. 253, 274 (1984).

Due process is not a fixed notion. Procedural rules, "even ancient ones, must satisfy contemporary notions of due process." *Burnham* v. *Superior Court of Cal., County of Marin*, 495 U. S. 604, 630 (1990) (Brennan, J., concurring in judgment). Although history creates a strong presumption of continued validity, "the Court has the authority under the [Fourteenth] Amendment to examine even traditionally accepted procedures and declare them invalid." *Id.*, at 628 (WHITE, J., concurring in part and concurring in judgment), citing *Shaffer* v. *Heitner*, 433 U. S. 186 (1977).

The Court's decision in *Williams* v. *Illinois*, 399 U. S. 235 (1970), is also instructive. In *Williams*, the Court invalidated on equal protection grounds the time-honored practice of extending prison terms beyond the statutory maximum

when a defendant was unable to pay a fine or court costs. The Court's language bears repeating:

> "[N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack . . . .
>
> "The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country." *Id.*, at 239–240.

Punitive damages are similarly ripe for reevaluation. In the past, such awards "merited scant attention" because they were "rarely assessed and likely to be small in amount." Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 2 (1982). When awarded, they were reserved for the most reprehensible, outrageous, or insulting acts. See F. Pollock, Law of Torts (1887); Huber 119. Even then, they came at a time when compensatory damages were not available for pain, humiliation, and other forms of intangible injury. Punitive damages filled this gap. See K. Redden, Punitive Damages § 2.3(A) (1980); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 519–520 (1957).

Recent years, however, have witnessed an explosion in the frequency and size of punitive damages awards. See RAND Institute for Civil Justice, M. Peterson, S. Sarma, & M. Shanley, Punitive Damages—Empirical Findings iii (1987) (hereinafter RAND). A recent study by the RAND Corporation found that punitive damages were assessed against 1 of every 10 defendants who were found liable for compensatory damages in California. *Id.*, at viii. The amounts can be staggering. Within nine months of our decision in *Browning-Ferris*, there were no fewer than six punitive damages awards of more than $20 million. Crovitz, Absurd Punitive Damages Also "Mock" Due Process, Wall St.

Journal, Mar. 14, 1990, p. A19, col. 3. Medians as well as averages are skyrocketing, meaning that even routine awards are growing in size. RAND vi, ix, 65. The amounts "seem to be limited only by the ability of lawyers to string zeros together in drafting a complaint." *Oki America, Inc.* v. *Microtech Int'l, Inc.*, 872 F. 2d 312, 315 (CA9 1989) (Kozinski, J., concurring).

Much of this is attributable to changes in the law. For 200 years, recovery for breach of contract has been limited to compensatory damages. In recent years, however, a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith. See, *e. g.*, *Seaman's Direct Buying Serv., Inc.* v. *Standard Oil Co.*, 36 Cal. 3d 752, 686 P. 2d 1158 (1984). Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards. See RAND iv. Other significant legal developments include the advent of product liability and mass tort litigation. "As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. . . . Since then, awards more than 30 times as high have been sustained on appeal." *Browning-Ferris*, 492 U. S., at 282 (O'CONNOR, J., concurring in part and dissenting in part). "Today, hardly a month goes by without a multimillion-dollar punitive damages verdict in a product liability case." Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919 (1989).

As in *Williams*, the time has come to reassess the constitutionality of a time-honored practice. The explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system. That we did not discover these defects earlier is regrettable, but it does not mean that we can pretend that they do not exist now. "[N]ew cases expose old infirmities which

apathy or absence of challenge has permitted to stand. But the constitutional imperatives . . . must have priority over the comfortable convenience of the status quo." *Williams*, 399 U. S., at 245. Circumstances today are different than they were 200 years ago, and nothing in the Fourteenth Amendment requires us to blind ourselves to this fact. See Wheeler 277. Just the opposite is true. The Due Process Clause demands that we possess some degree of confidence that the procedures employed to deprive persons of life, liberty, and property are capable of producing fair and reasonable results. When we lose that confidence, a change must be made.

III

"'The touchstone of due process is protection of the individual against arbitrary action of government.'" *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986), quoting *Dent* v. *West Virginia*, 129 U. S. 114, 123 (1889). Alabama's common-law scheme for awarding punitive damages provides a jury with "such skeletal guidance," *Browning-Ferris*, *supra*, at 281 (Brennan, J., concurring), that it invites—even requires—arbitrary results. It gives free reign to the biases and prejudices of individual jurors, allowing them to target unpopular defendants and punish selectively. In short, it is the antithesis of due process. It does not matter that the system has been around for a long time, or that the result in this particular case may not seem glaringly unfair. The common-law scheme yields unfair and inconsistent results "in so many instances that it should be held violative of due process in every case." *Burnham*, 495 U. S., at 628 (WHITE, J., concurring in part and concurring in judgment).

I would require Alabama to adopt some method, either through its legislature or its courts, to constrain the discretion of juries in deciding whether or not to impose punitive damages and in fixing the amount of such awards. As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which

they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.

This conclusion is neither groundbreaking nor remarkable. It reflects merely a straightforward application of our Due Process Clause jurisprudence. Given our statements in recent cases such as *Browning-Ferris*, *supra*, and *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U. S. 71 (1988), the parties had every reason to expect that this would be the Court's holding. Why, then, is it consigned to a dissent rather than a majority opinion? It may be that the Court is reluctant to afford procedural due process to Pacific Mutual because it perceives that such a ruling would force us to evaluate the constitutionality of every State's punitive damages scheme. I am confident, though, that if we announce what the Constitution requires and allow the States sufficient flexibility to respond, the constitutional problems will be resolved in time without any undue burden on the federal courts. Indeed, it may have been our hesitation that has inspired a flood of petitions for certiorari. For more than 20 years, this Court has criticized common-law punitive damages procedures, see *supra*, at 54–55, but has shied away from its duty to step in, hoping that the problems would go away. It is now clear that the problems are getting worse, and that the time has come to address them squarely. The Court does address them today. In my view, however, it offers an incorrect answer.

Syllabus

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL *v.* O'NEILL ET AL.

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

No. 89–1493. Argued January 14, 1991—Decided March 19, 1991

After Continental Airlines, Inc., filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, it repudiated its collective-bargaining agreement with petitioner Air Line Pilots Association, International (ALPA). An acrimonious strike ensued, during which Continental hired replacement pilots and reemployed several hundred crossover strikers. Two years into the strike, Continental announced in its "Supplementary Base Vacancy Bid 1985–5" (85–5 bid) that it would fill a large number of anticipated vacancies using a system that allows pilots to bid for positions and that, in the past, had assigned positions by seniority. Although ALPA authorized strikers to submit bids, Continental announced that all of the positions had been awarded to working pilots. ALPA and Continental then agreed to end the strike, dispose of some related litigation, and reallocate the positions covered by the 85–5 bid. Striking pilots were offered the option of settling all outstanding claims with Continental and participating in the 85–5 bid positions' allocations, electing not to return to work and receiving severance pay, or retaining their individual claims against Continental and becoming eligible to return to work only after all the settling pilots had been reinstated. Thus, striking pilots received some of the positions previously awarded to the working pilots. After the settlement, respondents, former striking pilots, filed suit in the District Court against ALPA, charging, *inter alia*, that the union had breached its duty of fair representation. The court granted ALPA's motion for summary judgment, but the Court of Appeals reversed. It rejected ALPA's argument that a union cannot breach the fair representation duty without intentional misconduct, applying, instead, the rule announced in *Vaca* v. *Sipes*, 386 U. S. 171, that a union violates the duty if its actions are "arbitrary, discriminatory, or in bad faith," *id.*, at 190. With respect to the test's first component, the court found that a nonarbitrary decision must be (1) based upon relevant permissible union factors, (2) a rational result of the consideration of those factors, and (3) inclusive of a fair and impartial consideration of all employees' interests. Applying that test, the court concluded that a jury could find that ALPA acted arbitrarily by negotiating a settlement less favorable than the consequences of a complete sur-

render to Continental, which the court believed would have left intact the striking pilots' seniority rights with regard to the 85–5 bid positions. It also found the existence of a material issue of fact whether the favored treatment of working pilots in the allocation of the 85–5 bid positions constituted discrimination against the strikers.

Held:

1. The tripartite standard announced in *Vaca* v. *Sipes*, *supra*, applies to a union in its negotiating capacity. See, *e. g.*, *Communications Workers* v. *Beck*, 487 U. S. 735, 743. Thus, when acting in that capacity, the union is not, as ALPA contends, required only to act in good faith and treat its members equally and in a nondiscriminatory fashion. Rather, it also has a duty to act in a rational, nonarbitrary fashion to provide its members fair and adequate representation. See, *e. g.*, *Vaca* v. *Sipes*, *supra*, at 177; *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202. Pp. 73–77.

2. The final product of the bargaining process may constitute evidence of a breach of the fair representation duty only if, in light of the factual and legal landscape, it can be fairly characterized as so far outside of a "wide range of reasonableness," *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338, that it is wholly "irrational" or "arbitrary." The Court of Appeals' refinement of the arbitrariness component authorizes more judicial review of the substance of negotiated agreements than is consistent with national labor policy. Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. See, *e. g.*, *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. See *Steele*, *supra*, at 198. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. Cf., *e. g.*, *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423. P. 78.

3. The resolution of the dispute as to the 85–5 bid positions was well within the "wide range of reasonableness" that a union is allowed in its bargaining. Assuming that the union made a bad settlement, it was by no means irrational when viewed in light of the legal landscape at the time of the settlement. Given Continental's resistance during the strike, it would have been rational for ALPA to recognize that a voluntary return to work might have precipitated litigation over the strikers' right to the positions, and that Continental might not have abandoned its bargaining position without a settlement disposing of the pilots' individual claims. Thus, it would have been rational to negotiate a settlement

that produced certain and prompt access to a share of the new jobs, avoided the costs and risks associated with major litigation, and was more favorable than a return to work for the significant number of pilots who chose severance. Any discrimination between striking and working pilots in the allocation of the 85–5 bid positions does not represent a breach of the duty, because, if it is correct that ALPA's decision to accept a compromise was rational, some form of allocation was inevitable. Cf. *Trans World Airlines, Inc.* v. *Flight Attendants*, 489 U. S. 426; *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, distinguished. Pp. 78–81.

886 F. 2d 1438, reversed.

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

Laurence Gold argued the cause for petitioner. With him on the briefs were *Harold G. Levison, Jed S. Rakoff, David Silberman, Gary Green*, and *John A. Irvine.*

Marty Harper argued the cause for respondents. With him on the brief were *John P. Frank, Allen R. Clarke*, and *Janet Napolitano.**

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to clarify the standard that governs a claim that a union has breached its duty of fair representation in its negotiation of a back-to-work agreement terminating a strike. We hold that the rule announced in *Vaca* v. *Sipes*, 386 U. S. 171, 190 (1967)—that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith"—applies to all union activity, including contract negotiation. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness," *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953), as to be irrational.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Shapiro*, and *James A. Feldman;* and for Continental Airlines, Inc., by *John J. Gallagher* and *Charles L. Warren.*

I

This case arose out of a bitter confrontation between Continental Airlines, Inc. (Continental), and the union representing its pilots, the Air Line Pilots Association, International (ALPA). On September 24, 1983, Continental filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Immediately thereafter, with the approval of the Bankruptcy Court, Continental repudiated its collective-bargaining agreement with ALPA and unilaterally reduced its pilots' salaries and benefits by more than half. ALPA responded by calling a strike that lasted for over two years. See 886 F. 2d 1438, 1440 (CA5 1989).

Of the approximately 2,000 pilots employed by Continental, all but about 200 supported the strike. By the time the strike ended, about 400 strikers had "crossed over" and been accepted for reemployment in order of reapplication. App. to Brief for Continental Airlines, Inc., as *Amicus Curiae* A11, and n. 8. By trimming its operations and hiring about 1,000 replacements, Continental was able to continue in business. By August 1985, there were 1,600 working pilots and only 1,000 strikers. 886 F. 2d, at 1440.

The strike was acrimonious, punctuated by incidents of violence and the filing of a variety of lawsuits, charges, and countercharges. In August 1985, Continental notified ALPA that it was withdrawing recognition of ALPA as the collective-bargaining agent for its pilots. ALPA responded with a federal lawsuit alleging that Continental was unlawfully refusing to continue negotiations for a new collective-bargaining agreement. In this adversary context, on September 9, 1985, Continental posted its "Supplementary Base Vacancy Bid 1985–5" (85–5 bid)—an act that precipitated not only an end to the strike, but also the litigation that is now before us. *Ibid.*

For many years Continental had used a "system bid" procedure for assigning pilots to new positions. Bids were typi-

cally posted well in advance in order to allow time for necessary training without interfering with current service. When a group of vacancies was posted, any pilot could submit a bid specifying his or her preferred position (captain, first officer, or second officer), base of operations, and aircraft type. *Ibid.* In the past, vacant positions had been awarded on the basis of seniority, determined by the date the pilot first flew for Continental. The 85–5 bid covered an unusually large number of anticipated vacancies—441 future captain and first officer positions and an undetermined number of second officer vacancies. Pilots were given nine days—until September 18, 1985—to submit their bids. *Id.*, at 1441.

Fearing that this bid might effectively lock the striking pilots out of jobs for the indefinite future, ALPA authorized the strikers to submit bids. Several hundred did so, as did several hundred working pilots. Although Continental initially accepted bids from both groups, it soon became concerned about the bona fides of the striking pilots' offers to return to work at a future date. It therefore challenged the strikers' bids in court and announced that all of the 85–5 bid positions had been awarded to working pilots. *Ibid.*

At this juncture, ALPA intensified its negotiations for a complete settlement. ALPA's negotiating committee and Continental reached an agreement, which was entered as an order by the Bankruptcy Court on October 31, 1985. See App. 7–41. The agreement provided for an end to the strike, the disposition of all pending litigation, and reallocation of the positions covered by the 85–5 bid. See *id.*, at 10–34.

The agreement offered the striking pilots three options. Under the first, pilots who settled all outstanding claims with Continental were eligible to participate in the allocation of the 85–5 bid positions. Under the second option, pilots who elected not to return to work received severance pay of $4,000 per year of service (or $2,000 if they had been fur-

loughed before the strike began).[1] Under the third option, striking pilots retained their individual claims against Continental and were eligible to return to work only after all the first option pilots had been reinstated. See 886 F. 2d., at 1441–1442.

Pilots who chose the first option were thus entitled to some of the 85–5 bid positions that, according to Continental, had previously been awarded to working pilots. The first 100 captain positions were allocated to working pilots and the next 70 captain positions were awarded, in order of seniority, to returning strikers who chose option one. App. 13. Thereafter, striking and nonstriking pilots were eligible for captain positions on a 1-to-1 ratio. *Id.*, at 13–14. The initial base and aircraft type for a returning striker was assigned by Continental, but the assignments for working pilots were determined by their bids. 886 F. 2d, at 1441. After the initial assignment, future changes in bases and equipment were determined by seniority, and striking pilots who were in active service when the strike began received seniority credit for the period of the strike. See App. 22.

II

Several months after the settlement, respondents, as representatives of a class of former striking pilots, brought this action against ALPA. See App. 1. In addition to raising other charges not before us, respondents alleged that the union had breached its duty of fair representation in negotiating and accepting the settlement.[2] After extensive discov-

[1] In its *amicus curiae* brief, Continental states that the 366 pilots who elected option two received $17.3 million, an average of over $47,000 per pilot. See Brief for Continental Airlines, Inc., as *Amicus Curiae* 9.

[2] The complaint included four counts: breach of the duty of fair representation, violation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U. S. C. § 411 *et seq.*, breach of fiduciary duty in violation of the LMRDA, and breach of contract. See App. 47–56. The District Court granted summary judgment for petitioner on all counts, *id.*, at 72–77, but respondents appealed only on the first two counts, see 886 F. 2d

ery, ALPA filed a motion for summary judgment. See *id.*, at 3. Opposing that motion, respondents identified four alleged breaches of duty, including the claim that "ALPA negotiated an agreement that arbitrarily discriminated against striking pilots."[3]

The District Court granted the motion, relying alternatively on the fact that the Bankruptcy Court had approved the settlement and on its own finding that, even if the October 31 settlement was merely a private agreement, ALPA did not breach its duty of fair representation. In his oral explanation of his ruling, the District Judge opined that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." App. 75.

The Court of Appeals reversed. 886 F. 2d 1438 (CA5 1989). It first rejected ALPA's argument that a union cannot breach its duty of fair representation without intentional misconduct. The court held that the duty includes "'three distinct'" components. *Id.*, at 1444 (quoting *Tedford* v. *Peabody Coal Co.*, 533 F. 2d 952, 957, n. 6 (CA5 1976)). A union breaches the duty if its conduct is "'arbitrary, discriminatory, or in bad faith.'" 886 F. 2d, at 1444 (quoting *Vaca* v. *Sipes*, 386 U. S., at 190). With respect to the arbitrariness

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1438, 1442 (CA5 1989). The Court of Appeals affirmed the summary judgment on the LMRDA count, *id.*, at 1448, and respondents did not seek our review of this decision. Therefore, only the fair representation claim is before us.

[3] The Court of Appeals described respondents' claims as follows:

"The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self-interest and political motivations." *Id.*, at 1442.

component, the Court of Appeals followed Fifth Circuit precedent, stating:

> "'We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors;* and (3) inclusive of a fair and impartial consideration of the interests of all employees.'" 886 F. 2d, at 1444 (quoting *Tedford*, 533 F. 2d, at 957) (footnotes omitted and emphasis added by the Court of Appeals).

Applying this arbitrariness test to the facts of this case, the Court of Appeals concluded that a jury could find that ALPA acted arbitrarily because the jury could find that the settlement "left the striking pilots worse off in a number of respects than complete surrender to [Continental]." 886 F. 2d, at 1445. That conclusion rested on the court's opinion that the evidence suggested that, if ALPA had simply surrendered and made an unconditional offer to return to work, the strikers would have been entitled to complete priority on all the positions covered by the 85–5 bid.[4] Relying on a District Court decision in litigation between ALPA and another airline,[5] the court rejected ALPA's argument that the 85–5 bid positions were arguably not vacancies because they had already been assigned to working pilots. *Id.*, at 1446. In addition, the Court of Appeals ruled that the evidence raised

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[4] "Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, [Continental] likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to [Continental]'s seniority-based assignment procedures." *Id.*, at 1446.

[5] *Air Line Pilots Assn. Int'l* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 (ND Ill. 1985), aff'd in relevant part, *Air Line Pilots Assn., Int'l* v. *United Air Lines, Inc.*, 802 F. 2d 886 (CA7 1986), cert. denied, 480 U. S. 946 (1987).

a genuine issue of material fact whether the favored treatment of working pilots in the allocation of 85–5 bid positions constituted discrimination against those pilots who had chosen to strike. *Id.*, at 1446–1447.

The court held that respondents had raised a jury question whether ALPA had violated its duty to refrain from "arbitrary" conduct, and the court therefore remanded the case for trial. *Id.*, at 1448–1449. Because it reversed the District Court's grant of summary judgment on the arbitrariness component, the Court of Appeals did not decide whether summary judgment on the fair representation claim might be precluded by the existence of other issues of fact.[6]

We granted certiorari to review the Court of Appeals' statement of the standard governing an alleged breach of a union's duty of fair representation and the court's application of the standard in this case. 498 U. S. 806 (1990).

III

ALPA's central argument is that the duty of fair representation requires only that a union act in good faith and treat its members equally and in a nondiscriminatory fashion. The duty, the union argues, does not impose any obligation to provide *adequate* representation. The District Court found that there was no evidence that ALPA acted other than in good faith and without discrimination.[7] Because of its view of the limited scope of the duty, ALPA contends that the Dis-

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[6] Respondents also argued that a jury could find that ALPA acted in bad faith. See n. 3, *supra*. Although we conclude below that the Court of Appeals erred in reversing summary judgment on the arbitrariness component, see Part IV, *infra*, we express no opinion on whether respondents have put forth a triable issue concerning whether ALPA acted in bad faith.

[7] "There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation." App. 74.

trict Court's finding, which the Court of Appeals did not question, is sufficient to support summary judgment.

The union maintains, not without some merit, that its view that courts are not authorized to review the rationality of good-faith, nondiscriminatory union decisions is consonant with federal labor policy. The Government has generally regulated only "the *process* of collective bargaining," *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 102 (1970) (emphasis added), but relied on private negotiation between the parties to establish "their own charter for the ordering of industrial relations," *Teamsters* v. *Oliver*, 358 U. S. 283, 295 (1959). As we stated in *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960), Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U. S. 212, 219 (1979).

There is, however, a critical difference between governmental modification of the terms of a private agreement and an examination of those terms in search for evidence that a union did not fairly and adequately represent its constituency. Our decisions have long recognized that the need for such an examination proceeds directly from the union's statutory role as exclusive bargaining agent. "[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202 (1944).

The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries. See *Teamsters* v. *Terry*, 494 U. S. 558, 567–568 (1990); *id.*, at 584–588 (KENNEDY, J., dissenting). Others have likened the relationship between union and employee to that between attorney and client.

See *id.*, at 582 (STEVENS, J., concurring in part and concurring in judgment). The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith. See, *e. g.*, Restatement (Second) of Trusts § 174 (1959) (trustee's duty of care); *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984) (lawyer must render "adequate legal assistance"); *Hanson Trust PLC* v. *ML SCM Acquisition Inc.*, 781 F. 2d 264, 274 (CA2 1986) (directors owe duty of care as well as loyalty).

ALPA suggests that a union need owe no enforceable duty of adequate representation because employees are protected from inadequate representation by the union political process. ALPA argues, as has the Seventh Circuit, that employees "do not need . . . protection against representation that is inept but not invidious" because if a "union does an incompetent job . . . its members can vote in new officers who will do a better job or they can vote in another union." *Dober* v. *Roadway Express, Inc.*, 707 F. 2d 292, 295 (CA7 1983). In *Steele*, the case in which we first recognized the duty of fair representation, we also analogized a union's role to that of a legislature. See 323 U. S., at 198. Even legislatures, however, are subject to *some* judicial review of the rationality of their actions. See, *e. g.*, *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938); *Department of Agriculture* v. *Moreno*, 413 U. S. 528 (1973).

ALPA relies heavily on language in *Ford Motor Co.* v. *Huffman*, 345 U. S. 330 (1953), which, according to the union, suggests that no review of the substantive terms of a settlement between labor and management is permissible. In particular, ALPA stresses our comment in the case that "[a] wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of

purpose in the exercise of its discretion." *Id.*, at 338. Unlike ALPA, we do not read this passage to limit review of a union's actions to "good faith and honesty of purpose," but rather to recognize that a union's conduct must also be within "[a] wide range of reasonableness."

Although there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty, including a prohibition against "arbitrary" conduct. Writing for the Court in the leading case in this area of the law, JUSTICE WHITE explained:

> "The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co.* v. *Huffman*, *supra*. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Humphrey* v. *Moore*, 375 U. S., at 342. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action." *Vaca* v. *Sipes*, 386 U. S., at 177.

This description of the "duty grounded in federal statutes" has been accepted without question by Congress and in a line of our decisions spanning almost a quarter of a century.[8]

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[8] See, *e. g.*, *Teamsters* v. *Terry*, 494 U. S. 558, 563 (1990); *Electrical Workers* v. *Foust*, 442 U. S. 42, 47 (1979); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 564 (1976).

The union correctly points out, however, that virtually all of those cases can be distinguished because they involved contract administration or enforcement rather than contract negotiation. ALPA argues that the policy against substantive review of contract terms applies directly only in the negotiation area. Although this is a possible basis for distinction, none of our opinions has suggested that the duty is governed by a double standard. Indeed, we have repeatedly noted that the *Vaca* v. *Sipes* standard applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Communications Workers* v. *Beck*, 487 U. S. 735, 743 (1988) (internal citation omitted); see also *Electrical Workers* v. *Foust*, 442 U. S. 42, 47 (1979); *Vaca* v. *Sipes*, 386 U. S., at 177. We have also held that the duty applies in other instances in which a union is acting in its representative role, such as when the union operates a hiring hall. See *Breininger* v. *Sheet Metal Workers*, 493 U. S. 67, 87–89 (1989).

We doubt, moreover, that a bright line could be drawn between contract administration and contract negotiation. Industrial grievances may precipitate settlement negotiations leading to contract amendments, and some strikes and strike settlement agreements may focus entirely on questions of contract interpretation. See *Conley* v. *Gibson*, 355 U. S. 41, 46 (1957); *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960). Finally, some union activities subject to the duty of fair representation fall into neither category. See *Breininger*, 493 U. S., at 87–89.

We are, therefore, satisfied that the Court of Appeals correctly concluded that the tripartite standard announced in *Vaca* v. *Sipes* applies to a union in its negotiating capacity. We are persuaded, however, that the Court of Appeals' further refinement of the arbitrariness component of the standard authorizes more judicial review of the substance of negotiated agreements than is consistent with national labor policy.

As we acknowledged above, Congress did not intend judicial review of a union's performance to permit the court to substitute its own view of the proper bargain for that reached by the union. Rather, Congress envisioned the relationship between the courts and labor unions as similar to that between the courts and the legislature. Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. Cf. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952) (court does "not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare"); *United States* v. *Carolene Products*, 304 U. S., at 154 (where "question is at least debatable," "decision was for Congress"). For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," *Ford Motor Co.* v. *Huffman*, 345 U. S., at 338, that it is wholly "irrational" or "arbitrary."

The approach of the Court of Appeals is particularly flawed because it fails to take into account either the strong policy favoring the peaceful settlement of labor disputes, see, *e. g.*, *Groves* v. *Ring Screw Works, Ferndale Fastener Div.*, 498 U. S. 168, 174 (1990), or the importance of evaluating the rationality of a union's decision in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made. As we shall explain, these factors convince us that ALPA's agreement to settle the strike was not arbitrary for either of the reasons posited by the Court of Appeals.

IV

The Court of Appeals placed great stress on the fact that the deal struck by ALPA was worse than the result the union would have obtained by unilateral termination of the strike. Indeed, the court held that a jury finding that the settlement

was worse than surrender could alone support a judgment that the union had acted arbitrarily and irrationally. See 886 F. 2d, at 1445–1446. This holding unduly constrains the "wide range of reasonableness," 345 U. S., at 338, within which unions may act without breaching their fair representation duty.

For purposes of decision, we may assume that the Court of Appeals was correct in its conclusion that, if ALPA had simply surrendered and voluntarily terminated the strike, the striking pilots would have been entitled to reemployment in the order of seniority. Moreover, we may assume that Continental would have responded to such action by rescinding its assignment of all of the 85–5 bid positions to working pilots. After all, it did rescind about half of those assignments pursuant to the terms of the settlement. Thus, we assume that the union made a bad settlement—one that was even worse than a unilateral termination of the strike.

Nevertheless, the settlement was by no means irrational. A settlement is not irrational simply because it turns out *in retrospect* to have been a bad settlement. Viewed in light of the legal landscape at the time of the settlement, ALPA's decision to settle rather than give up was certainly not illogical. At the time of the settlement, Continental had notified the union that all of the 85–5 bid positions had been awarded to working pilots and was maintaining that none of the strikers had any claim on any of those jobs.

A comparable position had been asserted by United Air Lines in litigation in the Northern District of Illinois.[9] Because the District Court in that case had decided that such vacancies were not filled until pilots were trained and actually working in their new assignments, the Court of Appeals here concluded that the issue had been resolved in ALPA's favor when it agreed to the settlement with Continental. See 886 F. 2d, at 1446. But this reasoning overlooks the fact

[9] *Air Line Pilots Assn. Int'l* v. *United Air Lines, Inc.*, 614 F. Supp. 1020 (ND Ill. 1985).

that the validity of the District Court's ruling in the other case was then being challenged on appeal.[10]

Moreover, even if the law had been clear that the 85–5 bid positions were vacancies, the Court of Appeals erroneously assumed that the existing law was also clarion that the striking pilots had a right to those vacancies because they had more seniority than the crossover and replacement workers. The court relied for the latter proposition solely on our cases interpreting the National Labor Relations Act. See 886 F. 2d, at 1445. We have made clear, however, that National Labor Relations Act cases are not necessarily controlling in situations, such as this one, which are governed by the Railway Labor Act. See *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383 (1969).

Given the background of determined resistance by Continental at all stages of this strike, it would certainly have been rational for ALPA to recognize the possibility that an attempted voluntary return to work would merely precipitate litigation over the right to the 85–5 bid positions. Because such a return would not have disposed of any of the individual claims of the pilots who ultimately elected option one or option two of the settlement, there was certainly a realistic possibility that Continental would not abandon its bargaining position without a complete settlement.

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[10] Even if the Seventh Circuit had already affirmed the District Court's holding in the *United Air Lines* case, the Court of Appeals would have erred in its conclusion that the law was so assuredly in ALPA's favor that the settlement was irrational. First, a Seventh Circuit case would not have controlled the outcome in this dispute, which arose in the Fifth Circuit. Second, even if the *United Air Lines* decision had been a Fifth Circuit case, it was factually distinguishable and therefore might not have dictated the outcome regarding the 85–5 bid positions. In *United Air Lines*, the Seventh Circuit affirmed on the basis of the District Court's finding that the carrier's action was taken in bad faith, motivated by antiunion animus. 802 F. 2d, at 898; 614 F. Supp., at 1046. An equivalent finding was by no means certain in this case.

At the very least, the settlement produced certain and prompt access to a share of the new jobs and avoided the costs and risks associated with major litigation. Moreover, since almost a third of the striking pilots chose the lump-sum severance payment rather than reinstatement, see n. 1, *supra*, the settlement was presumably more advantageous than a surrender to a significant number of striking pilots. In labor disputes, as in other kinds of litigation, even a bad settlement may be more advantageous in the long run than a good lawsuit. In all events, the resolution of the dispute over the 85–5 bid vacancies was well within the "wide range of reasonableness," 345 U. S., at 338, that a union is allowed in its bargaining.

The suggestion that the "discrimination" between striking and working pilots represented a breach of the duty of fair representation also fails. If we are correct in our conclusion that it was rational for ALPA to accept a compromise between the claims of the two groups of pilots to the 85–5 bid positions, some form of allocation was inevitable. A rational compromise on the initial allocation of the positions was not invidious "discrimination" of the kind prohibited by the duty of fair representation. Unlike the grant of "super-seniority" to the crossover and replacement workers in *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963), this agreement preserved the seniority of the striking pilots after their initial reinstatement. In *Erie*, the grant of extra seniority enabled the replacement workers to keep their jobs while more senior strikers lost theirs during a layoff subsequent to the strike. See *id.*, at 223–224. The agreement here only provided the order and mechanism for the reintegration of the returning strikers but did not permanently alter the seniority system. This case therefore more closely resembles our decision in *Trans World Airlines, Inc.* v. *Flight Attendants*, 489 U. S. 426 (1989), in which we held that an airline's refusal, after a strike, to displace crossover workers with more senior strikers was not unlawful discrimination.

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

It is so ordered.

Syllabus

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

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

No. 89–994. Argued October 9, 1990—Decided March 19, 1991

After petitioner West Virginia University Hospitals, Inc. (WVUH), prevailed at trial in its suit under 42 U. S. C. § 1983 against respondent Pennsylvania officials over Medicaid reimbursement rates for services provided to Pennsylvania residents, the District Court awarded fees pursuant to § 1988, which, *inter alia*, gives the court in certain civil rights suits discretion to allow the prevailing party "a reasonable attorney's fee as part of the costs." WVUH's award included fees attributable to an accounting firm and three doctors specializing in hospital finance hired to assist in the preparation of the suit and to testify. The Court of Appeals affirmed as to the merits, but reversed as to the expert fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses provided by 28 U. S. C. §§ 1920(3) and 1821(b).

Held: Fees for services rendered by experts in civil rights litigation may not be shifted to the losing party as part of "a reasonable attorney's fee" under § 1988. Pp. 86–102.

(a) Sections 1920 and 1821(b) define the full extent of a federal court's power to shift expert fees, whether testimonial or nontestimonial, absent "explicit statutory authority to the contrary." *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 439; see *id.*, at 441. This Court will not lightly infer that Congress has repealed those sections through a provision like § 1988 that does not refer explicitly to witness fees. See *id.*, at 445. Pp. 86–87.

(b) Statutory usage before, during, and after 1976 (the date of § 1988's enactment) did not regard the phrase "attorney's fees" as embracing fees for experts' services. Pp. 88–92.

(c) At the time of § 1988's enactment, judicial usage did not regard the phrase "attorney's fees" as including experts' fees. Pp. 92–97.

(d) Where, as here, a statute contains a phrase that is unambiguous, this Court's sole function is to enforce it according to its terms. See, *e. g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241. Although chronology and the remarks of some sponsors of the bill that became § 1988 suggest that it was viewed as a response to *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the text of

§ 1988 is both broader and narrower than the pre-*Alyeska* regime. The best evidence of congressional purpose is the statutory text, which cannot be expanded or contracted by the statements of individual legislators or committees during the enactment process. WVUH's argument that Congress would have included expert fees in § 1988 if it had thought about it, as it did in the Equal Access to Justice Act, and that this Court has a duty to ask how Congress would have decided had it actually considered the question, profoundly mistakes the Court's role with respect to unambiguous statutory terms. See *Iselin* v. *United States*, 270 U. S. 245, 250–251. Pp. 97–101.

885 F. 2d 11, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, *post*, p. 102. STEVENS, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 103.

Robert T. Adams argued the cause for petitioner. With him on the briefs was Jack M. Stover.

Calvin R. Koons, Senior Deputy Attorney General of Pennsylvania, argued the cause for respondents. With him on the brief were *Ernest D. Preate, Jr.*, Attorney General, *Jerome T. Foerster*, Deputy Attorney General, and *John G. Knorr III*, Chief Deputy Attorney General.*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether fees for services rendered by experts in civil rights litigation may be shifted to the losing party pursuant to 42 U. S. C. § 1988, which permits the award of "a reasonable attorney's fee."

**David S. Tatel, Norman Redlich, Robert B. McDuff, Steven R. Shapiro, Harvey Grossman, Sidney S. Rosdeitcher, Antonia Hernandez*, and *E. Richard Larson* filed a brief for the Lawyers' Committee for Civil Rights Under Law et al. as *amici curiae* urging reversal.

Robert E. Williams, Douglas S. McDowell, and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

I

Petitioner West Virginia University Hospitals, Inc. (WVUH), operates a hospital in Morgantown, W. Va., near the Pennsylvania border. The hospital is often used by Medicaid recipients living in southwestern Pennsylvania. In January 1986, Pennsylvania's Department of Public Welfare notified WVUH of new Medicaid reimbursement schedules for services provided to Pennsylvania residents by the Morgantown hospital. In administrative proceedings, WVUH unsuccessfully objected to the new reimbursement rates on both federal statutory and federal constitutional grounds. After exhausting administrative remedies, WVUH filed suit in Federal District Court under 42 U. S. C. § 1983. Named as defendants (respondents here) were Pennsylvania Governor Robert Casey and various other Pennsylvania officials.

Counsel for WVUH employed Coopers & Lybrand, a national accounting firm, and three doctors specializing in hospital finance to assist in the preparation of the lawsuit and to testify at trial. WVUH prevailed at trial in May 1988. The District Court subsequently awarded fees pursuant to 42 U. S. C. § 1988,[1] including over $100,000 in fees attributable to expert services. The District Court found these services to have been "essential" to presentation of the case—a finding not disputed by respondents.

Respondents appealed both the judgment on the merits and the fee award. The Court of Appeals for the Third Circuit affirmed as to the former, but reversed as to the expert fees, disallowing them except to the extent that they fell within the $30-per-day fees for witnesses prescribed by 28 U. S. C. § 1821(b). 885 F. 2d 11 (1989). WVUH petitioned

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[1] Title 42 U. S. C. § 1988 provides in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 . . . , or title VI of the Civil Rights Act of 1964 . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

this Court for review of that disallowance; we granted certiorari, 494 U. S. 1003 (1990).

II

Title 28 U. S. C. § 1920 provides:

> "A judge or clerk of any court of the United States may tax as costs the following:
>
> "(1) Fees of the clerk and marshal;
>
> "(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> "(3) Fees and disbursements for printing and witnesses;
>
> "(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> "(5) Docket fees under section 1923 of this title;
>
> "(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

Title 28 U. S. C. § 1821(b) limits the witness fees authorized by § 1920(3) as follows: "A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance. . . ."[2] In *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987), we held that these provisions define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further. "[W]hen," we said, "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limits of § 1821(b), absent contract or explicit statutory authority to the contrary." *Id.*, at 439. "We will

[2] Section 1821(b) has since been amended to increase the allowable per diem from $30 to $40. See Judicial Improvements Act of 1990, Pub. L. 101–650, § 314.

not lightly infer that Congress has repealed §§ 1920 and 1821, either through [Federal Rule of Civil Procedure] 54(d) or any other provision not referring explicitly to witness fees." *Id.*, at 445.

As to the testimonial services of the hospital's experts, therefore, *Crawford Fitting* plainly requires, as a prerequisite to reimbursement, the identification of "explicit statutory authority." WVUH argues, however, that some of the expert fees it incurred in this case were unrelated to expert *testimony*, and that as to those fees the § 1821(b) limits, which apply only to witnesses in attendance at trial, are of no consequence. We agree with that, but there remains applicable the limitation of § 1920. *Crawford Fitting* said that we would not lightly find an implied repeal of § 1821 *or* of § 1920, which it held to be an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts. 482 U. S., at 441. None of the categories of expenses listed in § 1920 can reasonably be read to include fees for services rendered by an expert employed by a party in a nontestimonial advisory capacity. The question before us, then, is—with regard to both testimonial and nontestimonial expert fees—whether the term "attorney's fee" in § 1988 provides the "explicit statutory authority" required by *Crawford Fitting*.[3]

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[3] JUSTICE STEVENS suggests that the expert fees requested here might be part of the "costs" allowed by § 1988 even if they are not part of the "attorney's fee." We are aware of no authority to support the counterintuitive assertion that "[t]he term 'costs' has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation," *post*, at 104. In *Crawford Fitting* we held that the word "costs" in Federal Rule of Civil Procedure 54(d) is to be read in harmony with the word "costs" in 28 U. S. C. § 1920, see 482 U. S., at 441, 445, and we think the same is true of the word "costs" in § 1988. We likewise see nothing to support JUSTICE STEVENS' speculation that the court below or the parties viewed certain disbursements by the hospital's attorneys as "costs" within the meaning of the statute. Rather, it is likely that these disbursements (billed directly to the client) were thought subsumed

III

The record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost. While some fee-shifting provisions, like § 1988, refer only to "attorney's fees," see, *e. g.*, Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k), many others explicitly shift expert witness fees *as well as* attorney's fees. In 1976, just over a week prior to the enactment of § 1988, Congress passed those provisions of the Toxic Substances Control Act, 15 U. S. C. §§ 2618(d), 2619(c)(2), which provide that a prevailing party may recover "the costs of suit and reasonable fees for attorneys *and expert witnesses*." (Emphasis added.) Also in 1976, Congress amended the Consumer Product Safety Act, 15 U. S. C. §§ 2060(c), 2072(a), 2073, which as originally enacted in 1972 shifted to the losing party "cost[s] of suit, including a reasonable attorney's fee," see 86 Stat. 1226. In the 1976 amendment, Congress altered the fee-shifting provisions to their present form by adding a phrase shifting expert witness fees *in addition to* attorney's fees. See Pub. L. 94–284, § 10, 90 Stat. 506, 507. Two other significant Acts passed in 1976 contain similar phrasing: the Resource Conservation and Recovery Act of 1976, 42 U. S. C. § 6972(e) ("costs of litigation (including reasonable attorney and expert witness fees)"), and the Natural Gas Pipeline Safety Act Amendments of 1976, 49 U. S. C. App. § 1686(e) ("costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees").

Congress enacted similarly phrased fee-shifting provisions in numerous statutes both before 1976, see, *e. g.*, Endangered Species Act of 1973, 16 U. S. C. § 1540(g)(4) ("costs of litigation (including reasonable attorney and expert witness

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within the phrase "attorney's fee." See, *e. g.*, *Northcross* v. *Board of Ed. of Memphis Schools*, 611 F. 2d 624, 639 (CA6 1979) ("reasonable out-of-pocket expenses incurred by the attorney" included in § 1988 "attorney's fee" award).

fees)"), and afterwards, see, *e. g.*, Public Utility Regulatory Policies Act of 1978, 16 U. S. C. § 2632(a)(1) ("reasonable attorneys' fees, expert witness fees, and other reasonable costs incurred in preparation and advocacy of [the litigant's] position"). These statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights: The Equal Access to Justice Act (EAJA), the counterpart to § 1988 for violation of federal rights by federal employees, states that "'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses . . . and reasonable attorney fees." 28 U. S. C. § 2412(d)(2)(A). At least 34 statutes in 10 different titles of the United States Code explicitly shift attorney's fees *and* expert witness fees.[4]

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[4] In addition to the provisions discussed in the text, see Administrative Procedure Act, 5 U. S. C. § 504(b)(1)(A) (added 1980) ("reasonable expenses of expert witnesses . . . and reasonable attorney or agent fees"); Federal Trade Commission Act, 15 U. S. C. § 57a(h)(1) (added 1975) ("reasonable attorneys' fees, expert witness fees and other costs of participating in a rulemaking proceeding"); Petroleum Marketing Practices Act, 15 U. S. C. §§ 2805(d)(1)(C), 2805(d)(3) ("reasonable attorney and expert witness fees"); National Historic Preservation Act Amendments of 1980, 16 U. S. C. § 470w–4 ("attorneys' fees, expert witness fees, and other costs of participating in such action"); Federal Power Act, 16 U. S. C. § 825q–1(b)(2) (added 1978) ("reasonable attorney's fees, expert witness fees and other costs of intervening or participating in any proceeding [before the Federal Energy Regulatory Commission]"); Tax Equity and Fiscal Responsibility Act of 1982, 26 U. S. C. § 7430(c)(1) ("reasonable expenses of expert witnesses . . . and reasonable fees paid . . . for the services of attorneys"); Surface Mining Control and Reclamation Act of 1977, 30 U. S. C. § 1270(d) ("costs of litigation (including attorney and expert witness fees)"); Deep Seabed Hard Mineral Resources Act, 30 U. S. C. § 1427(c) (enacted 1980) ("costs of litigation, including reasonable attorney and expert witness fees"); Federal Oil and Gas Royalty Management Act of 1982, 30 U. S. C. § 1734(a)(4) ("costs of litigation including reasonable attorney and expert witness fees"); Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U. S. C. § 928(d) ("In cases

The laws that refer to fees for nontestimonial expert services are less common, but they establish a similar usage both before and after 1976: Such fees are referred to *in addition to* attorney's fees when a shift is intended. A provision of the Criminal Justice Act of 1964, 18 U. S. C. § 3006A(e), directs the court to reimburse appointed counsel for expert fees necessary to the defense of indigent criminal defendants—even though the immediately preceding provision, § 3006A(d), already directs that appointed defense counsel be paid a designated hourly rate plus "expenses reasonably incurred." WVUH's position must be that expert fees billed to a client through an attorney are "attorney's fees" because they are

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where an attorney's fee is awarded . . . there may be further assessed . . . as costs, fees and mileage for necessary witnesses"); Federal Water Pollution Control Act Amendments of 1972, and 1987 amendment, 33 U. S. C. §§ 1365(d), 1369(b)(3) ("costs of litigation (including reasonable attorney and expert witness fees)"); Oil Pollution Act of 1990, 33 U. S. C. § 2706(g) (1988 ed., Supp. II) (same); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U. S. C. § 1415(g)(4) (same); Deepwater Port Act of 1974, 33 U. S. C. § 1515(d) (same); Act to Prevent Pollution from Ships, 33 U. S. C. § 1910(d) (enacted 1980) (same); Safe Drinking Water Act, 42 U. S. C. § 300j–8(d) (enacted 1974) (same); National Childhood Vaccine Injury Act of 1986, 42 U. S. C. § 300aa–31(c) (same); Noise Control Act of 1972, 42 U. S. C. § 4911(d) (same); Energy Reorganization Act of 1974, 42 U. S. C. § 5851(e)(2) (same); Energy Policy and Conservation Act, 42 U. S. C. § 6305(d) (enacted 1975) (same); Clean Air Amendments of 1970, 42 U. S. C. §§ 7413b, 7604(d), 7607(f) (same), and of 1977, 42 U. S. C. § 7622(b)(2)(B) ("all costs and expenses (including attorneys' and expert witness fees) reasonably incurred"); Powerplant and Industrial Fuel Use Act of 1978, 42 U. S. C. § 8435(d) ("costs of litigation (including reasonable attorney and expert witness fees)"); Ocean Thermal Energy Conversion Act of 1980, 42 U. S. C. § 9124(d) (same); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U. S. C. § 9659(f) (added 1986) (same); Emergency Planning and Community Right-to-Know Act of 1986, 42 U. S. C. § 11046(f) (same); Outer Continental Shelf Lands Act Amendments of 1978, 43 U. S. C. § 1349(a)(5) ("costs of litigation, including reasonable attorney and expert witness fees"); Hazardous Liquid Pipeline Safety Act of 1979, 49 U. S. C. App. § 2014(e) ("costs of suit, including reasonable attorney's fees and reasonable expert witnesses fees").

to be treated as part of the expenses of the attorney; but if this were normal usage, they would have been reimbursable under the Criminal Justice Act as "expenses reasonably incurred"—and subsection 3006A(e) would add nothing to the recoverable amount. The very heading of that subsection, "Services *other than* counsel" (emphasis added), acknowledges a distinction between services provided by the attorney himself and those provided to the attorney (or the client) by a nonlegal expert.

To the same effect is the 1980 EAJA, which provides: "'fees and other expenses' [as shifted by § 2412(d)(1)(A)] includes the reasonable expenses of expert witnesses, *the reasonable cost of any study, analysis, engineering report, test, or project* which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U. S. C. § 2412(d)(2)(A) (emphasis added). If the reasonable cost of a "study" or "analysis"—which is but another way of describing nontestimonial expert services—is by common usage already included in the "attorney fees," again a significant and highly detailed part of the statute becomes redundant. The Administrative Procedure Act, 5 U. S. C. § 504(b)(1)(A) (added 1980), and the Tax Equity and Fiscal Responsibility Act of 1982, 26 U. S. C. § 7430(c)(1), contain similar language. Also reflecting the same usage are two railroad regulation statutes, the Regional Rail Reorganization Act of 1973, 45 U. S. C. §§ 726(f)(9) ("costs and expenses (including reasonable fees of accountants, experts, and attorneys) actually incurred"), and 741(i) ("costs and expenses (including fees of accountants, experts, and attorneys), actually and reasonably incurred"), and the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 854(g) ("costs and expenses (including fees of accountants, experts, and attorneys) actually and reasonably incurred").[5]

[5] WVUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend that the term 'attorneys'

We think this statutory usage shows beyond question that attorney's fees and expert fees are distinct items of expense. If, as WVUH argues, the one includes the other, dozens of statutes referring to the two separately become an inexplicable exercise in redundancy.

IV

WVUH argues that at least in pre-1976 *judicial* usage the phrase "attorney's fees" included the fees of experts. To support this proposition, it relies upon two historical assertions: first, that pre-1976 courts, when exercising traditional equitable discretion in shifting attorney's fees, taxed as an element of such fees the expenses related to expert services; and second, that pre-1976 courts shifting attorney's fees pursuant to statutes identical in phrasing to § 1988 allowed the recovery of expert fees. We disagree with these assertions. The judicial background against which Congress enacted § 1988 mirrored the statutory background: Expert fees were regarded not as a subset of attorney's fees, but as a distinct category of litigation expense.

Certainly it is true that prior to 1976 some federal courts shifted expert fees to losing parties pursuant to various equitable doctrines—sometimes in conjunction with attorney's fees. But they did not shift them *as an element of* attorney's fees. Typical of the courts' mode of analysis (though not necessarily of their results) is *Fey* v. *Walston & Co.*, 493 F. 2d 1036, 1055–1056 (CA7 1974), a case brought under the federal securities laws. Plaintiff won and was awarded various ex-

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fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." H. R. Conf. Rep. No. 99–687, p. 5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 U. S. C. § 1415(e)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

penses: "Included in the . . . costs awarded by the [district] court were the sum of $1,700 for plaintiff's expert witness, expenses of an accountant in the amount of $142, and of an illustrator-diagrammer for $50 . . . and attorneys' fees of $15,660." The court treated these items separately: The services of the accountant and illustrator (who did not testify at trial) were "costs" which could be fully shifted in the discretion of the District Court; the expert witness fees also could be shifted, but only as limited by § 1821; the attorney's fees were not costs and could not be shifted at all because the case did not fit any of the traditional equitable doctrines for awarding such fees. *Id.*, at 1056. See also *In re Electric Power & Light Corp.*, 210 F. 2d 585, 587, 591 (CA2 1954) ("[Appellant] applied for an allowance for counsel fees of $35,975 and expenses . . . , and also for a fee of $2,734.28 for an expert accountant"; court permitted part of the attorney's fee but disallowed the expert witness fee), rev'd on other grounds *sub nom. SEC* v. *Drexel & Co.*, 348 U. S. 341 (1955); *Kiefel* v. *Las Vegas Hacienda, Inc.*, 404 F. 2d 1163, 1170–1171 (CA7 1968) (itemizing attorney's fee and expert witness fee separately, allowing part of the former and all of the latter permitted by § 1821); *Burgess* v. *Williamson*, 506 F. 2d 870, 877–880 (CA5 1975) (applying Alabama law to shift attorney's fee but not expert witness fee); *Henning* v. *Lake Charles Harbor and Terminal District*, 387 F. 2d 264, 267–268 (CA5 1968), on appeal after remand, 409 F. 2d 932, 937 (CA5 1969) (applying Louisiana law to shift expert fees but not attorney's fee); *Coughenour* v. *Campbell Barge Line, Inc.*, 388 F. Supp. 501, 506 (WD Pa. 1974) ("Plaintiffs' claim for counsel fees is denied [because defendant acted in good faith and thus equitable shifting is unavailable]. Plaintiff's claim for costs of medical expert witnesses is deemed proper insofar as they were necessary in establishing the claim . . .") (citations omitted).

Even where the courts' holdings treated attorney's fees and expert fees the same (*i. e.*, granted both or denied both),

their analysis discussed them as separate categories of expense. See, *e. g.*, *Wolf* v. *Frank*, 477 F. 2d 467, 480 (CA5 1973) ("The reimbursing of plaintiffs' costs for attorney's fees *and* expert witness fees is supported . . . by well established equitable principles") (emphasis added); *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 441 F. 2d 631, 636–637 (CA5 1971) ("[Appellant] argues that the district court erred in awarding costs, including attorneys' fees and expert witness fees to Humble"); *Bebchick* v. *Pub. Util. Comm'n*, 115 U. S. App. D. C. 216, 233, 318 F. 2d 187, 204 (1963) ("It is also our view that reasonable attorneys' fees for appellants, . . . reasonable expert witness fees, and appropriate litigation expenses, should be paid by [appellee]"); *Lipscomb* v. *Wise*, 399 F. Supp. 782, 798–801 (ND Tex. 1975) (in separate analyses, finding both attorney's fees and expert witness fees barred). We have found no support for the proposition that, at common law, courts shifted expert fees *as an element of* attorney's fees.

Of arguably greater significance than the courts' treatment of attorney's fees *versus* expert fees at common law is their treatment of those expenses under statutes containing fee-shifting provisions similar to § 1988. WVUH contends that in some cases courts shifted expert fees as well as the statutorily authorized attorney's fees—and thus must have thought that the latter included the former. We find, however, that the practice, at least in the overwhelming majority of cases, was otherwise.

Prior to 1976, the leading fee-shifting statute was the Clayton Act, 38 Stat. 731, as amended, 15 U. S. C. § 15 (shifting "the cost of suit, including a reasonable attorney's fee"). As of 1976, four Circuits (six Circuits, if one includes summary affirmances of district court judgments) had held that this provision did not permit a shift of expert witness fees. *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561, 586–587 (CA10 1961) (accountant's fees); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 223–224 (CA9

1964) (accounting fees); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 287 F. Supp. 143, 164 (Md. 1968) (accountant's fees), aff'd, 415 F. 2d 55 (CA4 1969); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 297 F. Supp. 924, 930 (Me.) (expert witness fees), aff'd, 421 F. 2d 61 (CA1 1969); *Trans World Airlines, Inc.* v. *Hughes*, 449 F. 2d 51, 81 (CA2 1971) (expert fees), rev'd on other grounds, 409 U. S. 363 (1973); *Ott* v. *Speedwriting Publishing Co.*, 518 F. 2d 1143, 1149 (CA6 1975) (expert witness fees); see also *Brookside Theater Corp.* v. *Twentieth Century-Fox Film Corp.*, 11 F. R. D. 259, 267 (WD Mo. 1951) (expert witness fees). No court had held otherwise. Also instructive is pre-1976 practice under the federal patent laws, which provided, 35 U. S. C. § 285, that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." Again, every court to consider the matter as of 1976 thought that this provision conveyed no authority to shift expert fees. *Specialty Equipment & Machinery Corp.* v. *Zell Motor Car Co.*, 193 F. 2d 515, 521 (CA4 1952) ("Congress having dealt with the subject of costs in patent cases and having authorized the taxation of reasonable attorneys fees without making any provision with respect to . . . fees of expert witnesses must presumably have intended that they be not taxed"); accord, *Chromalloy American Corp.* v. *Alloy Surfaces Co.*, 353 F. Supp. 429, 431, n. 1, 433 (Del. 1973); *ESCO Corp.* v. *Tru-Rol Co.*, 178 USPQ 332, 333 (Md. 1973); *Scaramucci* v. *Universal Mfg. Co.*, 234 F. Supp. 290, 291–292 (WD La. 1964); *Prashker* v. *Beech Aircraft Corp.*, 24 F. R. D. 305, 313 (Del. 1959).

WVUH contends that its position is supported by *Tasby* v. *Estes*, 416 F. Supp. 644, 648 (ND Tex. 1976), and *Davis* v. *County of Los Angeles*, 8 FEP Cases 244, 246 (CD Cal. 1974). Even if these cases constituted solid support for the proposition advanced by the hospital, they would hardly be sufficient to overcome the weight of authority cited above. But, in any case, we find neither opinion to be a clear example of con-

trary usage. Without entering into a detailed discussion, it suffices to say, as to *Davis* (where the expert fee award was in any event uncontested), that the opinion does not cite the statute, 42 U. S. C. § 2000e–5, as the basis for its belief that the expert fee could be shifted, and considers expert fees in a section separate from that dealing with attorney's fees. Given what was then the state of the law in the Ninth Circuit, and the District Court's citation, 8 FEP Cases, at 246, of at least one case that is avowedly an equitable discretion case, see *NAACP* v. *Allen*, 340 F. Supp. 703 (MD Ala. 1972), it is likely that the District Court thought the shifting of the fee was authorized under its general equitable powers, or under Federal Rule of Civil Procedure 54(d). As for *Tasby*, that case unquestionably authorized a shift of expert witness fees pursuant to an attorney's-fee-shifting statute, 20 U. S. C. § 1617 (1976 ed.). The basis of that decision, however, was not the court's own understanding of the statutory term "attorney's fees," but rather its belief (quite erroneous) that our earlier opinion in *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974), had adopted that interpretation. Thus, WVUH has cited not a single case, and we have found none, in which it is clear (or in our view even likely) that a court understood the statutory term "attorney's fees" to include expert fees.[6]

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[6] The hospital also cites *Fairley* v. *Patterson*, 493 F. 2d 598 (CA5 1974), and *Norris* v. *Green*, 317 F. Supp. 100, 102 (ND Ala. 1965). But in *Fairley* the court, remanding for reconsideration of the fee award, was explicitly equivocal as to whether "court costs" other than the ones normally assessable under § 1920 were awardable under the statute in question (the Voting Rights Act of 1965, whose fee-shifting provision parallels § 1988), or rather "should have to meet the harder discretionary standards" applicable to the award of fees pursuant to equitable discretion. 493 F. 2d, at 606, n. 11. In any event, *Fairley* did not consider expert witnesses explicitly, and there is no indication that the court necessarily included expert fees within its (undefined) category of "court costs."

As for *Norris*, that case awarded fees pursuant to 29 U. S. C. § 501(b), which is *not* parallel to § 1988, since it authorizes the shifting of "fees of

In sum, we conclude that at the time this provision was enacted neither statutory nor judicial usage regarded the phrase "attorney's fees" as embracing fees for experts' services.

V

WVUH suggests that a distinctive meaning of "attorney's fees" should be adopted with respect to § 1988 because this statute was meant to overrule our decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). As mentioned above, prior to 1975 many courts awarded expert fees and attorney's fees in certain circumstances pursuant to their equitable discretion. In *Alyeska*, we held that this discretion did not extend beyond a few exceptional circumstances long recognized by common law. Specifically, we rejected the so-called "private attorney general" doctrine recently created by some lower federal courts, see, *e. g.*, *La Raza Unida* v. *Volpe*, 57 F. R. D. 94, 98–102 (ND Cal. 1972), which allowed equitable fee shifting to plaintiffs in certain types of civil rights litigation. 421 U. S., at 269. WVUH argues that § 1988 was intended to restore the pre-*Alyeska* regime—and that, since expert fees were shifted then, they should be shifted now.

Both chronology and the remarks of sponsors of the bill that became § 1988 suggest that at least some members of Congress viewed it as a response to *Alyeska*. See, *e. g.*, S. Rep. No. 94–1011, pp. 4, 6 (1976). It is a considerable step, however, from this proposition to the conclusion the hospital would have us draw, namely, that § 1988 should be read as a reversal of *Alyeska* in all respects.

By its plain language and as unanimously construed in the courts, § 1988 is both broader and narrower than the pre-*Alyeska* regime. Before *Alyeska*, civil rights plaintiffs could

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counsel . . . *and* . . . *expenses necessarily paid or incurred.*" (Emphasis added.) There is no indication in the opinion that the court thought the expert fees were part of the former rather than the latter—and the court discussed them separately from attorney's fees.

recover fees pursuant to the private attorney general doctrine only if private enforcement was necessary to defend important rights benefiting large numbers of people, and cost barriers might otherwise preclude private suits. *La Raza Unida, supra,* at 98–101. Section 1988 contains no similar limitation—so that in the present suit there is no question as to the propriety of shifting WVUH's *attorney's* fees, even though it is highly doubtful they could have been awarded under pre-*Alyeska* equitable theories. In other respects, however, § 1988 is not as broad as the former regime. It is limited, for example, to violations of specified civil rights statutes—which means that it would not have reversed the outcome of *Alyeska* itself, which involved not a civil rights statute but the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.* Since it is clear that, in many respects, § 1988 was not meant to return us precisely to the pre-*Alyeska* regime, the objective of achieving such a return is no reason to depart from the normal import of the text.

WVUH further argues that the congressional purpose in enacting § 1988 must prevail over the ordinary meaning of the statutory terms. It quotes, for example, the House Committee Report to the effect that "the judicial remedy [must be] full and complete," H. R. Rep. No. 94–1558, p. 1 (1976), and the Senate Committee Report to the effect that "[c]itizens must have the opportunity to recover what it costs them to vindicate [civil] rights in court," S. Rep. No. 94–1011, *supra,* at 2. As we have observed before, however, the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. See *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the

course of the enactment process. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms'"), quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language, and we are bound by that restriction.

WVUH asserts that we have previously been guided by the "broad remedial purposes" of § 1988, rather than its text, in a context resolving an "analogous issue": In *Missouri* v. *Jenkins*, 491 U. S. 274, 285 (1989), we concluded that § 1988 permitted separately billed paralegal and law clerk time to be charged to the losing party. The trouble with this argument is that *Jenkins* did *not* involve an "analogous issue," insofar as the relevant considerations are concerned. The issue there was not, as WVUH contends, whether we would permit our perception of the "policy" of the statute to overcome its "plain language." It was not remotely plain in *Jenkins* that the phrase "attorney's fee" did not include charges for law clerk and paralegal services. Such services, like the services of "secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product," *id.*, at 285, had traditionally been included in calculation of the lawyers' hourly rates. Only recently had there arisen "the 'increasingly widespread custom of separately billing for [such] services,'" *id.*, at 286 (quoting from *Ramos* v. *Lamm*, 713 F. 2d 546, 558 (CA10 1983)). By contrast, there has never been, to our knowledge, a practice of including the cost of expert services within attorneys' hourly rates. There was also no record in *Jenkins*—as there is a lengthy record here—of statutory usage that recognizes a distinction between the charges at issue and attorney's fees. We do not know of a single statute that shifts clerk or paralegal fees separately; and even those, such as the EAJA, which comprehensively

define the assessable "litigation costs" make no separate mention of clerks or paralegals. In other words, *Jenkins* involved a respect in which the term "attorney's fees" (giving the losing argument the benefit of the doubt) was genuinely ambiguous; and we resolved that ambiguity not by invoking some policy that supersedes the text of the statute, but by concluding that charges of this sort had traditionally been included in attorney's fees and that separate billing should make no difference. The term's application to expert fees is not ambiguous; and if it were the means of analysis employed in *Jenkins* would lead to the conclusion that since such fees have not traditionally been included within the attorney's hourly rate they are not attorney's fees.

WVUH's last contention is that, even if Congress plainly did not include expert fees in the fee-shifting provisions of § 1988, it would have done so had it thought about it. Most of the pre-§ 1988 statutes that explicitly shifted expert fees dealt with environmental litigation, where the necessity of expert advice was readily apparent; and when Congress later enacted the EAJA, the federal counterpart of § 1988, it explicitly included expert fees. Thus, the argument runs, the 94th Congress simply forgot; it is our duty to ask how they would have decided had they actually considered the question. See *Friedrich* v. *Chicago*, 888 F. 2d 511, 514 (CA7 1989) (awarding expert fees under § 1988 because a court should "complete . . . the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly").

This argument profoundly mistakes our role. Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, Statutory Construction § 5201 (3d F. Horack ed. 1943). We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an

earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*. But where, as here, the meaning of the term prevents such accommodation, it is not our function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. The facile attribution of congressional "forgetfulness" cannot justify such a usurpation. Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe. We thus reject this last argument for the same reason that Justice Brandeis, writing for the Court, once rejected a similar (though less explicit) argument by the United States:

> "[The statute's] language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." *Iselin* v. *United States*, 270 U. S. 245, 250–251 (1926).[7]

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[7] WVUH at least asks us to guess the preferences of the *enacting* Congress. JUSTICE STEVENS apparently believes our role is to guess the desires of the *present* Congress, or of Congresses yet to be. "Only time will tell," he says, "whether the Court, with its literal reading of § 1988, has correctly interpreted the will of Congress," *post*, at 116. The implication is that today's holding will be proved wrong if Congress amends the law to conform with his dissent. We think not. The "will of Congress" we look to is not a will evolving from Session to Session, but a will expressed and fixed in a particular enactment. Otherwise, we would speak not of "interpreting" the law but of "intuiting" or "predicting" it. Our role is to say

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For the foregoing reasons, we conclude that § 1988 conveys no authority to shift expert fees. When experts appear at trial, they are of course eligible for the fee provided by § 1920 and § 1821—which was allowed in the present case by the Court of Appeals.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE MARSHALL, dissenting.

As JUSTICE STEVENS demonstrates, the Court uses the implements of literalism to wound, rather than to minister to, congressional intent in this case. That is a dangerous usurpation of congressional power when any statute is involved. It is troubling for special reasons, however, when the statute at issue is clearly designed to give access to the federal courts to persons and groups attempting to vindicate vital civil rights. A District Judge has ably put the point in an analogous context:

> "At issue here is much more than the simple question of how much [plaintiff's] attorneys should receive as attorney fees. At issue is . . . continued full and vigorous commitment to this Nation's lofty, but as yet unfulfilled, agenda to make the promises of this land available to all citizens, without regard to race or sex or other impermissible characteristic. There are at least two ways to undermine this commitment. The first is open and direct: a repeal of this Nation's anti-discrimination laws. The second is more indirect and, for this reason, somewhat insidious: to deny victims of discrimination a means for redress by creating an economic market in which attorneys cannot afford to represent them and take their

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what the law, as hitherto enacted, *is;* not to forecast what the law, as amended, *will be.*

cases to court." *Hidle* v. *Geneva County Bd. of Ed.*, 681 F. Supp. 752, 758–759 (MD Ala. 1988) (awarding attorney's fees and expenses under Title VII of the Civil Rights Act of 1964).

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

Since the enactment of the Statute of Wills in 1540,[1] careful draftsmen have authorized executors to pay the just debts of the decedent, including the fees and expenses of the attorney for the estate. Although the omission of such an express authorization in a will might indicate that the testator had thought it unnecessary, or that he had overlooked the point, the omission would surely not indicate a deliberate decision by the testator to forbid any compensation to his attorney.

In the early 1970's, Congress began to focus on the importance of public interest litigation, and since that time, it has enacted numerous fee-shifting statutes. In many of these statutes, which the majority cites at length, see *ante*, at 88–92, Congress has expressly authorized the recovery of expert witness fees as part of the costs of litigation. The question in this case is whether, notwithstanding the omission of such an express authorization in 42 U. S. C. § 1988, Congress intended to authorize such recovery when it provided for "a reasonable attorney's fee as part of the costs." In my view, just as the omission of express authorization in a will does not preclude compensation to an estate's attorney, the omission of express authorization for expert witness fees in a fee-shifting provision should not preclude the award of expert witness fees. We should look at the way in which the Court has interpreted the text of *this statute* in the past, as well as *this statute's* legislative history, to resolve the question before us, rather than looking at the text of the many other statutes that the majority cites in which Congress expressly recognized the need for compensating expert witnesses.

[1] 32 Hen. VIII, ch. 1 (1540).

I

Under either the broad view of "costs" typically assumed in the fee-shifting context or the broad view of "a reasonable attorney's fee" articulated by this Court, expert witness fees are a proper component of an award under § 1988. Because we are not interpreting these words for the first time, they should be evaluated in the context that this and other courts have already created.[2]

The term "costs" has a different and broader meaning in fee-shifting statutes than it has in the cost statutes that apply to ordinary litigation.[3] The cost bill in this case illustrates the point. Leaving aside the question of expert witness fees, the prevailing party sought reimbursement for $45,867 in disbursements, see App. to Pet. for Cert. C–1, which plainly would not have been recoverable costs under 28 U. S. C. § 1920.[4] These expenses, including such items as travel and long-distance telephone calls, were allowed by the District Court and were not even questioned by respondents. They were expenses that a retained lawyer would ordinarily bill to his or her client. They were accordingly considered proper "costs" in a case of this kind.

The broad construction typically given to "costs" in the fee-shifting context is highlighted by THE CHIEF JUSTICE's contrasting view in *Missouri* v. *Jenkins*, 491 U. S. 274 (1989), in which he argued that paralegal and law clerk fees could not even be awarded as "costs" under 28 U. S. C. § 1920. One of the issues in *Jenkins* was the *rate* at which the services of law clerks and paralegals should be compensated. The State contended that actual cost, rather than market value, should govern. It did not, however, even question the propriety of

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[2] My view, as I have expressed in the past, is that we should follow Justice Cardozo's advice to the judge to "lay [his] own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921).

[3] See, *e. g.*, 28 U. S. C. § 1920; see also Fed. Rule Civ. Proc. 54(d).

[4] Quoted in pertinent part, *ante*, at 86.

reimbursing the prevailing party for the work of these nonlawyers. Only THE CHIEF JUSTICE—in a lone dissent the reasoning of which is now endorsed by the Court—advanced a purely literal interpretation of the statute. He wrote:

> "I also disagree with the State's suggestion that law clerk and paralegal expenses incurred by a prevailing party, if not recoverable at market rates as 'attorney's fees' under § 1988, are nonetheless recoverable at actual cost under that statute. The language of § 1988 expands the traditional definition of 'costs' to include 'a reasonable attorney's fee,' but it cannot fairly be read to authorize the recovery of all other out-of-pocket expenses actually incurred by the prevailing party in the course of litigation. Absent specific statutory authorization for the recovery of such expenses, the prevailing party remains subject to the limitations on cost recovery imposed by Federal Rule of Civil Procedure 54(d) and 28 U. S. C. § 1920, which govern the taxation of costs in federal litigation where a cost-shifting statute is not applicable. Section 1920 gives the district court discretion to tax certain types of costs against the losing party in any federal litigation. The statute specifically enumerates six categories of expenses which may be taxed as costs: fees of the court clerk and marshal; fees of the court reporter; printing fees and witness fees; copying fees; certain docket fees; and fees of court-appointed experts and interpreters. We have held that this list is exclusive. *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437 (1987). Since none of these categories can possibly be construed to include the fees of law clerks and paralegals, I would also hold that reimbursement for these expenses may not be separately awarded at actual cost." 491 U. S., at 297–298.

Although THE CHIEF JUSTICE argued that charges for the work of paralegals and law clerks were not part of the nar-

rowly defined "costs" that were reimbursable under § 1920, nor were they part of an "attorney's fee" reimbursable under § 1988, the Court did not reach THE CHIEF JUSTICE's point about costs because it held in *Jenkins* that such expenses were part of a "reasonable attorney's fee" authorized by § 1988, and thus could be reimbursed at market rate. In the Court's view, a "reasonable attorney's fee" referred to "a reasonable fee for the work product of an attorney." *Id.*, at 285. We explained:

> "[T]he fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys." *Ibid.*

In *Jenkins*, the Court acknowledged that the use of paralegals instead of attorneys reduced the cost of litigation, and "'by reducing the spiraling cost of civil rights litigation, further[ed] the policies underlying civil rights statutes.'" *Id.*, at 288. If attorneys were forced to do the work that paralegals could just as easily perform under the supervision of an attorney, such as locating and interviewing witnesses or compiling statistical and financial data, then "it would not be surprising to see a greater amount of such work performed by attorneys themselves, thus increasing the overall cost of litigation." *Id.*, at 288, n. 10.

This reasoning applies equally to other forms of specialized litigation support that a trial lawyer needs and that the client customarily pays for, either directly or indirectly. Although reliance on paralegals is a more recent development than the use of traditional expert witnesses, both paralegals and ex-

pert witnesses perform important tasks that save lawyers' time and enhance the quality of their work product. In this case, it is undisputed that the District Court correctly found that the expert witnesses were "essential" and "necessary" to the successful prosecution of the plaintiff's case,[5] and that their data and analysis played a pivotal role in the attorney's trial preparation.[6] Had the attorneys attempted to perform the tasks that the experts performed, it obviously would have taken them far longer than the experts and the entire case would have been far more costly to the parties. As Judge Posner observed in a comparable case:

> "The time so spent by the expert is a substitute for lawyer time, just as paralegal time is, for if prohibited (or deterred by the cost) from hiring an expert the lawyer would attempt to educate himself about the expert's area of expertise. To forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals' work. There is thus no basis for distinguishing *Jenkins* from the present case so far as time spent by these experts in educating the plaintiffs' lawyer is concerned . . . ." *Friedrich* v. *Chicago*, 888 F. 2d 511, 514 (CA7 1989).

In *Jenkins*, we interpreted the award of "a reasonable *attorney's* fee" to cover charges for paralegals and law clerks, even though a paralegal or law clerk is not an attorney. Similarly, the federal courts routinely allow an attorney's travel expenses or long-distance telephone calls to be awarded, even though they are not literally part of an "attorney's *fee*," or part of "costs" as defined by 28 U. S. C. § 1920. To allow reimbursement of these other categories of expenses, and yet not to include expert witness fees, is both

[5] App. to Pet. for Cert. C–2; App. 117.

[6] The expert witnesses here played a pivotal role in their nontestimonial, rather than simply their testimonial, capacity. See Pet. for Cert. 6–7; App. 120–139.

arbitrary and contrary to the broad remedial purpose that inspired the fee-shifting provision of § 1988.

II

The Senate Report on the Civil Rights Attorney's Fees Awards Act of 1976 explained that the purpose of the proposed amendment to 42 U. S. C. § 1988 was "to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), and to achieve consistency in our civil rights laws."[7] S. Rep. No. 94–1011, p. 1 (1976). The Senate Committee on the Judiciary wanted to level the playing field so that private citizens, who might have little or no money, could still serve as "private attorneys general" and afford to bring actions, even against state or local bodies, to enforce the civil rights laws. The Committee acknowledged that "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover *what it costs them* to vindicate these rights in court." *Id.*, at 2 (emphasis added). According to the Committee, the bill would create "no startling new remedy," but would simply provide "the technical requirements" requested by the Supreme Court in *Alyeska*, so that courts could "continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision." *Id.*, at 6.

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[7] In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), the Court held that courts were not free to fashion new exceptions to the American Rule, according to which each side assumed the cost of its own attorney's fees. The Court reasoned that it was not the Judiciary's role "to invade the legislature's province by redistributing litigation costs . . . ," *id.*, at 271, and that it would be "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation . . . ." *Id.*, at 247.

To underscore its intention to return the courts to their pre-*Alyeska* practice of shifting fees in civil rights cases, the Senate Committee's Report cited with approval not only several cases in which fees had been shifted, but also all of the cases contained in Legal Fees, Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pt. 3, pp. 888–1024, 1060–1062 (1973) (hereinafter Senate Hearings). See S. Rep. No. 94–1011, at 4, n. 3. The cases collected in the 1973 Senate Hearings included many in which courts had permitted the shifting of costs, including expert witness fees. At the time when the Committee referred to these cases, though several were later reversed, it used them to make the point that prior to *Alyeska*, courts awarded attorney's fees and costs, including expert witness fees, in civil rights cases, and that they did so in order to encourage private citizens to bring such suits.[8] It was to this pre-*Alyeska* regime, in which courts could award expert witness fees along with attorney's fees, that the Senate Committee intended to return through the passage of the fee-shifting amendment to § 1988.

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[8] See, *e. g.*, *Beens* v. *Erdahl*, 349 F. Supp. 97, 100 (Minn. 1972); *Bradley* v. *School Board of Richmond*, 53 F. R. D. 28, 44 (ED Va. 1971) ("Fees for expert witnesses' testimony likewise will be allowed as an expense of suit. It is difficult to imagine a more necessary item of proof (and source of assistance to the Court) than the considered opinion of an educational expert"), rev'd, 472 F. 2d 318 (CA4 1972), vacated, 416 U. S. 696 (1974); *La Raza Unida* v. *Volpe*, No. 71–1166 (ND Cal., Oct. 19, 1972), reprinted in Senate Hearings, pt. 3, pp. 1060, 1062 (expert witness fees allowed because experts' testimony was "helpful to the court"); *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 360 F. Supp. 669, 672 (DC 1973) ("The plaintiff's experts played a vital role in the resolution of the case, their work and testimony going to the heart of the matter. Accordingly, it seems entirely appropriate to award their fees as scheduled in the total amount of $20,488.72 . . ."), rev'd, 163 U. S. App. D. C. 90, 499 F. 2d 1095 (1974), cert. denied, 420 U. S. 962 (1975).

The House Report expressed concerns similar to those raised by the Senate Report. It noted that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens" and that the House bill was "designed to give such persons effective access to the judicial process . . . ." H. R. Rep. No. 94–1558, p. 1 (1976). The House Committee on the Judiciary concluded that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision," and that the case had had a "devastating impact" and had created a "compelling need" for a fee-shifting provision in the civil rights context. *Id.*, at 2–3.

According to both Reports, the record of House and Senate subcommittee hearings, consisting of the testimony and written submissions of public officials, scholars, practicing attorneys, and private citizens, and the questions of the legislators, makes clear that both committees were concerned with preserving access to the courts and encouraging public interest litigation.[9]

[9] A frequently expressed concern was the need to undo the damage to public interest litigation caused by *Alyeska*. See, *e. g.*, Awarding of Attorneys' Fees, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 2, 41, 42, 43, 54, 82–85, 87, 90–92, 94, 103, 119–121, 123–125, 134, 150, 153–155, 162, 182–183, 269, 272–273, 370, 378–395, 416–418 (1975) (hereinafter House Hearings). Many who testified expressed the view that attorneys needed fee-shifting provisions so that they could afford to work on public interest litigation, see, *e. g.*, *id.*, at 66–67, 76, 78–79, 80, 89, 124–125, 137–142, 146, 158–159, 276–277, 278–280, 306–308; see also *id.*, at 316–326; Senate Hearings, pt. 3, pp. 789–790, 855–857, 1115, and private citizens needed fee-shifting provisions so that they could be made whole again, see, *e. g.*, House Hearings, pp. 60, 189, 192, 254–255, 292, 328; see also *id.*, at 106–111, 343–345, 347–349. For example, the private citizen who was brought into court by the Government and who later prevailed would still not be made whole, because he had to bear the costs of his own attorney's fees. The Senate Hearings also examined the average citizen's lack of access to the legal system. See, *e. g.*, Senate Hearings, pts. 1, 2, pp. 1–2, 3–4, 273 (addressing question whether coal miners were receiving adequate legal coverage); *id.*, pt. 2, at 466, 470–471, 505–509, 515 (addressing question whether veterans were denied

It is fair to say that throughout the course of the hearings, a recurring theme was the desire to return to the pre-*Alyeska* practice in which courts could shift fees, including expert witness fees, and make those who acted as private attorneys general whole again, thus encouraging the enforcement of the civil rights laws.

The case before us today is precisely the type of public interest litigation that Congress intended to encourage by amending § 1988 to provide for fee shifting of a "reasonable attorney's fee as part of the costs." Petitioner, a tertiary medical center in West Virginia near the Pennsylvania border,[10] provides services to a large number of Medicaid recipients throughout Pennsylvania. In January 1986, when the Pennsylvania Department of Public Welfare notified petitioner of its new Medicaid payment rates for Pennsylvania Medicaid recipients, petitioner believed them to be below the minimum standards for reimbursement specified by the Social Security Act. Petitioner successfully challenged the adequacy of the State's payment system under 42 U. S. C. § 1983.

This Court's determination today that petitioner must assume the cost of $104,133 in expert witness fees is at war with the congressional purpose of making the prevailing party whole. As we said in *Hensley* v. *Eckerhart*, 461 U. S. 424, 435 (1983), petitioner's recovery should be "fully compensatory," or, as we expressed in *Jenkins*, petitioner's recovery should be "comparable to what 'is traditional with attorneys compensated by a fee-paying client.' S. Rep. No. 94–1011, p. 6 (1976)." 491 U. S., at 286.

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legal assistance by $10 contingent fee); *id.*, pt. 3, at 789, 791–796, 808–810 (Indians' access to lawyers); *id.*, pt. 3, at 1127, 1253–1254 (average citizen cannot afford attorney).

[10] A "tertiary" hospital provides a level of medical services that is generally complex and not provided by community hospitals. Brief for Petitioner 3, n. 1.

III

In recent years the Court has vacillated between a purely literal approach to the task of statutory interpretation and an approach that seeks guidance from historical context, legislative history, and prior cases identifying the purpose that motivated the legislation. Thus, for example, in *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), we rejected a "mechanical construction," *id.*, at 418, of the fee-shifting provision in § 706(k) of Title VII of the Civil Rights Act of 1964 that the prevailing defendant had urged upon us. Although the text of the statute drew no distinction between different kinds of "prevailing parties," we held that awards to prevailing plaintiffs are governed by a more liberal standard than awards to prevailing defendants. That holding rested entirely on our evaluation of the relevant congressional policy and found no support within the four corners of the statutory text. Nevertheless, the holding was unanimous and, to the best of my knowledge, evoked no adverse criticism or response in Congress.[11]

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[11] Other examples of cases in which the Court eschewed the literal approach include *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), and *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U. S. 616 (1987). Although the dissenters had the better textual argument in both cases, and urged the Court to read the words of the statute literally, the Court, in both cases, opted for a reading that took into account congressional purpose and historical context. See *Steelworkers* v. *Weber*, 443 U. S., at 201 (Court rejected "literal construction of §§ 703(a) and (d)" and held that the statute must "be read against the background of the legislative history of Title VII and the historical context from which the Act arose"); *Johnson* v. *Transportation Agency*, 480 U. S., at 627 (legality of employer's affirmative-action plan to be assessed according to criteria announced in *Weber*). Neither decision prompted an adverse congressional response.

Although there have been those who have argued that congressional inaction cannot be seen as an endorsement of this Court's interpretations, see, *e. g.*, *Johnson* v. *Transportation Agency*, 480 U. S., at 671–672 (SCALIA, J., dissenting); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989), that charge has been answered by the observation

On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. It is no coincidence that the Court's literal reading of Title VII, which led to the conclusion that disparate treatment of pregnant and nonpregnant persons was not discrimination on the basis of sex, see *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), was repudiated by the 95th Congress;[12] that its literal reading of the "continuous physical presence" requirement in § 244(a)(1) of the Immigration and Nationality Act, which led to the view that the statute did not permit even temporary or inadvertent absences from this country, see *INS* v. *Phinpathya*, 464 U. S. 183 (1984), was rebuffed by the 99th Congress;[13] that its literal reading of the word "program" in Title IX of the

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that "when Congress has been displeased with [the Court's] interpretation . . . , it has not hesitated to amend the statute to tell us so. . . . Surely, it is appropriate to find some probative value in such radically different congressional reactions to this Court's interpretations . . . ." *Johnson* v. *Transportation Agency*, 480 U. S., at 629–630, n. 7; see *Patterson* v. *McLean Credit Union*, 491 U. S., at 200 (Brennan, J., concurring in judgment in part and dissenting in part) ("Where our prior interpretation of congressional intent was plausible, . . . we have often taken Congress' subsequent inaction as probative to varying degrees, depending upon the circumstances, of its acquiescence"). Since Congress has had an opportunity, albeit brief, to correct our broad reading of attorney's fees in *Jenkins* if it thought that we had misapprehended its purpose, the Court has no reason to change its approach to the fee-shifting provision of § 1988, as the majority does today.

[12] See Pregnancy Discrimination Act of 1978, Pub. L. 95–555, 92 Stat. 2076, 42 U. S. C. § 2000e(k) (overturning *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976)).

[13] Immigration Reform and Control Act of 1986, Pub. L. 99–603, § 315(b), 100 Stat. 3440 ("An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence").

Education Amendments of 1972, which led to the Court's gratuitous limit on the scope of the antidiscrimination provisions of Title IX,[14] see *Grove City College* v. *Bell*, 465 U. S. 555 (1984), was rejected by the 100th Congress;[15] or that its refusal to accept the teaching of earlier decisions in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989) (reformulating order of proof and weight of parties' burdens in disparate-impact cases), and *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989) (limiting scope of 42 U. S. C. § 1981 to the making and enforcement of contracts), was overwhelmingly rejected by the 101st Congress,[16] and its refusal to accept the widely held view of lower courts about the scope of fraud, see *McNally* v. *United States*, 483 U. S. 350 (1987) (limiting mail

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[14] See *Grove City College* v. *Bell*, 465 U. S., at 579 (STEVENS, J., concurring in part and concurring in result) (Court should refrain from deciding issue not in dispute).

[15] See Civil Rights Restoration Act of 1987, Pub. L. 100–259, 102 Stat. 28, 20 U. S. C. § 1687. Congress was clear in expressing the need for the subsequent legislation:

"Congress finds that—

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972 . . . ; and

"(2) legislative action is necessary to restore prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." 20 U. S. C. § 1687 note.

[16] See H. R. Conf. Rep. No. 101–856, p. 1 (1990) (Civil Rights Act of 1990). Again, Congress was blunt about its purposes:

"The purposes of this Act are to—

"(1) respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions; and

"(2) strengthen existing protections and remedies available under Federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination." *Id.*, at 1–2.

The fact that the President vetoed the legislation does not undermine the conclusion that Congress viewed the Court's decisions as incorrect interpretations of the relevant statutes.

fraud to protection of property), was quickly corrected by the 100th Congress.[17]

In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it "to take the time to revisit the matter"[18] and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error. As Judge Learned Hand explained, statutes are likely to be imprecise.

> "All [legislators] have done is to write down certain words which they mean to apply generally to situations of that kind. To apply these literally may either pervert what was plainly their general meaning, or leave undisposed of what there is every reason to suppose they meant to provide for. Thus it is not enough for the judge just to use a dictionary. If he should do no more, he might come out with a result which every sensible man would recognize to be quite the opposite of what was really intended; which would contradict or leave unfulfilled its plain purpose." L. Hand, How Far Is a Judge Free in Rendering a Decision?, in The Spirit of Liberty 103, 106 (I. Dilliard ed. 1952).

The Court concludes its opinion with the suggestion that disagreement with its textual analysis could only be based on the dissenters' preference for a "better" statute, *ante*, at 101. It overlooks the possibility that a different view may be more faithful to Congress' command. The fact that Congress has consistently provided for the inclusion of expert witness fees in fee-shifting statutes when it considered the matter is a weak reed on which to rest the conclusion that the omission of

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[17] See Pub. L. 100–690, § 7603, 102 Stat. 4508, 18 U. S. C. § 1346 ("[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services").

[18] *Smith* v. *Robinson*, 468 U. S. 992, 1031 (1984) (Brennan, J., dissenting).

such a provision represents a deliberate decision to forbid such awards. Only time will tell whether the Court, with its literal reading [19] of § 1988, has correctly interpreted the will of Congress with respect to the issue it has resolved today.

I respectfully dissent.

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[19] Seventy years ago, Justice Cardozo warned of the dangers of literal reading, whether of precedents or statutes:

"[Some judges'] notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." The Nature of the Judicial Process, at 20–21.

NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS' ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89–1027. Argued December 3, 1990—Decided March 19, 1991*

Once the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation under the conditions set forth in Chapter 113 of the Interstate Commerce Act (Act), 49 U. S. C. § 11301 *et seq.*, a carrier in such a consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ," § 11341(a). In these cases, the ICC issued orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements. The Court of Appeals reversed and remanded, holding that § 11341(a) does not authorize the ICC to relieve a party of collectively bargained obligations that impede implementation of an approved transaction. Reasoning, *inter alia*, that the legislative history demonstrates a congressional intent that § 11341(a) apply to specific types of positive laws and not to common-law rules of liability, such as those governing contracts, the court declined to decide whether the section could operate to override provisions of the Railway Labor Act (RLA) governing the formation, construction, and enforcement of the collective-bargaining agreements at issue.

Held: The § 11341(a) exemption "from all other law" includes a carrier's legal obligations under a collective-bargaining agreement when necessary to carry out an ICC-approved transaction. The exemption's language, as correctly interpreted by the ICC, is clear, broad, and unqualified, bespeaking an unambiguous congressional intent to include any obstacle imposed by law. That language neither admits of a distinction between positive enactments and common-law liability rules nor supports the exclusion of contractual obligations. Thus, the exemption effects an override of such obligations by superseding the law—here, the RLA—which makes the contract binding. Cf. *Schwabacher* v. *United States*, 334 U. S. 182, 194–195, 200–201. This determination makes sense of the Act's consolidation provisions, which were designed to promote economy and efficiency in interstate transportation by removing

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*Together with No. 89–1028, *CSX Transportation, Inc.* v. *Brotherhood of Railway Carmen et al.*, also on certiorari to the same court.

the burdens of excessive expenditure. Whereas § 11343(a)(1) requires the ICC to approve consolidations in the public interest, and § 11347 conditions such approval on satisfaction of certain labor-protective conditions, the § 11341(a) exemption guarantees that once employee interests are accounted for and the consolidation is approved, the RLA—whose major disputes resolution process is virtually interminable—will not prevent the efficiencies of consolidation from being achieved. Moreover, this reading will not, as the lower court feared, lead to bizarre results, since § 11341(a) does not exempt carriers from all law, but rather from all law *necessary* to carry out an *approved* transaction. Although it might be true that § 11341(a)'s scope is limited by § 11347, and that the breadth of the exemption is defined by the scope of the approved transaction, the conditions of approval and the standard for necessity are not at issue because the lower court did not pass on them and the parties do not challenge them here. Pp. 127–134.

279 U. S. App. D. C. 239, 880 F. 2d 562, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 134.

Jeffrey S. Berlin argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 89–1027 were *Mark E. Martin* and *William P. Stallsmith, Jr.* *James S. Whitehead, Nicholas S. Yovanovic,* and *James D. Tomola* filed briefs for petitioner in No. 89–1028.

Jeffrey S. Minear argued the cause for the federal respondents in support of petitioners in both cases pursuant to this Court's Rule 12.4. On the briefs were *Acting Solicitor General Roberts, Deputy Solicitor General Shapiro, Lawrence S. Robbins, Robert S. Burk, Henri F. Rush,* and *John J. McCarthy, Jr.*

William G. Mahoney argued the cause for the union respondents in both cases. With him on the brief was *John O'B. Clarke, Jr.*†

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†*Richard T. Conway, Ralph J. Moore, Jr., D. Eugenia Langan,* and *David P. Lee* filed a brief for the National Railway Labor Conference as *amicus curiae* urging reversal.

JUSTICE KENNEDY delivered the opinion of the Court.

The Interstate Commerce Commission has the authority to approve rail carrier consolidations under certain conditions. 49 U. S. C. § 11301 *et seq.* A carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . . ." § 11341(a). These cases require us to decide whether the carrier's exemption under § 11341(a) "from all other law" extends to its legal obligations under a collective-bargaining agreement. We hold that it does.

I

A

"Prior to 1920, competition was the *desideratum* of our railroad economy." *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315 (1954). Following a period of Government ownership during World War I, however, "many of the railroads were in very weak condition and their continued survival was in jeopardy." *Ibid.* At that time, the Nation made a commitment to railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry. Beginning with the Transportation Act of 1920, ch. 91, 41 Stat. 456, "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." *United States* v. *Lowden*, 308 U. S. 225, 232 (1939). See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, *supra*, at 315–321.

Chapter 113 of the Interstate Commerce Act, recodified in 1978 at 49 U. S. C. § 11301 *et seq.*, contains the current statement of this national policy. The Act grants the Interstate Commerce Commission exclusive authority to examine, condition, and approve proposed mergers and consolidations of

transportation carriers within its jurisdiction. § 11343(a)(1). The Act requires the Commission to "approve and authorize" the transactions when they are "consistent with the public interest." § 11344(c). Among the factors the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." § 11344(b)(1)(D).[1] In authorizing a merger or consolidation, the Commission "may impose conditions governing the transaction." § 11344(c). Once the Commission approves a transaction, a carrier is "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." § 11341(a).

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. § 11347. In *New York Dock Railway—Control—Brooklyn Eastern Dist. Terminal*, 360 I. C. C. 60, 84–90, aff'd *sub nom. New York Dock Railway* v. *United States*, 609 F. 2d 83 (CA2 1979), the Commission announced a comprehensive set of conditions and procedures designed to meet its obligations under § 11347. Section 2 of the *New York Dock* conditions provides that the "rates of pay, rules, working conditions and all collective

[1] Section 11344(b)(1) provides:

"In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

"(A) the effect of the proposed transaction on the adequacy of transportation to the public.

"(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

"(C) the total fixed charges that result from the proposed transaction.

"(D) the interest of carrier employees affected by the proposed transaction.

"(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region."

bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements." 360 I. C. C., at 84. Section 4 sets forth negotiation and arbitration procedures for resolution of labor disputes arising from an approved railroad merger. *Id.*, at 85. Under § 4, a merged or consolidated railroad which plans an operational change that may cause dismissal or displacement of any employee must provide the employee and his union 90 days' written notice. *Ibid.* If the carrier and union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited "final, binding and conclusive" determination by a neutral arbitrator. *Ibid.* Finally, the *New York Dock* conditions provide affected employees with up to six years of income protection, as well as reimbursements for moving costs and losses from the sale of a home. See *id.*, at 86–89 (§§ 5–9, 12).

B

The two cases before us today involve separate ICC orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements.

1. In No. 89–1027, the Commission approved an application by NWS Enterprises, Inc., to acquire control of two previously separate rail carriers, petitioners Norfolk and Western Railway Company (N&W) and Southern Railway Company (Southern). See *Norfolk Southern Corp.—Control—Norfolk & W. R. Co. and Southern R. Co.*, 366 I. C. C. 173 (1982). In its order approving control, the Commission imposed the standard *New York Dock* labor-protective conditions and noted the possibility that "further displacement [of employees] may arise as additional coordinations occur." 366 I. C. C., at 230–231.

In September 1986, this possibility became a reality. The carriers notified the American Train Dispatchers' Association, the bargaining representative for certain N&W employ-

ees, that they proposed to consolidate all "power distribution"—the assignment of locomotives to particular trains and facilities—for the N&W-Southern operation. To effect the efficiency move, the carriers informed the union that they would transfer work performed at the N&W power distribution center in Roanoke, Virginia, to the Southern center in Atlanta, Georgia. The carriers proposed an implementing agreement in which affected N&W employees would be made management supervisors in Atlanta, and would receive increases in wages and benefits in addition to the relocation expenses and wage protections guaranteed by the *New York Dock* conditions. The union contended that this proposal involved a change in the existing collective-bargaining agreement that was subject to mandatory bargaining under the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* The union also maintained that the carriers were required to preserve the affected employees' collective-bargaining rights, as well as their right to union representation under the RLA.

Pursuant to § 4 of the *New York Dock* procedures, the parties negotiated concerning the terms of the implementing agreement, but they failed to resolve their differences. As a result, the carriers invoked the *New York Dock* arbitration procedures. After a hearing, the arbitration committee ruled in the carriers' favor. The committee noted that the transfer of work to Atlanta was an incident of the control transaction approved by the ICC, and that it formed part of the "additional coordinations" the ICC predicted would be necessary to achieve "greater efficiencies." The committee also held it had the authority to abrogate the provisions of the collective-bargaining agreement and of the RLA as necessary to implement the merger. Finally, it held that because the application of the N&W bargaining agreement would impede the transfer, the transferred employees did not retain their collective-bargaining rights.

The union appealed to the Commission, which affirmed by a divided vote. It explained that "[i]t has long been the Commission's view that private collective bargaining agreements and [Railway Labor Act] provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." App. to Pet. for Cert. in No. 89–1027, p. 33a. Accordingly, the Commission upheld the arbitration committee's determination that the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.*, at 35a. The Commission also held that because the work transfer was incident to the approved merger, it was "immunized from conflicting laws by section 11341(a)." *Ibid.* Noting that "[i]mposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function," the Commission upheld the decision to override the collective-bargaining agreement and RLA provisions. *Id.*, at 37a.

2. In No. 89–1028, the Commission approved an application by CSX Corporation to acquire control of the Chessie System, Inc., and Seaboard Coastline Industries, Inc. *CSX Corp.—Control—Chessie System, Inc., and Seaboard Coastline Industries, Inc.*, 363 I. C. C. 521 (1980). Chessie was the parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railway Company; Seaboard was the parent of the Seaboard Coast Line Railroad Company. In approving the control acquisition, the Commission imposed the *New York Dock* conditions and recognized that "additional coordinations may occur that could lead to further employee displacements." 363 I. C. C., at 589.

In August 1986, the consolidated carrier notified respondent Brotherhood of Railway Carmen that it planned to close Seaboard's heavy freight car repair shop at Waycross, Georgia, and transfer the Waycross employees to Chessie's similar shop in Raceland, Kentucky. The carrier informed the Brotherhood that the proposed transfer would result in a net decrease of jobs at the two shops. Pursuant to *New York Dock*, the carrier and the union negotiated concerning the terms of an agreement to implement the transfer. The sticking point in the negotiations involved a 1966 collective-bargaining agreement between the union and Seaboard known as the "Orange Book." The Orange Book provided that the carrier would employ each covered employee and maintain each employee's work conditions and benefits for the remainder of the employee's working life. The Brotherhood contended that the Orange Book prevented CSX from moving work or covered employees from Waycross to Raceland.

When negotiations broke down, both the union and the carrier invoked the arbitration procedures under § 4 of *New York Dock*. The arbitration committee ruled for the carrier. It agreed with the union that the Orange Book prohibited the proposed transfer of work and employees. It determined, however, that it could override any Orange Book or RLA provision that impeded an operational change authorized or required by the ICC's decision approving the original merger. The committee then held that the carrier could transfer the heavy repair work, which it found necessary to the original control acquisition, but could not transfer employees protected by the Orange Book, which it found would only slightly impair the original control acquisition. Both parties appealed the award to the Commission.

A divided Commission affirmed in part and reversed in part. The Commission agreed the committee possessed authority to override collective-bargaining rights and RLA rights that prevent implementation of a proposed transac-

tion. It reasoned, however, that "[i]mposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 4 I. C. C. 2d 641, 650 (1988). The Commission thus affirmed the arbitration committee's order permitting the transfer of work but reversed the holding that the carriers could not transfer Orange Book employees.

3. The unions appealed both cases to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals considered the cases together and reversed and remanded to the Commission. *Brotherhood of Railway Carmen* v. *ICC*, 279 U. S. App. D. C. 239, 880 F. 2d 562 (1989). The court held that § 11341(a) does not authorize the Commission to relieve a party of collective-bargaining agreement obligations that impede implementation of an approved transaction. The court stated various grounds for its conclusion. First, because the court did not read the phrase "all other law" in § 11341(a) to include "all legal obstacles," it found "no support in the language of the statute" to apply the statute to obligations imposed by collective-bargaining agreements. *Id.*, at 244, 880 F. 2d, at 567. Second, the court analyzed the Transportation Act of 1920, ch. 91, § 407, 41 Stat. 482, which contained a predecessor to § 11341(a), and found that Congress "did not intend, when it enacted the immunity provision, to override contracts." 279 U. S. App. D. C., at 247, 880 F. 2d, at 570. The court noted that Congress had "focused nearly exclusively . . . on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a contract." *Ibid.* The court further noted that Congress had often revisited the immunity provision without making it clear that it included contracts or collective-bargaining agreements. *Ibid.* Finally, the court did not defer to the ICC's interpretation of the Act, presumably because it determined that the Commission's interpretation was belied by the contrary "'unambigu-

ously expressed intent of Congress,'" *id.*, at 244, 880 F. 2d, at 567 (quoting *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984)).

In ruling that § 11341(a) did not apply to collective-bargaining agreements, the court "decline[d] to address the question" whether the section could operate to override provisions of the RLA. *Brotherhood of Railway Carmen, supra*, at 247–250, 880 F. 2d, at 570–573. It also declined to consider whether the labor-protective conditions required by § 11347 are exclusive, or whether § 4 of the *New York Dock* conditions gives an arbitration committee the right to override provisions of a collective-bargaining agreement. 279 U. S. App. D. C., at 250, 880 F. 2d, at 573. The court remanded the case to the Commission for a determination on these issues.

After the Court of Appeals denied the carriers' petitions for rehearing, the carriers in the consolidated cases filed petitions for certiorari, which we granted on March 26, 1990. 494 U. S. 1055.[2] We now reverse.

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[2] On September 9, 1989, the Commission also filed a petition for rehearing, and requested the court to refrain from ruling on the petition until the Commission could issue a comprehensive decision on remand addressing issues that the Court of Appeals left open for resolution. On September 29, 1989, the Court of Appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand." App. to Pet. for Cert. in No. 89–1027, p. 54a.

On January 4, 1990, the Commission reopened proceedings in the case remanded to it. On May 21, 1990, two months after we granted the carriers' petitions for certiorari, the Commission issued its remand decision. *CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc.*, 6 I. C. C. 2d 715. In its decision, the Commission adhered to the Court of Appeals' ruling that § 11341(a) did not authorize it to override provisions of a collective-bargaining agreement. The Commission held, however, that § 11341(a) authorized it to foreclose resort to RLA remedies for modification and enforcement of collective-bargaining agreements "at least to the extent of [its] authority" to impose labor-protective conditions under § 11347. *Id.*, at 754. The Commission explained that the § 11347 limit on its § 11341(a) authority "reflects the consistency of the

II

Title 49 U. S. C. § 11341(a) provides:

> ". . . A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . ."

We address the narrow question whether the exemption in § 11341(a) from "all other law" includes a carrier's legal obligations under a collective-bargaining agreement.

By its terms, the exemption applies only when *necessary* to carry out an *approved* transaction. These predicates, however, are not at issue here, for the Court of Appeals did not pass on them and the parties do not challenge them. For purposes of this decision, we assume, without deciding, that the Commission properly considered the public interest factors of § 11344(b)(1) in approving the original transaction, that its decision to override the carriers' obligations is consistent with the labor-protective requirements of § 11347, and that the override was necessary to the implementation of the transaction within the meaning of § 11341(a). Under these

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overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations." *Id.*, at 722. The Commission remanded its decision to the parties for further negotiation or arbitration.

On December 4, 1990, the union respondents petitioned the Court of Appeals for review of the Commission's remand decision. The petition raises three issues: (1) whether § 11341(a) authorizes the ICC to foreclose employee resort to the RLA; (2) whether § 11347 authorizes the ICC to compel employees to arbitrate changes in collective-bargaining agreements; and (3) whether abrogation of employee contract rights effected a taking in violation of the Due Process and Just Compensation Clauses of the Fifth Amendment.

assumptions, we hold that the exemption from "all other law" in § 11341(a) includes the obligations imposed by the terms of a collective-bargaining agreement.[3]

As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U. S., at 842–843. The contested language in § 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability. Nor does it support the Court of Appeals' conclusion that Congress did not intend the immunity clause to apply to contractual obligations.

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[3] On May 23, 1990, and again on September 19, 1990, the union respondents filed motions to dismiss the case as moot. They argued that in light of the alternative ground for decision offered by the ICC on remand from the Court of Appeals, see n. 2, *supra*, the meaning and scope of § 11341(a) was no longer material to the dispute. The union respondents reassert their mootness argument in their brief on the merits. Brief for Respondent Unions 18.

We disagree. The Commission predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of § 11341(a). Thus, our definitive interpretation of § 11341(a) may affect the Commission's remand order. Agency compliance with the Court of Appeals' mandate does not moot the issue of the correctness of the court's decision. See, *e. g.*, *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U. S. 788, 791, n. 1 (1985); *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 42, n. 12 (1981); *Maher* v. *Roe*, 432 U. S. 464, 468–469, n. 4 (1977). In addition, the alternative basis offered by the Commission on remand does not end the controversy between the parties. The parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the Commission's interpretation of the Act in its review of the remand order.

By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result. Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. See *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 84–85 (1990). The canon does not control, however, when the whole context dictates a different conclusion. Here, there are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes. First, because "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 350 (1963), Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of § 11341(a). Second, the otherwise general term "all other law" "includ[es]" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws. In short, the immunity provision in § 11341 means what it says: A carrier is exempt from *all law* as necessary to carry out an ICC-approved transaction.

The exemption is broad enough to include laws that govern the obligations imposed by contract. "The obligation of a contract is 'the law which binds the parties to perform their agreement.'" *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429 (1934) (quoting *Sturges* v. *Crowninshield*, 4 Wheat. 122, 197 (1819)). A contract depends on a re-

gime of common and statutory law for its effectiveness and enforcement.

> "Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank of Richmond*, 262 U. S. 649, 660 (1923).

A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in § 11341(a) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.

Schwabacher v. *United States*, 334 U. S. 182 (1948), which construed the immediate precursor of § 11341(a), § 5(11) of the Transportation Act of 1940, ch. 722, § 7, 54 Stat. 908–909,[4] supports this conclusion. In *Schwabacher*, minority stockholders in a carrier involved in an ICC-approved merger complained that the terms of the merger diminished the value of their shares as guaranteed by the corporate char-

[4] Section 5(11) of the Transportation Act of 1940 provided:

"[A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ."

The recodification of this language in § 11341(a) effected no substantive change. See H. R. Rep. No. 95–1395, pp. 158–160 (1978). See also *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 299, n. 12 (1987) (STEVENS, J., concurring in judgment).

ter and thus "deprived [them] of contract rights under Michigan law . . . ." 334 U. S., at 188. We explained that the Commission was charged under the Act with passing upon and approving all capital liabilities assumed or discharged by the merged company, and that once the Commission approved a merger in the public interest and on just and reasonable terms, the immunity provision relieved the parties to the merger of "restraints, limitations, and prohibitions of law, Federal, State, or municipal," as necessary to carry out the transaction. *Id.*, at 194–195, 198. We noted that before approving the merger, the Commission had a duty "to see that minority interests are protected," and emphasized that any such minority rights were, "as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.*, at 201. Once these interests were accounted for, however, "[i]t would be inconsistent to allow state law to apply a liquidation basis [for valuation] to what federal law designates as a basis for continued public service." *Id.*, at 200. Relying in part on the immunity provision, we held the contract rights protected by state law did not survive the merger agreement found by the Commission to be in the public interest. *Id.*, at 194–195, 200–201. Because the Commission had disclaimed jurisdiction to settle the shareholders' complaints, we remanded the case to the Commission to ensure that the terms of the merger were just and reasonable. *Id.*, at 202.

Just as the obligations imposed by state contract law did not survive the merger at issue in *Schwabacher*, the obligations imposed by the law that gives force to the carriers' collective-bargaining agreements, the RLA, do not survive the merger in this case. The RLA governs the formation, construction, and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts "to make and maintain" collective-bargaining agreements, 45 U. S. C. § 152 First, and to refrain from making changes in existing agreements except in

accordance with RLA procedures, 45 U. S. C. §§ 152 Seventh, 156. The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 242 (1950). As the law which gives "legal and binding effect to collective agreements," *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142, 156 (1969), the RLA is the law that, under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective-bargaining obligations. See *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 287 (1987) (STEVENS, J., concurring in judgment); *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F. 2d 794, 801 (CA1 1986); *Missouri Pacific R. Co.* v. *United Transportation Union*, 782 F. 2d 107, 111 (CA8 1986); *Burlington Northern, Inc.* v. *American Railway Supervisors Assn.*, 503 F. 2d 58, 62–63 (CA7 1974); *Bundy* v. *Penn Central Co.*, 455 F. 2d 277, 279–280 (CA6 1972); *Nemitz* v. *Norfolk & Western R. Co.*, 436 F. 2d 841, 845 (CA6), aff'd, 404 U. S. 37 (1971); *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. R. Co.*, 314 F. 2d 424 (CA8 1963); *Texas & N. O. R. Co.* v. *Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 161–162 (CA5 1962); *Railway Labor Executives Assn.* v. *Guilford Transp. Industries, Inc.*, 667 F. Supp. 29, 35 (Me. 1987), aff'd, 843 F. 2d 1383 (CA1 1988).

Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Texas* v. *United States*, 292 U. S. 522, 534–535 (1934). The Act requires the Commission to approve consolidations in the public interest. 49 U. S. C. § 11343(a)(1). Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to

transferred employees" as well as "the loss of seniority rights," *United States* v. *Lowden*, 308 U. S. 225, 233 (1939), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. 49 U. S. C. §§ 11344(b)(1)(D), 11347; see also *New York Dock Railway—Control—Brooklyn Eastern Dist. Terminal*, 360 I. C. C. 60 (1979). Section 11341(a) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If § 11341(a) did not apply to bargaining agreements enforceable under the RLA, rail carrier consolidations would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, *e. g.*, *Burlington Northern R. Co.* v. *Maintenance of Way Employes*, 481 U. S. 429, 444 (1987) (resolution procedures for major disputes "virtually endless"); *Detroit & T. S. L. R. Co.* v. *United Transportation Union*, 396 U. S. 142, 149 (1969) (dispute resolution under RLA involves "an almost interminable process"); *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238, 246 (1966) (RLA procedures are "purposely long and drawn out"). The immunity provision of § 11341(a) is designed to avoid this result.

We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in § 11341(a) includes any obstacle imposed by law. In this case, the term "all other law" in § 11341(a) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission's interpretation of § 11341(a), not out of deference in the face of an

ambiguous statute, but rather because the Commission's interpretation is the correct one.

This reading of § 11341(a) will not, as the Court of Appeals feared, lead to bizarre results. *Brotherhood of Railway Carmen* v. *ICC*, 279 U. S. App. D. C., at 244, 880 F. 2d, at 567. The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by § 11347, which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, *supra*. It also might be true that "[t]he breadth of the exemption [in § 11341(a)] is defined by the scope of the approved transaction . . . ." *ICC* v. *Locomotive Engineers*, *supra*, at 298 (STEVENS, J., concurring in judgment). We express no view on these matters, as they are not before us here.

The judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The statutory exemption that the Court construes today had its source in § 407 of the Transportation Act of 1920 (1920 Act). 41 Stat. 482. Its wording was slightly changed in 1940, 54 Stat. 908–909, and again in 1978, 92 Stat. 1434. There is, however, no claim that either of those amendments modified the coverage of the exemption in any way. It is therefore appropriate to begin with a consideration of the purpose and the text of the 1920 Act.

Before the First World War, the railroad industry had been the prime target of antitrust enforcement.[1] In 1920, however, Congress adopted a new national transportation policy that expressly favored the consolidation of railroads. The policy of consolidation embodied in the 1920 Act would obviously have been frustrated by the federal antitrust laws had Congress not chosen to exempt explicitly all approved mergers from these laws. Section 407 of that Act provided, in part:

> "The carriers affected by any order made under the foregoing provisions of this section . . . shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' . . . and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat. 482.

Both the background and the text of § 407 make it absolutely clear that its primary focus was on federal antitrust laws. Sensibly, however, Congress wrote that section using language broad enough to cover any other federal or state law that might otherwise forbid the consummation of any approved merger or prevent the immediate operation of its properties under a new corporate owner. Not a word in the statute, or in its legislative history, contains any hint that the approval of a merger by the Interstate Commerce Commission (ICC) would impair the obligations of valid and otherwise enforceable private contracts.

Given the present plight of our Nation's railroads, it may be wise policy to give the ICC a power akin to, albeit greater

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[1] See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *United States* v. *Joint Traffic Assn.*, 171 U. S. 505 (1898); *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904); *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383 (1912); *United States* v. *Union Pacific R. Co.*, 226 U. S. 61 (1912); *United States* v. *Pacific & Arctic R. & Nav. Co.*, 228 U. S. 87 (1913).

than, that of a bankruptcy court to approve a trustee's rejection of a debtor's executory private contracts.[2] Through nothing short of a *tour de force*, however, can one find any such power in 49 U. S. C. § 11341, or in either of its predecessors. Obviously, consolidated carriers would find it useful to have the ability to disavow disadvantageous long-term leases on obsolete car repair facilities, employment contracts with high salaried executives whose services are no longer needed, as well as collective-bargaining agreements that provide costly job security to a shrinking work force. If Congress had intended to give the ICC such broad ranging power to impair contracts, it would have done so in language much clearer than anything that can be found in the present Act.

The Court's contrary conclusion rests on its reading of the "plain meaning" of the present statutory text and our decision in *Schwabacher* v. *United States*, 334 U. S. 182 (1948). Neither of these reasons is sufficient. Moreover, the Court's reading is inconsistent with other unambiguous provisions in the statute.

I

With or without the *ejusdem generis* canon, I believe that the normal reader would assume that the text of § 11341 encompasses the antitrust laws, as well as other federal or state laws, that would otherwise prohibit rail carriers from consummating approved mergers, and nothing more. See *ante*, at 128. That text contains no suggestion that whenever a criminal law, tort law, or any regulatory measure impedes the efficient operation of a new merged carrier, the carrier can avoid such a restriction by virtue of the ICC approval of that merger. Nor does the text of § 11341 contain any sug-

[2] Section 365 of the Bankruptcy Code, 11 U. S. C. § 365, allows a trustee to assume or reject a debtor's executory contracts and unexpired leases subject to the *subsequent* approval of the bankruptcy court. Collective-bargaining agreements can be rejected only if the additional requirements of 11 U. S. C. § 1113 are met.

gestion that such an approval would impair the obligation of private contracts.[3] Rather, as both an application of the *ejusdem generis* canon and an examination of the legislative history show, the purpose of the exemption was to relieve the carriers "from the operation of the antitrust *and other restrictive or prohibitory laws.*" H. R. Conf. Rep. No. 650, 66th Cong., 2d Sess., 64 (1920) (emphasis added).

The Court speculates that the reason the 1920 Congress explicitly referred to the antitrust laws was simply to avoid the force of the rule that repeals of the antitrust laws by implication are not favored, citing *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 350 (1963). In that case, however, the rule was announced in the context of the industry's argument that federal regulatory approval of a transaction exempted the transaction from the antitrust laws even though the regulatory statute was entirely silent on the subject of exemption. *Ibid.* The authority cited in the *Phila-*

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[3] As Judge D. H. Ginsburg, writing for the Court of Appeals, noted:

"We cannot sustain the ICC's position that this provision empowers it to override a [collective-bargaining agreement (CBA)]. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, § 11341(a) contemplates exemption only from 'the antitrust laws and from all other law' to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to CBAs. Nor has the ICC explained how we can read the term 'other law,' as it has done, to mean 'all legal obstacles.' *Dispatchers*, J. A. 207. None of the Supreme Court decisions, discussed below, authorizing the ICC to abrogate an 'other law' even suggests that the term means 'all legal obstacles.' The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. See *Gulf, Mobile & Ohio R. R. Co.—Abandonment*, 282 I. C. C. 311, 335 (1952) ('None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.')." *Brotherhood of Railway Carmen* v. *ICC*, 279 U. S. App. D. C. 239, 244, 880 F. 2d 562, 567 (1989).

delphia decision to support this rule sheds no light on the question whether a statute creating a broad exemption for mergers would naturally be read to include all statutes that otherwise would have prohibited the consummation of a merger of large rail carriers.[4]

Of greater importance, however, is the Court's rather remarkable assumption that an exemption "from 'all other

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[4] All but two of the cases that the Court cited in the *Philadelphia* decision to support the rule against implicit repeals of the antitrust statutes arose under a regulatory framework in which there was no mention of exemption. *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321, 350, n. 28 (1963). See *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S., at 314–315; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505 (1898); *Northern Securities Co.* v. *United States*, 193 U. S., at 343, 374–376 (plurality and dissenting opinions); *United States* v. *Pacific & Arctic R. & Nav. Co.*, 228 U. S., at 105, 107; *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 161–162 (1922); *Central Transfer Co.* v. *Terminal Railway Assn. of St. Louis*, 288 U. S. 469, 474–475 (1933); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500, 513–515 (1936); *United States* v. *Borden Co.*, 308 U. S. 188, 197–206 (1939); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 226–228 (1940); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457 (1945); *United States Alkali Export Assn., Inc.* v. *United States*, 325 U. S. 196, 205–206 (1945); *Allen Bradley Co.* v. *Electrical Workers*, 325 U. S. 797, 809–810 (1945); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 9 (1958); *United States* v. *Radio Corp. of America*, 358 U. S. 334 (1959); *California* v. *FPC*, 369 U. S. 482 (1962); *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963). The other two cases involve regulations with explicit exemptions from the antitrust laws, but do not support the position taken by the Court in this case. In *Maryland & Virginia Milk Producers Assn., Inc.* v. *United States*, 362 U. S. 458 (1960), this Court held that § 6 of the Clayton Act's exemption of agricultural cooperatives from the antitrust law only protected the formation of those associations; once formed they could not engage in any further conduct that would violate the antitrust laws. In *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), the Court held that the exemption relieving airlines from the operation of the antitrust laws when certain transactions were approved by the Civil Aeronautics Board did not exempt the airlines from all antitrust violations, but only exempted them from violations stemming from activity explicitly governed by the regulatory scheme.

law'" should be read to encompass the restraints created by private contract.[5] *Ante*, at 129–130. Even if the text of the present Act could bear that reading, it is flatly inconsistent with the text of the 1920 Act, which relieved the participating carriers "from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions by law, State or federal . . . ." 41 Stat. 482. Moreover, given the respect that our legal system has always paid to the enforceability of private contracts—a respect that is evidenced by express language in the Constitution itself[6]—there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws. Had Congress intended to convey the message the Court finds in § 11341, it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract.[7]

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[5] Again Judge Ginsburg's observation is pertinent:

"Moreover, the ICC's proposed insertion of 'all legal obstacles' into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. *Cf. Gulf, Mobile & Ohio*, 282 I. C. C. at 331–35 (declaring itself without power, in an abandonment context, to relieve a carrier from its 'contractual obligations for the payment of rent'). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act." 279 U. S. App. D. C., at 244–245, 880 F. 2d, at 567–568.

[6] "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U. S. Const., Art. I, § 10, cl. 1.

[7] After reviewing the legislative history, Judge Ginsburg concluded:

"From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate—all of which were positive enactments, not common law rules of liability, as on a con-

II

In my opinion, the Court's reliance on the decision in *Schwabacher* v. *United States*, 334 U. S. 182 (1948), is misplaced. In that case, the owners of two percent of the outstanding preferred stock of the Pere Marquette Railway brought suit in the United States District Court to set aside an ICC order approving a merger between that corporation and the Chesapeake and Ohio Railway Corporation. In approving the merger, the ICC had found that the market value of plaintiffs' preferred shares ranged, at different times, from $87 to $99 per share, and that the stock that they received in exchange pursuant to the merger agreement would have realized about $90 and $111 on the same dates. Thus, the terms of the merger, as applied to the plaintiffs' class, were just and reasonable. Plaintiffs contended, however, that the exchange value of their shares amounted to $172.50 per share because the merger was a "liquidation" as a matter of Michigan law, and the Pere Marquette Charter provided that in the event of liquidation or dissolution, the preferred shareholders were entitled to receive full payment of par value plus all accrued unpaid dividends.

The ICC order approving the merger did not resolve the Michigan law question. The ICC considered the issue too insignificant to affect the validity of the entire transaction, and left the matter for resolution by negotiation or later litigation. On appeal from the District Court's judgment sustaining the ICC order, this Court held that the ICC's finding that the exchange value was just and reasonable foreclosed any other claim that the dissenting shareholders might assert

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tract. *Cf. Association of Flight Attendants* v. *Delta Air Lines, Inc.*, 879 F. 2d 906, 917 (D. C. Cir. 1989). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties." 279 U. S. App. D. C., at 247, 880 F. 2d, at 570.

concerning the value of their shares. Whatever Michigan law might provide for the preferred shareholders in the event of a winding-up or liquidation could not determine the just and reasonable value of shares in the continuing enterprise. The essence of the Court's holding is set forth in this passage:

> "Since the federal law clearly contemplates merger as a step in continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal law designates as a basis for continued public service. . . .
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> . . . . . .
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> "We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id.*, at 200–201.

It is true that the effect of the *Schwabacher* decision was to extinguish whatever contractual rights the dissenting shareholders possessed as a matter of Michigan law. But the Court did require the ICC, on remand, to consider whatever value the Michigan law claims might have in connection with its final conclusion that the merger plan was "just and reasonable." A fair reading of the entire opinion makes it clear that the holding was based more on the ICC's "complete control of the capital structure to result from a merger," *id.*, at 195, than on the exemption at issue in these cases. *Schwabacher* cannot fairly be read as authorizing carriers to renounce private contracts that limit the benefits achievable through the merger.

III

There is tension between the Court's interpretation of the exemption that is now codified in 49 U. S. C. § 11341(a) and the labor-protection conditions set forth in 49 U. S. C. § 11347. The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, 45 U. S. C. § 565. One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the *New York Dock* conditions described by the Court, *ante*, at 120–121. As the Court notes, that condition provides that the benefits protected "'under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements.'" *Id.*, at 121 (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining agreements would survive any ICC approved merger.

As I noted in my separate opinion in *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 298 (1987), the statutory immunity provision in § 11341 is self-executing and becomes effective at the time of the ICC approval. "The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." *Ibid.* (footnote omitted). In neither of the cases before the Court today did the ICC approval of the merger purport to modify or terminate any collective-bargaining agreement. The ICC approval orders were entered in 1980 and 1982 and contained no mention of either of the proposed transfers of personnel that are now at issue and about which the union was first notified several years after the ICC orders were entered.[8]

[8] In the ICC order approving the merger of Chessie System, Inc., and Seaboard Coastline Industries, Inc., the ICC discussed how the coordination of facilities would generate significant cost reductions and improved

I cannot subscribe to a late-blooming interpretation of a 71-year-old immunity statute that gives the Commission a roving power—exercisable years after a merger has been approved and consummated—to impair the obligations of private contracts that may "prevent the efficiencies of consolidation from being achieved." *Ante*, at 133. The Court's decision may represent a "better" policy choice than the one Congress actually made in 1920, cf. *West Virginia University Hospitals, Inc.* v. *Casey*, *ante*, at 100–101, but it is neither an accurate reading of the command that Congress issued in 1920, nor is it a just disposition of claims based on valid private contracts.

I respectfully dissent.

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economic efficiency. *CSX Corp.—Control—Chessie System, Inc., and Seaboard Coastline Industries, Inc.*, 363 I. C. C. 521, 556 (1980). The ICC noted:

"These savings will spring from common-point coordination projects, mechanical and engineering department coordinations, locomotive and car utilization improvements, and internal rerouting efficiencies. Each of these projects is discussed separately below." *Ibid.*

In the discussion that followed, the ICC did discuss plans to expand the car production facilities at Raceland, Kentucky, in order to make cars for a member line that had been buying its cars from an independent manufacturer. The ICC found that the applicants had failed to show that the public would derive any benefit from this plan. There was no discussion of the consolidation of that facility by closing Seaboard's car repair shop in Waycross, Georgia. Nor did the ICC discuss the consolidation of locomotive works in *Norfolk Southern Corp.—Control—Norfolk & W. R. Co. and Southern R. Co.*, 366 I. C. C. 173 (1982).

MARTIN, SECRETARY OF LABOR *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL.

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

No. 89–1541. Argued November 27, 1990—Decided March 20, 1991

The Occupational Safety and Health Act of 1970 assigns distinct regulatory tasks to two independent administrative actors: petitioner Secretary of Labor is charged with setting and enforcing workplace health and safety standards, and respondent Occupational Safety and Health Review Commission is responsible for carrying out adjudicatory functions. The Act also requires a court of appeals reviewing a Commission order to treat as "conclusive" Commission findings of fact that are "supported by substantial evidence." In this case, having found that respondent CF&I Steel Corporation had equipped some of its employees with loose-fitting respirators that exposed them to impermissible coke-oven emission levels, the Secretary issued a citation to CF&I and assessed a monetary penalty against it for violating a regulation promulgated by the Secretary requiring an employer to institute a respiratory protection program. The Commission vacated the citation, ruling that the facts did not establish a violation of that regulation, which was the sole asserted basis for liability, since the regulation expressly requires only that an employer train employees in the proper use of respirators, whereas another regulation expressly states the employer's obligation to assure a proper fit. The Court of Appeals affirmed, holding that where, as here, the relevant regulations are ambiguous, a reviewing court must defer to the Commission's reasonable interpretation rather than the Secretary's interpretation, since Congress intended to delegate to the Commission the normal complement of adjudicative powers possessed by traditional administrative agencies, including the power to "'declare' the law." Concluding that the Commission's interpretation was a reasonable one, the court did not assess the reasonableness of the Secretary's competing view.

Held: A reviewing court should defer to the Secretary when the Secretary and the Commission furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the Act. Pp. 150–159.

(a) It must be inferred from the Act's unusual "split enforcement" structure and from its legislative history that the power to render authoritative interpretations of the Secretary's regulations is a necessary adjunct of the Secretary's rulemaking and enforcement powers. The

Secretary, as the promulgator of standards, is in a better position than the Commission to reconstruct the purpose of particular regulations. Moreover, since the Secretary, as enforcer, comes into contact with a much greater number of regulatory problems than does the Commission, the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation. Furthermore, dividing the power to make and enforce standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implementing the Act's policy objectives, an outcome inconsistent with Congress' intent in combining legislative and enforcement powers in the Secretary. It must also be concluded that Congress did not intend to endow the Commission with the normal adjudicative powers possessed by a traditional, unitary agency. Such an agency permissibly uses adjudication to engage in lawmaking and policymaking only because it also has been delegated the power to make law and policy through rulemaking and necessarily interprets regulations that *it* has promulgated. The more plausible inference is that the Commission was meant to have the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context, such that the Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness and possesses no more power than is necessary to make authoritative findings of fact and to apply the Secretary's standards to those facts in making a decision. Although the Commission was established in response to concerns that combining rulemaking, enforcement, and adjudicatory power in the Secretary would leave employers unprotected from prosecutorial bias, such concerns are dispelled by the vesting of authoritative factfinding and review powers in a body wholly independent of the administrative enforcer; regulated parties are protected from biased interpretations when the Commission and ultimately the court of appeals review the Secretary's interpretation for reasonableness. Nor is such an interpretation, when furnished in the course of an administrative adjudication, a mere "litigating position" undeserving of judicial deference under this Court's precedents. Since such an interpretation *is* agency action, not a *post hoc* rationalization of it, and assumes a form expressly provided for by Congress when embodied in a citation, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of health and safety standards. Pp. 150–157.

(b) The reviewing court should defer to the Secretary only if the Secretary's interpretation of an ambiguous regulation *is* reasonable. That interpretation is subject to the same Administrative Procedure Act standard of substantive review that applies to any other exercise of dele-

gated lawmaking power. Moreover, the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, the quality of the Secretary's elaboration of pertinent policy considerations, and other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers. Since the Court of Appeals did not address the reasonableness of the Secretary's interpretation, it, rather than this Court, must do so in the first instance on remand. Pp. 157–159.

891 F. 2d 1495, reversed and remanded.

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

Clifford M. Sloan argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Deputy Solicitor General Shapiro*, *Allen H. Feldman*, and *Mark S. Flynn*.

John D. Faught argued the cause for respondent CF&I Steel Corp. With him on the brief were *Randy L. Sego* and *Michael W. Coriden*.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we consider the question to whom should a reviewing court defer when the Secretary of Labor and the Occupational Safety and Health Review Commission furnish reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary under the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U. S. C. § 651 *et seq.* The Court of Appeals

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**George H. Cohen*, *Jeremiah A. Collins*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for nominal respondent Occupational Safety and Health Review Commission by *Robert C. Gombar*, *Glen D. Nager*, and *Earl R. Ohman, Jr.*; for the American Iron and Steel Institute by *Albert J. Beveridge III* and *Barton C. Green*; for the Chamber of Commerce of the United States of America et al. by *Stephen A. Bokat* and *Robin S. Conrad*; and for the National Association of Manufacturers et al. by *W. Scott Railton*, *Jan S. Amundson*, *Quentin Riegel*, and *William H. Crabtree*.

concluded that it should defer to the Commission's interpretation under such circumstances. We reverse.

I

A

The Occupational Safety and Health Act of 1970 (OSH Act or Act) establishes a comprehensive regulatory scheme designed "to assure so far as possible . . . safe and healthful working conditions" for "every working man and woman in the Nation." 29 U. S. C. §651(b). See generally *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U. S. 442, 444–445 (1977). To achieve this objective, the Act assigns distinct regulatory tasks to two different administrative actors: the Secretary of Labor (Secretary); and the Occupational Safety and Health Review Commission (Commission), a three-member board appointed by the President with the advice and consent of the Senate. 29 U. S. C. §§651(b)(3), 661.

The Act charges the Secretary with responsibility for setting and enforcing workplace health and safety standards. See *Cuyahoga Valley R. Co.* v. *United Transportation Union*, 474 U. S. 3, 6–7 (1985) *(per curiam)*. The Secretary establishes these standards through the exercise of rulemaking powers. See 29 U. S. C. §665. If the Secretary (or the Secretary's designate) determines upon investigation that an employer is failing to comply with such a standard, the Secretary is authorized to issue a citation and to assess the employer a monetary penalty. §§658–659, 666.[1]

The Commission is assigned to "carr[y] out adjudicatory functions" under the Act. §651(b)(3). If an employer

[1] The Secretary has delegated certain statutory responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration. See Secretary of Labor's Order No. 12–71, 36 Fed. Reg. 8754 (1971); Order No. 8–76, 41 Fed. Reg. 25059 (1976); Order No. 9–83, 48 Fed. Reg. 35736 (1983).

wishes to contest a citation, the Commission must afford the employer an evidentiary hearing and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." § 659(c). Initial decisions are made by an administrative law judge (ALJ), whose ruling becomes the order of the Commission unless the Commission grants discretionary review. § 661(j). Both the employer and the Secretary have the right to seek review of an adverse Commission order in the court of appeals, which must treat as "conclusive" Commission findings of fact that are "supported by substantial evidence." § 660(a)–(b).

B

This case arises from the Secretary's effort to enforce compliance with OSH Act standards relating to coke-oven emissions. Promulgated pursuant to the Secretary's rulemaking powers, these standards establish maximum permissible emissions levels and require the use of employee respirators in certain circumstances. See 29 CFR § 1910.1029 (1990). An investigation by one of the Secretary's compliance officers revealed that respondent CF&I Steel Corporation (CF&I) had equipped 28 of its employees with respirators that failed an "atmospheric test" designed to determine whether a respirator provides a sufficiently tight fit to protect its wearer from carcinogenic emissions. As a result of being equipped with these loose-fitting respirators, some employees were exposed to coke-oven emissions exceeding the regulatory limit. Based on these findings, the compliance officer issued a citation to CF&I and assessed it a $10,000 penalty for violating 29 CFR § 1910.1029(g)(3) (1990), which requires an employer to "institute a respiratory protection program in accordance with § 1910.134." CF&I contested the citation.

The ALJ sided with the Secretary, but the full Commission subsequently granted review and vacated the citation. See *CF&I*, 12 OSHC 2067 (1986). In the Commission's view, the "respiratory protection program" referred to in

§ 1910.1029(g)(3) expressly requires only that an employer train employees in the proper use of respirators;[2] the obligation to assure proper fit of an individual employee's respirator, the Commission noted, was expressly stated in another regulation, namely, § 1910.1029(g)(4)(i).[3] See 12 OSHC, at 2077–2078. Reasoning, *inter alia*, that the Secretary's interpretation of § 1910.1029(g)(3) would render § 1910.1029 (g)(4) superfluous, the Commission concluded that the facts alleged in the citation and found by the ALJ did not establish a violation of § 1910.1029(g)(3). See 12 OSHC, at 2078–2079. Because § 1910.1029(g)(3) was the only asserted basis for liability, the Commission vacated the citation. See *id.*, at 2079.

The Secretary petitioned for review in the Court of Appeals for the Tenth Circuit, which affirmed the Commission's order. See *Dole* v. *Occupational Safety and Health Review Commission*, 891 F. 2d 1495 (1989). The court concluded that the relevant regulations were ambiguous as to the employer's obligation to assure proper fit of an employee's respirator. The court thus framed the issue before it as *whose* reasonable interpretation of the regulations, the Secretary's or the Commission's, merited the court's deference. See *id.*, at 1497. The court held that the Commission's interpreta-

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[2] "For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere." 29 CFR § 1910.134(e)(5) (1990).

[3] This regulation states in pertinent part: "*Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." § 1910.1029. According to the Commission, the compliance officer who issued the citation "acknowledged that [§ 1910.1029(g)(4)(i)] applied," and "that he might have cited the wrong standard." *CF&I*, 12 OSHC 2067, 2078 (1986).

tion was entitled to deference under such circumstances, reasoning that Congress had intended to delegate to the Commission "the normal complement of adjudicative powers possessed by traditional administrative agencies" and that "[s]uch an adjudicative function necessarily encompasses the power to 'declare' the law." *Id.*, at 1498. Although the court determined that it would "certainly [be] possible to reach an alternate interpretation of the ambiguous regulatory language," the court nonetheless concluded that the Commission's interpretation was a reasonable one. *Id.*, at 1500. The court therefore deferred to the Commission's interpretation without assessing the reasonableness of the Secretary's competing view. See *ibid.*

The Secretary thereafter petitioned this Court for a writ of certiorari. We granted the petition in order to resolve a conflict among the Circuits on the question whether a reviewing court should defer to the Secretary or to the Commission when these actors furnish reasonable but conflicting interpretations of an ambiguous regulation under the OSH Act.[4] 497 U. S. 1002 (1990).

II

It is well established "that an agency's construction of its own regulations is entitled to substantial deference." *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986); accord, *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965). In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," *Ehlert* v. *United States*, 402

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[4] Compare *Brock* v. *Williams Enterprises of Georgia, Inc.*, 832 F. 2d 567, 569–570 (CA11 1987) (deference to Secretary); *United Steelworkers of America* v. *Schuylkill Metals Corp.*, 828 F. 2d 314, 319 (CA5 1987) (same); and *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F. 2d 61, 65–66 (CA1 1985) (same), with *Brock* v. *Cardinal Industries, Inc.*, 828 F. 2d 373, 376, n. 4 (CA6 1987) (deference to Commission); *Brock* v. *Bechtel Power Corp.*, 803 F. 2d 999, 1000–1001 (CA9 1986) (same); and *Marshall* v. *Western Electric, Inc.*, 565 F. 2d 240, 244 (CA2 1977) (same).

U. S. 99, 105 (1971), that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations," *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U. S. 12, 15 (1975). Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566, 568 (1980). The question before us in this case is to which administrative actor—the Secretary or the Commission—did Congress delegate this "interpretive" lawmaking power under the OSH Act.[5]

To put this question in perspective, it is necessary to take account of the unusual regulatory structure established by the Act. Under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority. See, *e. g.*, 15 U. S. C. § 41 *et seq.* (Federal Trade Commission); 15 U. S. C. §§ 77s–77u (Securities and Exchange Commission); 47 U. S. C. § 151 *et seq.* (Federal Communications Commission). Under the OSH Act, however, Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two *different* administrative authorities. The purpose of this "split enforcement" structure was to achieve a greater separation of functions than exists within the traditional "unitary" agency, which under the Administrative Procedure Act (APA) generally must divide enforcement and adjudication between separate personnel, see 5 U. S. C. § 554(d). See generally Johnson, The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences, 39 Admin. L. Rev. 315, 317–319 (1987).

[5] The parties do not challenge the Court of Appeals' conclusion that the regulations at issue in this case are ambiguous. We assume that this conclusion is correct for purposes of our analysis.

This is not the first time that we have been called upon to resolve an OSH Act "jurisdictional" dispute between the Secretary and the Commission. See *Cuyahoga Valley R. Co.* v. *United Transportation Union*, 474 U. S., at 3. At issue in *Cuyahoga Valley* was whether the Commission could conduct an administrative adjudication notwithstanding the Secretary's motion to vacate the citation. We held that the Commission had no such power. We noted that "enforcement of the Act is the sole responsibility of the Secretary" and concluded that "[a] necessary adjunct of that power is the authority to withdraw a citation and enter into settlement discussions with the employer." *Id.*, at 6–7. The Commission's role as "neutral arbiter," we explained, "plainly does not extend to overturning the Secretary's decision not to issue or to withdraw a citation." *Id.*, at 7.

Although the Act does not expressly address the issue, we now infer from the structure and history of the statute, see *id.*, at 6–7, that the power to render authoritative interpretations of OSH Act regulations is a "necessary adjunct" of the Secretary's powers to promulgate and to enforce national health and safety standards. The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary's statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations. Cf. Note, Employee Participation in Occupational Safety and Health Review Commission Proceedings, 85 Colum. L. Rev. 1317, 1331, and n. 90 (1985) (reporting small percentage of OSH Act citations contested between 1979 and 1985). Consequently, the Secretary is more likely to develop the expertise relevant to assessing the ef-

fect of a particular regulatory interpretation. Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, see, *e. g.*, *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 484 U. S. 135, 159 (1987); *Ford Motor Credit Co.* v. *Milhollin*, *supra*, at 566; *INS* v. *Stanisic*, 395 U. S. 62, 72 (1969), we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes.

The legislative history of the OSH Act supports this conclusion. The version of the Act originally passed by the House of Representatives vested adjudicatory power in the Commission and rulemaking power in an independent standards board, leaving the Secretary with only enforcement power. 116 Cong. Rec. 38716 (1970), reprinted in Legislative History of the Occupational Safety and Health Act of 1970 (S. 2193, Pub. L. 91–596) (Committee Print prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare), pp. 1094–1096 (1971) (Legislative History). The Senate version dispensed with the standards board and established the division of responsibilities that survives in the enacted legislation. The Senate Committee Report explained that combining legislative and enforcement powers in the Secretary would result in "a sounder program" because it would make a single administrative actor responsible both for "formulat[ing] rules . . . and for seeing that they are workable and effective in their day-to-day application," and would allow Congress to hold a single administrative actor politically "accountable for the overall implementation of that program." S. Rep. No. 91–1282, p. 8 (1970), reprinted in Legislative History 148. Because dividing the power to promulgate and enforce OSH Act standards from the power to make law by interpreting them would make *two* administrative actors ultimately responsible for implement-

ing the Act's policy objectives, we conclude that Congress did not expect the Commission to possess authoritative interpretive powers.

For the same reason, we reject the Court of Appeals' inference that Congress intended "to endow the Commission with the normal complement of adjudicative powers possessed by *traditional* administrative agencies." 891 F. 2d, at 1498 (emphasis added). Within traditional agencies—that is, agencies possessing a *unitary* structure—adjudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 292–294 (1974); *SEC* v. *Chenery Corp.*, 332 U. S. 194, 201–203 (1947). But in these cases, we concluded that agency adjudication is a generally permissible mode of lawmaking and policymaking only because the unitary agencies in question also had been delegated the power to make law and policy through rulemaking. See *Bell Aerospace*, *supra*, at 292–294; *Chenery Corp.*, *supra*, at 202–203. See generally Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921 (1965). Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role. Moreover, when a traditional, unitary agency uses adjudication to engage in lawmaking by regulatory interpretation, it necessarily interprets regulations that *it* has promulgated. This, too, cannot be said of the Commission's power to adjudicate.

Consequently, we think the more plausible inference is that Congress intended to delegate to the Commission the type of nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary's interpretations only for consistency

with the regulatory language and for reasonableness. In addition, of course, Congress expressly charged the Commission with making authoritative findings of fact and with applying the Secretary's standards to those facts in making a decision. See 29 U. S. C. § 660(a) (Commission's factual findings "shall be conclusive" so long as "supported by substantial evidence"). The Commission need be viewed as possessing no more power than this in order to perform its statutory role as "neutral arbiter." See *Cuyahoga Valley*, 474 U. S., at 7.

CF&I draws a different conclusion from the history and structure of the Act. Congress, CF&I notes, established the Commission in response to concerns that combining rulemaking, enforcement, and adjudicatory power in the Secretary would leave employers unprotected from regulatory bias. Construing the Act to separate enforcement and interpretive powers is consistent with this purpose, CF&I argues, because it protects regulated employers from biased prosecutorial interpretations of the Secretary's regulations. Indeed, interpretations furnished in the course of administrative penalty actions, according to CF&I, are mere "litigating positions," undeserving of judicial deference under our precedents. See, *e. g.*, *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 212 (1988).

Although we find these concerns to be important, we think that they are overstated. It is clear that Congress adopted the split-enforcement structure in the OSH Act in order to achieve a greater separation of functions than exists in a conventional unitary agency. See S. Rep. No. 91–1282, *supra*, at 56, reprinted in Legislative History 195 (individual views of Sen. Javits) (noting that adjudication by independent panel goes beyond division of functions under the APA but defending split-enforcement structure as "more closely [in] accor[d] with traditional notions of due process"). But the conclusion that the Act should therefore be understood to separate enforcement powers from authoritative interpretive powers

begs the question just *how much* Congress intended to depart from the unitary model. Sponsors of the Commission purported to be responding to the traditional objection that an agency head's participation in or supervision of agency investigations results in biased review of the decisions of the hearing officer, notwithstanding internal separations within the agency. See *ibid.* See generally 3 K. Davis, Administrative Law Treatise § 18.8, pp. 369–370 (2d ed. 1980). Vesting authoritative factfinding and ALJ-review powers in the Commission, an administrative body wholly independent of the administrative enforcer, dispels this concern.

We harbor no doubt that Congress also intended to protect regulated parties from biased interpretations of the Secretary's regulations. But this objective is achieved when the Commission, and ultimately the court of appeals, review the Secretary's interpretation to assure that it is consistent with the regulatory language and is otherwise *reasonable.* Giving the Commission the power to substitute *its* reasonable interpretations for the Secretary's might slightly increase regulated parties' protection from overzealous interpretations. But it would also clearly frustrate Congress' intent to make a single administrative actor "accountable for the overall implementation" of the Act's policy objectives by combining legislative and enforcement powers in the Secretary. S. Rep. No. 91–1282, p. 8, reprinted in Legislative History 148.

We are likewise unpersuaded by the contention that the Secretary's interpretations of regulations will necessarily appear in forms undeserving of judicial deference. Our decisions indicate that agency "litigating positions" are not entitled to deference when they are merely appellate counsel's "*post hoc* rationalizations" for agency action, advanced for the first time in the reviewing court. See *Bowen* v. *Georgetown Univ. Hospital, supra,* at 212; *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 168 (1962). Because statutory and regulatory interpretations furnished in this setting occur *after* agency proceedings have terminated, they do not

constitute an exercise of the agency's delegated lawmaking powers. The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, *is* agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. See 29 U. S. C. § 658. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.

In addition, the Secretary regularly employs less formal means of interpreting regulations prior to issuing a citation. These include the promulgation of interpretive rules, see, *e. g.*, *Marshall* v. *W and W Steel Co.*, 604 F. 2d 1322, 1325–1326 (CA10 1979); cf. *Whirlpool Corp.* v. *Marshall*, 445 U. S. 1, 11 (1980), and the publication of agency enforcement guidelines, see United States Department of Labor, OSHA Field Operations Manual (3d ed. 1989). See generally S. Bokat & H. Thompson, Occupational Safety and Health Law 658–660 (1988). Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review. See *Batterton* v. *Francis*, 432 U. S. 416, 425–426, and n. 9 (1977); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944); *Whirlpool*, *supra*, at 11. A reviewing court may certainly consult them to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position. See *Ehlert* v. *United States*, 402 U. S., at 105.

III

We emphasize the narrowness of our holding. We deal in this case only with the division of powers between the Secretary and the Commission under the OSH Act. We conclude from the available indicia of legislative intent that Congress

did not intend to sever the power authoritatively to interpret OSH Act regulations from the Secretary's power to promulgate and enforce them. Subject only to constitutional limits, Congress is free, of course, to divide these powers as it chooses, and we take no position on the division of enforcement and interpretive powers within other regulatory schemes that conform to the split-enforcement structure. Nor should anything we say today be understood to bear on whether particular divisions of enforcement and adjudicative power within a unitary agency comport with § 554(d) of the APA.

In addition, although we hold that a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary, we emphasize that the reviewing court should defer to the Secretary only if the Secretary's interpretation *is* reasonable. The Secretary's interpretation of an ambiguous regulation is subject to the same standard of substantive review as any other exercise of delegated lawmaking power. See 5 U. S. C. § 706(2)(A); *Batterton* v. *Francis*, *supra*, at 426. As we have indicated, the Secretary's interpretation is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication. But as the Secretary's counsel conceded in oral argument, Tr. of Oral Arg. 18–19, 20–21, the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties, see *Bell Aerospace*, 416 U. S., at 295; *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S., at 220 (SCALIA, J., concurring), on the quality of the Secretary's elaboration of pertinent policy considerations, see *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983), and on other factors relevant to the reasonableness of the Secretary's exercise of delegated lawmaking powers.

CF&I urges us to hold that the Secretary unreasonably interpreted 29 CFR § 1910.1029(g)(3) (1990) in this case. However, because the Court of Appeals deferred to the Commission's interpretation, it had no occasion to address the reasonableness of the Secretary's interpretation. Rather than consider this issue for the first time ourselves, we leave the issue for resolution on remand.

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

It is so ordered.

UNITED STATES ET AL. *v.* SMITH ET AL.

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

No. 89–1646. Argued November 7, 1990—Decided March 20, 1991

Respondents Smith filed suit in the District Court against one Dr. Marshall, alleging that he had negligently injured respondent Dominique Smith during his birth at a United States Army hospital in Italy. The court granted the Government's motion to substitute itself for Marshall pursuant to the Gonzalez Act, which provides that in a suit against military medical personnel for employment-related torts, the Government is to be substituted as the defendant and the suit is to proceed under the Federal Tort Claims Act (FTCA). The court then dismissed the suit on the ground that the FTCA excludes recovery for injuries sustained abroad. The Court of Appeals reversed, holding that neither the Gonzalez Act nor the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Act) required substitution of the Government or otherwise immunized Marshall. It ruled that § 5 of the Act—which, with two exceptions not here relevant, confers absolute immunity on Government employees by making an FTCA action against the Government the exclusive remedy for their employment-related torts—applies only when the FTCA provides a remedy.

Held: The Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government. Pp. 165–175.

(a) The Act's language confirms that § 5 makes the FTCA the exclusive mode of recovery. Congress recognized that requiring substitution of the Government would sometimes foreclose a tort plaintiff's recovery altogether when it provided in § 6 of the Act that suits proceeding under the FTCA are subject to the "limitations and exceptions" applicable to FTCA actions. Moreover, in light of § 5's two express exceptions preserving employee liability, a third exception preserving liability when the FTCA bars suit cannot be implied, absent a contrary legislative intent. Furthermore, the enactment of § 9 of the Act—which provides for the substitution of the Tennessee Valley Authority as defendant in employment-related tort suits against its employees—supports no inference on the scope of § 5 immunity when the FTCA precludes suit against the United States. Pp. 165–169.

(b) Respondents' several arguments to support the decision below are rejected. Construing the Act to preclude Marshall's tort liability does

not result in an implied repeal of the Gonzalez Act. The Gonzalez Act functions solely to protect military medical personnel from malpractice liability and does not create rights in favor of malpractice plaintiffs, whose rights arise instead under state or foreign law. Since respondents' rights as malpractice plaintiffs were not created by Congress, the rule disfavoring implied repeals is not implicated when Congress limits those rights. Similarly, respondents' suggestion that the Act was meant to apply solely to those Government employees not already protected from tort liability by a pre-existing federal immunity statute is inconsistent with the Act's purpose. The Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not. Congress clearly was aware of the pre-Act immunity statutes. Congress' enactment of the two express limitations of immunity under § 5 of the Act indicates that if it intended to limit the Act's protection to employees not covered under the pre-Act immunity statutes, it would have said this expressly. Finally, since nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians, respondents' malpractice claim does not involve a violation of the Gonzalez Act. Thus, it does not fall within the Act's exception for suits brought for a violation of a United States statute under which action against an employee is otherwise authorized. Pp. 169–175.

885 F. 2d 650, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 175.

Deputy Solicitor General Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Stephen L. Nightingale, Barbara L. Herwig,* and *John F. Daly.*

Walter A. Oleniewski argued the cause for respondents. With him on the brief was *Ashley Joel Gardner.*

JUSTICE MARSHALL delivered the opinion of the Court.

The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act or Act) limits the relief available to persons injured by Government employees acting within the scope of their employment. For persons so injured, the Act provides that "[t]he remedy against the

United States" under the Federal Tort Claims Act (FTCA) "is exclusive of any other civil action or proceeding for money damages." 28 U. S. C. § 2679(b)(1). Subject to certain exceptions, the FTCA permits a person injured by a Government employee acting within the scope of his or her employment to seek tort damages against the Government. One exception bars such recovery for injuries sustained outside the country. See 28 U. S. C. § 2680(k). This case presents the question whether a person injured abroad by a military physician, and whom the FTCA foreign-country exception therefore precludes from suing the Government, may nonetheless seek damages from the particular Government employee who caused the injury. We hold that the Liability Reform Act bars this alternative mode of recovery.

I

In 1982, while working on the medical staff of the United States Army hospital in Vicenza, Italy, Dr. William Marshall served as attending physician to Hildegard Smith during the delivery of her son Dominique. At this time, Ms. Smith's husband, Marcus Smith, was an Army Sergeant stationed in Italy. According to the Smiths, Dominique was born with massive brain damage. In 1987, the Smiths, who are respondents in this Court, sued Dr. Marshall in the United States District Court for the Central District of California, basing jurisdiction on diversity of citizenship. The Smiths alleged that Dr. Marshall's negligence during the delivery caused Dominique's injuries.[1]

The Government intervened and sought to have itself substituted for Dr. Marshall as the defendant pursuant to the Gonzalez Act, 10 U. S. C. § 1089. The Gonzalez Act provides that in suits against military medical personnel for torts committed within the scope of their employment, the Government is to be substituted as the defendant and the suit is to

[1] Respondents brought their claim under California law, Italian law, and "general American principles of law." See Complaint ¶ 19.

proceed against the Government under the FTCA. See §§ 1089(a), (b). The Government also argued that, because the action arose overseas, the FTCA exception excluding recovery for injuries sustained abroad, 28 U. S. C. § 2680(k), precluded Government liability. Consequently, the Government concluded, the action should be dismissed. The District Court granted the Government's motion for substitution and dismissed the action. See App. to Pet. for Cert. 17a–18a.[2]

In 1988, while respondents' appeal was pending, Congress enacted the Liability Reform Act as an amendment to the FTCA. Congress took this action in response to our ruling in *Westfall* v. *Erwin*, 484 U. S. 292 (1988), which held that the judicially created doctrine of official immunity does not provide absolute immunity to Government employees for torts committed in the scope of their employment. In *Westfall*, we ruled that such official immunity would have to be determined on a case-by-case basis, according to whether "the contribution to effective government in particular contexts" from granting immunity "outweighs the potential harm to individual citizens." 484 U. S., at 299. The Liability Reform Act establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*. The Act confers such immunity by making an FTCA action against the Government the exclusive remedy for torts committed by Government employees in the scope of their employment.[3]

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[2] As an alternative ground for dismissal, the District Court cited respondents' failure to present their claim to the appropriate federal agency within the time required under 28 U. S. C. § 2401(b). See App. to Pet. for Cert. 17a–18a.

[3] Section 5 of the Act provides:

"The remedy against the United States provided by [the FTCA] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of

On appeal in the present case, the Government relied on this new statute to support the District Court's dismissal of respondents' action.[4] The Government argued that the Liability Reform Act essentially had the same effect as that which the District Court had found to result from the Gonzalez Act. Because Dr. Marshall's alleged malpractice occurred in the scope of his employment, the Government argued, respondents' action should proceed against it as an FTCA action.[5] The Government further contended that, because of the FTCA exception under § 2680(k) barring recovery for injuries occurring overseas, the District Court's ruling dismissing the suit should be affirmed.

The Ninth Circuit reversed, holding that neither the Gonzalez Act nor the Liability Reform Act required substitution of the Government as the defendant in this suit or otherwise immunized Dr. Marshall from liability. See 885 F. 2d 650 (1989).[6] With respect to the Liability Reform Act, the

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the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." 28 U. S. C. § 2679(b)(1).

[4] Pursuant to § 8(b), the Liability Reform Act applies to all proceedings pending on the date of its enactment. 102 Stat. 4565–4566, note following 28 U. S. C. § 2679. Respondents do not dispute that the Act applies in this case.

[5] Under § 6 of the Liability Reform Act, the Attorney General is required to certify that the original defendant (the Government employee) "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U. S. C. § 2679(d)(1). Once certification occurs, the action "shall be deemed an action against the United States [under the FTCA] and the United States shall be substituted as the party defendant." *Ibid.* Where the Attorney General refuses to issue such certification, the Act permits the employee to seek a judicial determination that he was acting within the scope of his employment. § 2679(d)(3).

[6] Following the Liability Reform Act's enactment and the Eleventh Circuit's decision in *Newman* v. *Soballe*, 871 F. 2d 969 (1989), the Government

Ninth Circuit reasoned that although the Act renders a suit against the Government under the FTCA the exclusive remedy for employment-related torts committed by Government employees, the Act applies only when the FTCA in fact provides a remedy. Because § 2680(k) of the FTCA precludes any remedy against the Government in cases arising from injuries incurred abroad, the Ninth Circuit concluded that respondents' tort claim against Dr. Marshall was not barred by the Liability Reform Act. *Id.*, at 654–655.

We granted certiorari, 496 U. S. 924 (1990), to resolve a conflict among the Circuits over whether the Liability Reform Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government.[7] We conclude the Act does confer such immunity and therefore reverse.

II

Section 5 of the Liability Reform Act states that "[t]he remedy" against the Government under the FTCA "is exclu-

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withdrew reliance on the Gonzalez Act as a basis for affirming the District Court's ruling. However, Dr. Marshall, appearing *pro se*, requested the Ninth Circuit to address the applicability of the Gonzalez Act. See Brief for United States 5, n. 3. Following the rationale of *Newman* v. *Soballe*, *supra*, the Ninth Circuit held that the Gonzalez Act made the FTCA the exclusive remedy only for malpractice committed by stateside military medical personnel and that the Act left foreign-based military medical personnel like Dr. Marshall subject to malpractice liability. See 885 F. 2d, at 651–654. Because the Government did not raise the Gonzalez Act issue in its petition for certiorari, we need not address that portion of the lower court's ruling that denied Dr. Marshall immunity under the Gonzalez Act. In any event, that question is rendered irrelevant in this case by our holding that the Liability Reform Act confers Dr. Marshall immunity.

[7] The First, Fifth and Tenth Circuits all have held that the Liability Reform Act applies even when an FTCA exception precludes liability against the Government. See *Nasuti* v. *Scannell*, 906 F. 2d 802, 810, n. 14 (CA1 1990); *Mitchell* v. *Carlson*, 896 F. 2d 128 (CA5 1990); *Aviles* v. *Lutz*, 887 F. 2d 1046 (CA10 1989). The Eleventh Circuit has taken the opposite position. See *Newman* v. *Soballe*, *supra*, at 971.

sive of any other civil action or proceeding for money damages . . . against the employee" and then reemphasizes that "[a]ny other civil action or proceeding for money damages . . . against the employee . . . is precluded." 28 U. S. C. § 2679(b)(1). The central question in this case is whether, by designating the FTCA as the "exclusive remedy," § 5 precludes an alternative mode of recovery against a Government employee in cases where the FTCA itself does not provide a means of recovery.

Two provisions in the Liability Reform Act confirm that § 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability. The first is § 6 of the Act. As noted, see n. 5, *supra*, § 6 directs the Attorney General in appropriate tort cases to certify that a Government employee named as defendant was acting within the scope of his employment when he committed the alleged tort. Section 6 also provides that the suit "shall proceed in the same manner as any action against the United States filed pursuant to [the FTCA] and shall be subject to the *limitations and exceptions* applicable to those actions." 28 U. S. C. § 2679(d)(4) (emphasis added). One of these "exceptions"—expressly designated as such under § 2680—is the provision barring Government liability for torts "arising in a foreign country." § 2680(k). The "limitations and exceptions" language in § 6 of the Liability Reform Act persuades us that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether.

The second basis of our interpretation arises from the express preservations of employee liability in § 5. Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* ac-

tion,[8] seeking damages for a constitutional violation by a Government employee; or (2) an action under a federal statute that authorizes recovery against a Government employee. See § 2679(b)(2). Congress' express creation of these two exceptions convinces us that the Ninth Circuit erred in inferring a third exception that would preserve tort liability for Government employees when a suit is barred under the FTCA. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Construction Co.*, 446 U. S. 608, 616–617 (1980).[9]

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[8] See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

[9] The legislative history fully supports our construction. In particular, the House Committee Report provides:

"The 'exclusive remedy' provision . . . is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents actual recovery. Thus, *any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U. S. C.[,] also is precluded against an employee* in his or her estate." H. R. Rep. No. 100–700, p. 6 (1988) (emphasis added).

The Ninth Circuit deemed the Report "internally inconsistent," 885 F. 2d, at 656, because of other language in the Report stating that "[u]nder [the Liability Reform Act], no one who previously had the right to initiate a lawsuit will lose that right," H. R. Rep., *supra*, at 7. The Ninth Circuit understood this passage to suggest that Congress did not intend to narrow existing rights of recovery. However, this language must be read in conjunction with a preceding sentence in the Report, which states that the Act "contains provisions to ensure that no one is unfairly affected by [the Act's] procedural ramifications" and that, where "an injury has occurred before [the Act] is enacted, but no lawsuit has yet been filed . . . , the claimant will have to pursue a remedy against the United States, not against the employee." *Ibid.* When read in context, the passage relied on by the Ninth Circuit indicates that those with existing lawsuits would be permitted to continue to prosecute them by substituting the Government for the employee. The passage supports only the conclusion that the Liability

The Ninth Circuit based its contrary construction of the Liability Reform Act on one of the Act's specialized provisions. Section 9 of the Act provides that the Tennessee Valley Authority (TVA) shall be substituted as defendant in any suit against a TVA employee arising from "act[ions] within the scope of his office or employment," 16 U. S. C. § 831c–2(b)(1), and that an action against the TVA is "ex[c]lusive of any other civil action or proceeding," 16 U. S. C. § 831c–2(a)(1). Under the TVA exception to the FTCA, 28 U. S. C. § 2680(*l*), the Government may not be held liable for any claim arising from the TVA's activities. The Ninth Circuit inferred from the enactment of § 9 that Congress must have expected that § 5 would *not* shield TVA employees from liability where suit against the United States was precluded by § 2680(*l*). See 885 F. 2d, at 655. And because only TVA employees were singled out for a special grant of immunity, the court concluded that all other Government employees must remain subject to liability where the FTCA precludes suit against the United States. See *ibid.*

The Ninth Circuit's analysis rests on a misunderstanding of the purpose and effect of § 9. By its terms, § 9 does not invest TVA employees with more immunity than § 5 affords other Government employees. Rather, § 9 provides merely that a suit against *the TVA*, 16 U. S. C. § 831c–2(a)(1), rather than one against *the United States*, 28 U. S. C. § 2679(b)(1), shall be the exclusive remedy for the employment-related torts of TVA employees. This adjustment of the Liability Reform Act's immunity scheme is perfectly sensible, for although the United States may not be held liable for the TVA's activities, the TVA itself "[m]ay sue and be sued in its corporate name." 16 U. S. C. § 831c(b). Courts have read this "sue or be sued" clause as making the TVA liable to suit

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Reform Act preserved the *procedural* right to initiate an action. It does not suggest that the Act did not narrow existing *substantive* rights of recovery.

in tort, subject to certain exceptions. See, *e. g.*, *Peoples Nat. Bank of Huntsville, Ala.* v. *Meredith*, 812 F. 2d 682, 684–685 (CA11 1987); *Queen* v. *Tennessee Valley Authority*, 689 F. 2d 80, 85 (CA6 1982), cert. denied, 460 U. S. 1082 (1983). In our view, the most plausible explanation for § 9 is that, in view of lower court cases establishing the TVA's own tort liability independent of the FTCA, Congress decided to clarify that the TVA should be substituted in suits brought against TVA employees.

Seen in this light, the enactment of § 9 supports no inference either way on the scope of § 5 immunity when suit against the United States is precluded under the FTCA. Both the plain language and legislative history of § 9 indicate that the provision was intended to give TVA employees the *same* degree of immunity as § 5 gives other Government employees. Compare 28 U. S. C. § 2679(b)(1), with 16 U. S. C. § 831c–2(a)(1). See also 134 Cong. Rec. 31054 (1988) (remarks of Sen. Heflin). But because the scope of immunity conferred to employees is the same, § 9 has no bearing upon whether Congress viewed § 5 as protecting Government employees from liability when suit against the United States is precluded under the FTCA.[10]

III

A

In support of the decision below, respondents advance reasoning not relied upon by the Ninth Circuit. They invoke the well-established principle of statutory interpretation that implied repeals should be avoided. See, *e. g.*, *Randall* v.

[10] We note, moreover, that Congress included within § 9 a provision parallel to that under § 5 preserving employee liability for *Bivens* actions. See 16 U. S. C. § 831c–2(a)(2). Likewise, § 9 contains language parallel to the "limitations and exceptions" language within § 6. See 16 U. S. C. § 831c–2(b)(4) (indicating that action against TVA under § 9 "shall be subject to the limitations and exceptions applicable to" actions against the TVA generally).

Loftsgaarden, 478 U. S. 647, 661 (1986) ("'repeals by implication are not favored'" (citations omitted)). Respondents contend that the Government's construction of the Liability Reform Act precluding tort liability for Dr. Marshall results in an implied repeal of the Gonzalez Act, 10 U. S. C. § 1089, which regulates suits against military medical personnel. We disagree.

The Gonzalez Act is one of a series of immunity statutes enacted prior to the Liability Reform Act that were designed to protect certain classes of Government employees from the threat of personal liability.[11] For torts committed by military medical personnel within the scope of their employment, the Gonzalez Act provides that a suit against the Government under the FTCA is the exclusive remedy. 10 U. S. C. § 1089(a).[12]

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[11] The Gonzalez Act was passed in response to the decision in *Henderson* v. *Bluemink*, 167 U. S. App. D. C. 161, 511 F. 2d 399 (1974), which held that an Army physician did not have absolute immunity from suit for alleged malpractice committed within the scope of his employment. See S. Rep. No. 94–1264, p. 4 (1976). Similar pre-immunity statutes were enacted for other medical personnel employed by the Government, including those in the State Department, see 22 U. S. C. § 2702, the Veterans' Administration, see 38 U. S. C. § 4116, and the Public Health Service, see 42 U. S. C. § 233. Another immunity statute was enacted to shield Defense Department attorneys from claims of legal malpractice. See 10 U. S. C. § 1054. Finally, before it was expressly repealed by the superseding provisions of the Liability Reform Act, the Federal Drivers Act, 28 U. S. C. § 2679(b)–(e) (1982 ed.), made the FTCA the exclusive remedy for torts committed by Government employees while operating a motor vehicle within the scope of their employment.

[12] Section 1089(a) provides:

"The remedy against the United States provided by [the FTCA] for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel . . . of the armed forces . . . while acting within the scope of his duties or employment . . . shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or

Two Courts of Appeals, including the Ninth Circuit in the decision below, have held that the Gonzalez Act's grant of absolute immunity from suit protects only military medical personnel who commit torts within the United States and not those committing torts abroad. See 885 F. 2d, at 652–654; *Newman* v. *Soballe*, 871 F. 2d 969 (CA11 1989). In reaching this conclusion, these courts relied largely on § 1089(f) of Title 10, which permits agency heads to indemnify or insure foreign-based military medical personnel against liability for torts committed abroad while in the scope of their employment.[13] The Ninth and Eleventh Circuits construe § 1089(f) to limit the protection available to foreign-based military medical personnel to indemnification or insurance, instead of the immunity that is otherwise available to them when stationed within the United States.[14] Under this interpretation, the Gonzalez Act would not preclude respondents from suing Dr. Marshall directly in a United States court. Respondents contend that extending the Liability Reform Act to foreign-based military medical personnel therefore would effect an implied repeal of their "Gonzalez Act remedy." See Brief for Respondents 8, 33, 46.

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paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding."

[13] Section 1089(f) provides:

"The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country . . . ."

[14] See also *Jackson* v. *Kelly*, 557 F. 2d 735, 740–741 (CA10 1977) (endorsing this view in dictum). But cf. *Powers* v. *Schultz*, 821 F. 2d 295 (CA5 1987) (reasoning that § 1089(f)'s indemnify-or-insure language applies only when foreign-based personnel are sued in foreign courts and that such personnel remain immune from suit in a United States court).

We reject the last step in respondents' argument. For purposes of this case, we need not question the lower court's determination that the Gonzalez Act would not immunize Dr. Marshall from a malpractice action brought under state or foreign law. Even if the lower court properly interpreted the Gonzalez Act, it does not follow, however, that application of the Liability Reform Act to an action founded on state or foreign law effects a "repeal" of the Gonzalez Act. The Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs. What respondents describe as their "Gonzalez Act remedy" is in fact a state- or foreign-law remedy that would not be foreclosed by Gonzalez Act immunity. Consequently, the rule disfavoring implied repeals simply is not implicated by the facts of this case, because the Liability Reform Act does not repeal anything *enacted* by the Gonzalez Act. The Liability Reform Act *adds* to what Congress created in the Gonzalez Act, namely protection from liability for military doctors. Respondents' rights, on the other hand, arise solely out of state or foreign law. Because Congress did not create respondents' rights, no implied repeal problem arises when Congress limits those rights.[15]

B

Respondents next raise a second and slightly different argument involving the Gonzalez Act. They contend that the Liability Reform Act was meant to apply solely to those Government employees not already protected from tort liability in some fashion by a pre-existing federal immunity

[15] The dissent contends that we have rendered "virtually meaningless" the insure-or-indemnify clause of § 1089(f) of the Gonzalez Act by holding that the Liability Reform Act bars any malpractice action in state or federal court against a foreign-based military physician. See *post*, at 176–177. This is not true. In the wake of the Liability Reform Act, insurance or indemnification against malpractice suits in *domestic* courts is no longer needed, but § 1089(f) still serves to protect foreign-based military personnel against malpractice suits in *foreign* courts. See *Powers* v. *Schultz*, 821 F. 2d, at 297.

statute. Under respondents' construction of the Act, military medical personnel and other Government employees who were already protected by other statutes, see n. 11, *supra*, cannot now benefit from the more generous immunity available under the Liability Reform Act. In our view, such a construction is inconsistent with Congress' purpose in enacting the Liability Reform Act.

The Liability Reform Act's plain language makes no distinction between employees who are covered under pre-Act immunity statutes and those who are not. Section 5 states that, with respect to a tort committed by "*any* employee of the Government" within the scope of employment, the FTCA provides the exclusive remedy. See 28 U. S. C. § 2679(b)(1) (emphasis added). No language in § 5 or elsewhere in the statute purports to restrict the phrases "any employee of the Government," as respondents urge, to reach only employees not protected from liability by another statute. When Congress wanted to limit the scope of immunity available under the Liability Reform Act, it did so expressly, as it did in preserving employee liability for *Bivens* actions and for actions brought under a federal statute authorizing recovery against the individual employee. § 2679(b)(2); see also *supra*, at 166–167. In drafting the Liability Reform Act, Congress clearly was aware of the pre-Act immunity statutes. See H. R. Rep. 100–700, p. 4 (1988) (citing these statutes, including the Gonzalez Act). We must conclude that if Congress had intended to limit the protection under the Act to employees not covered under the pre-Act statutes, it would have said as much.[16]

C

Finally, respondents argue that their claim falls within one of the two express exceptions under the Liability Reform

[16] The House Committee Report echoes the all-encompassing language of the statute: "The 'exclusive remedy' provision . . . is intended to substitute the United States as the solely permissible defendant in *all* common law tort actions against Federal employees who acted in the scope of employment." H. R. Rep. No. 100–700, at 6 (emphasis added).

Act—the exception permitting suits "brought for a violation of a statute of the United States under which such action against an individual [employee] is otherwise authorized." § 2679(b)(2)(B). Respondents assert that they have satisfied both conditions set forth in this exception. They contend that (1) their claim against Dr. Marshall is "authorized" by the Gonzalez Act and that (2) because the Gonzalez Act permits suits against military doctors for negligence in certain instances, such claims of negligence constitute claims of a Gonzalez Act "violation." We need not decide whether a tort claim brought under state or foreign law could be deemed authorized by the Gonzalez Act, for we find that respondents' second argument—that a claim for malpractice involves "a violation of" the Gonzalez Act—is without merit. Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians. Consequently, a physician allegedly committing malpractice under state or foreign law does not "violate" the Gonzalez Act.

The dissent disagrees. According to the dissent, unless § 2679(b)(2)(B) "was intended to preserve the Gonzalez Act remedy, it was essentially without purpose." *Post*, at 183. However, the dissent never attempts to square this assertion with the plain language of § 2679(b)(2)(B), which permits only those suits against Government employees "brought for a *violation of a statute of the United States* under which such action against an [employee] is otherwise authorized" (emphasis added). At no point does the dissent indicate how a military physician's malpractice under state or foreign law could be deemed a "violation" of the Gonzalez Act. Nor can the dissent avoid this obstacle merely by invoking the canon of statutory construction that every provision of a law should be given meaning. See *post*, at 183, and n. 8. It is true that the legislative history fails to disclose (and neither we nor the dissent has attempted to discover) what cause(s) of action Congress sought to preserve when it enacted § 2679(b)(2)(B), but a malpractice suit alleging a "violation" of the Gonzalez

Act cannot have been one of them. The Gonzalez Act simply does not impose any duties of care upon military physicians that could be violated.

The dissent resists this conclusion because it is impressed by "Congress' general intent, expressed throughout the hearings and in the House Report, that [the Liability Reform Act] not curtail any pre-existing remedies of tort victims." *Post*, at 183. The truth is, however, that the legislative history reveals considerably less solicitude for tort plaintiffs' rights than the dissent suggests. As we have already noted, see n. 9, *supra*, the House Report expressly warned that, under the Liability Reform Act, "*any* claim against the government that is precluded by [FTCA] exceptions"—which obviously would include claims barred by the exception for causes of action arising abroad—"also is precluded against an employee." H. R. Rep. 100–700, at 6 (emphasis added). This congressional intent was clearly implemented in § 5 of the Act, and we are obliged to give it effect.

IV

For the reasons set forth above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, dissenting.

The Department of Defense (Department) provides medical and dental care for families of service personnel stationed abroad. Subsection (f) of the Gonzalez Act authorizes the Department to indemnify its health care personnel serving overseas in the event that they are sued for malpractice.[1]

[1] The Gonzalez Act, also known as the Medical Malpractice Immunity Act, authorizes indemnification as follows:

"(f) The head of the agency concerned or his designee may, to the extent that he or his designee deems appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or

Regulations issued pursuant to subsection (f) make the United States the real party in interest in such a tort action.[2] The regulations provide victims of malpractice with a remedy against the United States, even in cases in which the nominal, individual defendant may have no assets.

This Gonzalez Act remedy protects both doctors and patients involved in malpractice claims arising out of the performance of health care services for American military

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wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury." 90 Stat. 1986(f), as amended, 10 U. S. C. § 1089(f).

Another subsection makes the same indemnification arrangement available to members of the National Aeronautics and Space Administration. See 90 Stat. 1989, 42 U. S. C. § 2458a(f).

[2] According to the Navy Department's regulations:

"6. Extent of Protection. Reference (b) [the Gonzalez Act] extends coverage within the United States and its possessions by making suit against the United States under the Federal Tort Claims Act the exclusive remedy for an injured party. Where the Federal Tort Claims Act does not apply (as, for example, where the acts giving rise to the claim occurred outside the United States), coverage is provided by allowing the Secretary of Defense to hold harmless or provide liability insurance for health care personnel.

"7. Exercise of Authority. By reference (a), the Secretary of Defense delegated to the Secretary of the Navy the authority to hold harmless or provide liability insurance for Navy health care personnel. All persons referred to in paragraph 4 above and in subsection (a) of reference (b) are hereby held harmless for damages resulting from negligent or wrongful acts or omissions while acting within the scope of duties and assigned to duty in a foreign country, or detailed for service with other than a Federal agency, or if the circumstances are such as are likely to preclude remedy against the United States under the Federal Tort Claims Act, as provided by subsection (f) of reference (b)." Department of the Navy, SECNAV INSTRUCTION 6300.3, JAG:14C (Mar. 14, 1978), App. to Brief for Respondents 2a–3a.

personnel and their dependents assigned to duty in foreign countries. The Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act) that the Court construes today says nothing about this special situation; yet, the effect of today's decision is to render subsection (f) of the Gonzalez Act virtually meaningless. There is nothing in the legislative history of the Liability Reform Act to indicate that Congress intended this result. On the contrary, there is strong evidence in both the legislative history, and in the language of §§ 2 and 5(b)(2)(B) of the statute, that Congress intended to preserve pre-existing remedies. This point is clarified by examining the two statutes separately and in chronological order.

I

The principal purpose of the Gonzalez Act is succinctly stated in its preamble. It was enacted

> "[t]o provide for an exclusive remedy against the United States in suits based upon medical malpractice on the part of medical personnel of the armed forces, the Defense Department, the Central Intelligence Agency, and the National Aeronautics and Space Administration, and for other purposes." 90 Stat. 1985.

To achieve its purpose, Congress simply followed the precedent set by four previous amendments to the Federal Tort Claims Act (FTCA), none of which had curtailed any pre-existing remedies.[3]

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[3] As the Senate Report explained:

"By making the Federal Tort Claims Act an exclusive remedy, a claimant is forced to sue the United States for damages rather than a government employee in his personal capacity. At least four existing statutes make the Federal Tort Claims Act an exclusive remedy in order to protect a certain class of government employee from personal liability.

"In 1961 the Government Driver's Act (Public Law 87–258) made the Federal Tort Claims Act the exclusive remedy for damages sustained as a result of the negligent operation of a motor vehicle by a federal driver acting within the scope of his employment. The result was to protect federal

For claims not covered by the FTCA, such as for those claims arising in foreign countries, the Gonzalez Act authorized medical personnel to be insured or indemnified by the Federal Government. See n. 1, *supra*. By that arrangement, Congress protected Government doctors from personal liability for services performed in the course of their overseas duties, and at the same time, preserved the common-law remedy for American victims of medical malpractice.

The Court does not disagree with this interpretation of the Gonzalez Act, see *ante*, at 170–171, or with the Court of Appeals' conclusion that respondent's claim was viable prior to the enactment of the Liability Reform Act in 1988. See *ante*, at 172. Thus, the question is whether the Liability Reform Act withdrew the remedy for malpractice claims arising outside of the United States that had been expressly preserved by subsection (f) of the Gonzalez Act.

II

The Liability Reform Act was a direct response to this Court's decision in *Westfall* v. *Erwin*, 484 U. S. 292 (1988).

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employees in their individual capacity from tort liability arising from the operation of motor vehicles.

"In 1965, Congress enacted a bill patterned after the Government Driver's Act which protected medical personnel of the Veterans' Administration for individual tort liability from malpractice when acting within the scope of their employment (Public Law 89–311).

"Similar legislation making the Federal Tort Claims Act the exclusive remedy for malpractice was enacted in 1970 to immunize medical personnel of the Public Health Service from personal liability arising out of performance of their medical duties (Public Law 91–623).

"More recently, the Foreign Relations Authorization Act of fiscal year of 1977 (Public Law 94–350) immunized medical personnel of the State Department from personal liability for medical malpractice.

"In all essential respects these four statutes are similar. Each statute abolished old rights recognized by the common law to obtain the legislative object of protecting certain federal employees from suit in their individual capacities.

"H. R. 3954 is modeled after these statutes." S. Rep. No. 94–1264, p. 3 (1976).

In *Westfall*, we resolved a conflict among the Courts of Appeals on the question whether conduct by federal officials must be discretionary in nature, as well as being within the scope of their employment, before the conduct is absolutely immune from state-law tort liability. *Id.*, at 295. We held unanimously that nondiscretionary conduct was not entitled to such immunity. *Id.*, at 297.

Congress enacted the Liability Reform Act to protect all federal employees from the risk of personal liability that was thought to have been created by *Westfall*. Congress was particularly concerned that lower level employees, the rank and file "who are least likely to exercise discretion in carrying out their duties," were among those who were most likely to be affected by the *Westfall* decision. H. R. Rep. No. 100–700, p. 3 (1988).

Section 2 of the Liability Reform Act contains a detailed statement of Congress' reasons for enacting the statute.[4] Congress summarized its purpose as follows:

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[4] In § 2 of Pub. L. 100–694, 102 Stat. 4563, Congress set forth the findings and purposes of the Liability Reform Act:

"(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

. . . . . .

"(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

"(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

. . . . . .

"(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful." 102 Stat. 4563–4564, note following 28 U. S. C. § 2671.

> "It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, *while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.*" 102 Stat. 4564, note following 28 U. S. C. § 2671 (emphasis added).

Notably, neither that statement, nor anything in the legislative history of the Act, reveals any intent on the part of Congress to limit the scope of pre-existing remedies available to victims of torts committed by federal employees.[5]

There were two recurring themes throughout the hearings on the bill that gave rise to the Liability Reform Act. One theme was that this legislation was not intended to curtail any existing remedies already available to tort victims against federal employees,[6] and the other was that Congress

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[5] Senator Grassley, one of the sponsors of the legislation, explained:

"As my colleagues know, the FTCA has generally worked well over the past four decades in providing fair and expeditious compensation to persons injured by the common law torts of Federal employees. This bill, by covering Westfall-type cases under the FTCA, assures that victims of common law torts of Federal employees will be fairly compensated. At the same time, it provides a needed measure of employee protection from personal liability.

"Mr. President, I would like to emphasize that this bill does not have any effect on the so-called Bivens cases or Constitutional tort claims. Although this too is an area of concern to me—and I have introduced corrective legislation in the past—the bill that we pass today has no impact on these cases, which can continue to be brought against individual Government officials." 134 Cong. Rec. 29933 (1988).

[6] Thus, a representative of the Department of Justice testified:

"H. R. 4358 would do nothing more than extend the protection now enjoyed by doctors, drivers, and DoD attorneys to all federal employees. It also will ensure equitable and consistent treatment for persons injured by federal conduct, without regard to the status of the employee whose actions are alleged to have caused the injury." Hearings on H. R. 4358 et al. before the Subcommittee on Administrative Law and Governmental Rela-

sought to protect all federal employees from suit by substituting the United States for the individual tortfeasor as the responsible party—a substitution that would normally benefit the injured party who would no longer have to worry about whether he or she would be able to collect the judgment. The bill was supported by the Department of Justice and two unions representing federal employees.

Members of Congress not only articulated their intent to preserve the scope of existing remedies during the hearings, but also reinforced that intent by amending the original bill to include § 5(b)(2), 28 U. S. C. § 2679(b)(2). As amended, § 5(b)(2) provides:

> "(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> "(A) which is brought for a violation of the Constitution of the United States, or
>
> "(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U. S. C. § 2679(b)(2).

As to § 5(b)(2)(A), Congress made explicit throughout the hearings its intent to exclude constitutional violations from the Liability Reform Act's coverage.[7] The Justice Department endorsed that view:

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tions of the House Committee on the Judiciary, 100th Cong., 2d Sess., 76 (1988) (hereinafter House Hearings).

The point was reiterated by others during the hearings and debate. See *id.*, at 34 ("In no way, in no way at all, does this measure infringe or diminish any legal rights of individuals") (statement of Rep. Wolf); *id.*, at 44 ("[W]e want to protect the employees without diminishing the rights of anyone who might be injured") (statement of Chairman Frank); 134 Cong. Rec. 15963 (1988) ("Other remedies under other acts, Civil Rights Act, are not affected at all") (statement of Chairman Frank).

[7] See, *e. g.*, House Hearings 40, 58, 127, 195.

> "It also is important to emphasize the [Liability Reform Act] would apply only to cases alleging injury caused by ordinary common law tortious conduct. By common law tortious conduct, we mean not just causes of action based upon the 'common' or case law of the several states, but also causes of action codified in state statutes that permit recovery for negligence, such as, for example, wrongful death statutes. The term does not include, and [the Liability Reform Act] is not intended to apply to, cases that allege violations of constitutional rights, or what commonly are known as *Bivens* cases. Persons alleging constitutional torts will, under [the Liability Reform Act], remain free to pursue a remedy against the individual employee if they so choose." House Hearings 78.

The Justice Department explained that the issue of constitutional torts was a controversial one, and one that was not affected by the Court's decision in *Westfall* because *Westfall* was limited to common-law torts. *Id.*, at 79. Members of Congress stressed that constitutional torts would not be encompassed by this legislation, and thus, there was no need to address the issue. See, *e. g.*, *id.*, at 40, 195. During the hearings, however, there was some suggestion that an action could involve both a common-law tort and a constitutional violation. See, *e. g.*, *id.*, at 42, 127, 173. In response to this concern, Congress apparently added § 5(b)(2)(A) to make explicit what it had assumed all along: that victims of constitutional violations would remain free to pursue a remedy against the individual employee if they chose to do so.

As to § 5(b)(2)(B), Congress provided no specific explanation for its inclusion, other than its general concern with preserving all pre-existing remedies available to victims of torts committed by federal employees. Just as Congress added § 5(b)(2)(A) to ensure that constitutional torts would not be included within the scope of the Liability Reform Act, similarly, it must have added § 5(b)(2)(B) to ensure that pre-existing remedies protected by a statute would not be af-

fected as well. Congress did not need to add this amendment, any more than it needed to add § 5(b)(2)(A), because just as constitutional torts are, for the most part, outside the realm of common-law torts, similarly statutory violations are also outside the realm of common-law torts. Nevertheless, this action is consistent with Congress' general intent, expressed throughout the hearings and in the House Report, that it not curtail any pre-existing remedies of tort victims. Unless the amendment was intended to preserve the Gonzalez Act remedy, it was essentially without purpose—a result Congress clearly could not have intended.

The Court's reading of the Liability Reform Act makes § 5(b)(2)(B) superfluous.[8] Indeed, the Court never says what kind of statutory violation § 5(b)(2)(B) is meant to protect, nor does Congress provide any specific guidance. To avoid the Court's result of turning this subsection into surplusage, it should be construed to accomplish the purpose repeatedly identified in the hearings, which is to avoid any interpretation of the Act that would limit the scope of pre-existing common-law remedies. This purpose was unequivocally identified in the House Report on the bill. It explains: "Under H. R. 4612, no one who previously had the right to initiate a lawsuit will lose that right." H. R. Rep. No. 100–700, at 7.[9]

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[8] The Court's approach today runs counter to the well-established rule that meaning should be attributed to each subsection of a statute. See *United States* v. *Morton*, 467 U. S. 822, 828 (1984); see also 2A C. Sands, Sutherland on Statutory Construction § 46.06, p. 104 (rev. 4th ed. 1984) ("A statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant") (footnotes omitted).

[9] The Court today attempts to explain the House Report's language away by claiming that because it appears in a section pertaining to implementation of the Act, it says nothing more than that those plaintiffs who had actions pending would be permitted to pursue them by substituting the Government for the individual employee. See *ante*, at 167–168, n. 9. However, similar language also appears in the House Report *before* any discussion of what would happen during the transition period. According to the House Report, the Liability Reform Act "does not change the law,

The description of § 5 in the section-by-section analysis of the Liability Reform Act is consistent with the view that it was intended to describe the remedy available to a plaintiff in a common-law cause of action for malpractice arising in foreign countries that was specifically authorized by subsection (f) of the Gonzalez Act. The House Report states that the section "would make it clear that the remedy provided in this legislation does not extend to constitutional torts or to *causes of action specifically authorized to be brought against an individual by another statute of the United States.*" *Id.*, at 8 (emphasis added).

The Court argues that the "Gonzalez Act remedy" has not been impliedly repealed because "[t]he Gonzalez Act functions solely to protect military medical personnel from malpractice liability; it does not create rights in favor of malpractice plaintiffs." *Ante*, at 172. This is not strictly accurate because subsection (f) of the Gonzalez Act, as implemented by regulation, did provide malpractice plaintiffs with an important remedy against the United States as the real party in interest that they did not previously have.[10] Moreover, this

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as interpreted by the Courts, with respect to the availability of other recognized causes of action; nor does it either expand or diminish rights established under other Federal statutes." H. R. Rep. No. 100–700, p. 7 (1988). Such language indicates that Congress was concerned not just with preserving procedural rights, as the Court would have it, but also with preserving existing substantive rights.

[10] The Eleventh Circuit recognized that subsection (f) could not be ignored: "Because subsection (f) was written into the Gonzalez Act, we are required to give it meaning." *Newman* v. *Soballe*, 871 F. 2d 969, 974 (1989). The Tenth Circuit also acknowledged, albeit in dicta, that subsection (f) of the Gonzalez Act provided an important remedy:

"The purpose of [subsection (f)] is to provide a method for the assumption by the government of responsibility for damage claims against its military medical personnel arising from medical care given in foreign countries in the scope of their employment. Behind it is the desire to protect military medical personnel from the ever-present danger of personal liability . . . while preserving a means for compensating malpractice victims for their injuries. . . . Instead of granting military medical personnel practicing in foreign countries absolute immunity from suit for acts within the scope of

provision of the Gonzalez Act amounted to an express preservation of a common-law remedy. Because § 5(b)(2)(B) of the Liability Reform Act is otherwise virtually meaningless,[11] I believe it should be construed to preserve that remedy. Otherwise, without any justification for doing so, the Liability Reform Act has silently repealed this provision of the Gonzalez Act.

Under the Court's holding, the Liability Reform Act has closed the door to all federal and state courts for American victims of malpractice by federal health care personnel stationed abroad.[12] No legislative purpose is achieved by that holding because these personnel are already protected from personal liability by the Gonzalez Act and the indemnity regulation. The only significant effect of this holding is to deprive an important class of potential plaintiffs of their pre-existing judicial remedy. Respondents, and other plaintiffs like them, are now precluded from pursuing their pre-

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their employment, Congress elected to have the government protect them through indemnification or insurance. The effect of this approach rather than absolute immunity is to ensure a remedy to victims of malpractice by military medical personnel assigned to a foreign country." *Jackson* v. *Kelly*, 557 F. 2d 735, 740–741 (1977).

[11] The theoretical possibility of litigation in a foreign court, see *ante*, at 172, n. 15, was never even mentioned in the legislative history of either the Gonzalez Act or the Liability Reform Act.

[12] The only remedy that remains available to respondents after the Court's decision today is the possibility of a private bill. See *Office of Personnel Management* v. *Richmond*, 496 U. S. 414 (1990). Ironically, the Court, by its restrictive reading, now leaves families of service personnel who have been injured by federal health workers in foreign countries with little choice but to seek private bills in order to receive compensation; this is the very policy that Congress sought to avoid when it enacted the FTCA over 40 years ago. At the time of the FTCA's enactment, Congress sought to rectify the shortcomings of a system that was "unduly burdensome to the Congress" and was "unjust to the claimants" because it did not "accord to injured parties a recovery as a matter of right but base[d] any award that may be made on considerations of grace." H. R. Rep. No. 1287, 79th Cong., 1st Sess., 2 (1945). Congress intended the FTCA to "establish a uniform system" to replace the existing system of private bills. *Id.*, at 3.

existing common-law claims against an allegedly negligent doctor working abroad, even though the doctor is indemnified by the Federal Government. I cannot believe that Congress intended that result. I am therefore persuaded that § 5(b)(2)(B) should be read in a way that prevents it from being nothing more than a meaningless appendage and allows it to fulfill its intended purpose of preserving pre-existing claims.[13]

In *Westfall* v. *Erwin*, 484 U. S. 292 (1988), we said that "Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and we suggested that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.*, at 300. Today, the Court, by deciding that a section of Congress' handiwork is a nullity, once again invites Congress to step in and "provide guidance."

I respectfully dissent.

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[13] In response to this dissent, the Court has restated its argument that Dr. Marshall did not "violate" the Gonzalez Act. See *ante*, at 174. As a matter of pure grammar, the Court is, of course, correct. It nevertheless remains true that this literal reading of the Liability Reform Act fails to answer two critical questions: (1) What legislative purpose is served by depriving malpractice victims, such as respondents, of their Gonzalez Act remedy? (2) If § 5(b)(2)(B) does not preserve that remedy, then what was its purpose? If forced to choose between an assumption that Congress used imperfect grammar to achieve a benign purpose identified in the legislative history and an assumption that it inadvertently achieved a heartless purpose disclaimed in the legislative history, I have no difficulty in choosing the former.

Syllabus

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. *v.* JOHNSON CONTROLS, INC.

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

No. 89–1215. Argued October 10, 1990—Decided March 20, 1991

A primary ingredient in respondent's battery manufacturing process is lead, occupational exposure to which entails health risks, including the risk of harm to any fetus carried by a female employee. After eight of its employees became pregnant while maintaining blood lead levels exceeding that noted by the Occupational Safety and Health Administration (OSHA) as critical for a worker planning to have a family, respondent announced a policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding the OSHA standard. Petitioners, a group including employees affected by respondent's fetal-protection policy, filed a class action in the District Court, claiming that the policy constituted sex discrimination violative of Title VII of the Civil Rights Act of 1964, as amended. The court granted summary judgment for respondent, and the Court of Appeals affirmed. The latter court held that the proper standard for evaluating the policy was the business necessity inquiry applied by other Circuits; that respondent was entitled to summary judgment because petitioners had failed to satisfy their burden of persuasion as to each of the elements of the business necessity defense under *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642; and that even if the proper evaluative standard was bona fide occupational qualification (BFOQ) analysis, respondent still was entitled to summary judgment because its fetal-protection policy is reasonably necessary to further the industrial safety concern that is part of the essence of respondent's business.

Held: Title VII, as amended by the Pregnancy Discrimination Act (PDA), forbids sex-specific fetal-protection policies. Pp. 197–211.

(a) By excluding women with childbearing capacity from lead-exposed jobs, respondent's policy creates a facial classification based on gender and explicitly discriminates against women on the basis of their sex under § 703(a) of Title VII. Moreover, in using the words "capable of bearing children" as the criterion for exclusion, the policy explicitly classifies on the basis of potential for pregnancy, which classification must be

regarded, under the PDA, in the same light as explicit sex discrimination. The Court of Appeals erred in assuming that the policy was facially neutral because it had only a discriminatory effect on women's employment opportunities, and because its asserted purpose, protecting women's unconceived offspring, was ostensibly benign. The policy is not neutral because it does not apply to male employees in the same way as it applies to females, despite evidence about the debilitating effect of lead exposure on the male reproductive system. Also, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Cf. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542. Because respondent's policy involves disparate treatment through explicit facial discrimination, the business necessity defense and its burden shifting under *Wards Cove* are inapplicable here. Rather, as indicated by the Equal Employment Opportunity Commission's enforcement policy, respondent's policy may be defended only as a BFOQ, a more stringent standard than business necessity. Pp. 197–200.

(b) The language of both the BFOQ provision set forth in § 703(e)(1) of Title VII—which allows an employer to discriminate on the basis of sex "in those certain instances where . . . sex . . . is a [BFOQ] reasonably necessary to the normal operation of [the] particular business"—and the PDA provision that amended Title VII—which specifies that, unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes"—as well as these provisions' legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. The so-called safety exception to the BFOQ is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform, and the employer must direct its concerns in this regard to those aspects of the woman's job-related activities that fall within the "essence" of the particular business. *Dothard* v. *Rawlinson*, 433 U. S. 321, 333, 335; *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 413. The unconceived fetuses of respondent's female employees are neither customers nor third parties whose safety is essential to the business of battery manufacturing. Pp. 200–206.

(c) Respondent cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Moreover, respondent's professed concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Title VII, as amended by the PDA, mandates that decisions about the welfare of future children be left to the parents

who conceive, bear, support, and raise them rather than to the employers who hire those parents or the courts. Pp. 206–207.

(d) An employer's tort liability for potential fetal injuries and its increased costs due to fertile women in the workplace do not require a different result. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best. Moreover, the incremental cost of employing members of one sex cannot justify a discriminatory refusal to hire members of that gender. See, *e. g.*, *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 716–718, and n. 32. Pp. 208–211.

886 F. 2d 871, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which MARSHALL, STEVENS, O'CONNOR, and SOUTER, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 211. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 223.

Marsha S. Berzon argued the cause for petitioners. With her on the briefs were *Jordan Rossen*, *Ralph O. Jones*, and *Laurence Gold*.

Stanley S. Jaspan argued the cause for respondent. With him on the briefs were *Susan R. Maisa*, *Anita M. Sorensen*, *Charles G. Curtis, Jr.*, and *John P. Kennedy*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States et al. by *Solicitor General Starr*, *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Clegg*, *Clifford M. Sloan*, *David K. Flynn*, *Charles A. Shanor*, *Gwendolyn Young Reams*, *Lorraine C. Davis*, and *Carolyn L. Wheeler*; for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Marian M. Johnston*, Supervising Deputy Attorney General, and *Manuel M. Medeiros*, Deputy Attorney General; for the Commonwealth of Massachusetts et al. by *James M. Shannon*, Attorney General of Massachusetts, *Jennifer Wriggins*, *Marjorie Heins*, and *Judith E. Beals*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Robert K. Corbin* of Arizona, *Clarine Nardi Riddle* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *William J. Guste, Jr.*, of Louisiana, *James E. Tierney* of Maine, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Robert M. Spire* of Ne-

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are concerned with an employer's gender-based fetal-protection policy. May an employer exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might conceive?

I

Respondent Johnson Controls, Inc., manufactures batteries. In the manufacturing process, the element lead is a primary ingredient. Occupational exposure to lead entails health risks, including the risk of harm to any fetus carried by a female employee.

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braska, *Robert J. Del Tufo* of New Jersey, *Robert Abrams* of New York, *Anthony J. Celebrezze, Jr.*, of Ohio, *Robert H. Henry* of Oklahoma, *Hector Rivera-Cruz* of Puerto Rico, *Jim Mattox* of Texas, *Jeffrey L. Amestoy* of Vermont, *Godfrey R. de Castro* of the Virgin Islands, and *Kenneth O. Eikenberry* of Washington; for the American Civil Liberties Union et al. by *Joan E. Bertin, Elisabeth A. Werby*, and *Isabelle Katz Pinzler;* for the American Public Health Association et al. by *Nadine Taub* and *Suzanne L. Mager;* for Equal Rights Advocates et al. by *Susan Deller Ross* and *Naomi R. Cahn;* for the NAACP Legal Defense and Educational Fund, Inc., et al., by *Julius LeVonne Chambers, Charles Stephen Ralston*, and *Ronald L. Ellis;* and for Trial Lawyers for Public Justice by *Arthur H. Bryant.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States of America by *Timothy B. Dyk, Willis J. Goldsmith, Stephen A. Bokat*, and *Robin S. Conrad;* for Concerned Women for America by *Jordan W. Lorence, Cimron Campbell*, and *Wendell R. Bird;* for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, Garen E. Dodge, Jan S. Amundson*, and *Quentin Riegel;* for the Industrial Hygiene Law Project by *Jack Levy* and *Ilise Levy Feitshans;* for the National Safe Workplace Institute by *James D. Holzhauer;* for the United States Catholic Conference by *Mark E. Chopko* and *John A. Liekweg;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar*, and *John C. Scully.*

Briefs of *amici curiae* were filed for the Association of the Bar of the City of New York et al. by *Sidney S. Rosdeitcher, Evelyn Cohn, Janet Gallagher, Janice Goodman, Arthur Leonard*, and *Jim Williams;* for the Natural Resources Defense Council, Inc., by *Thomas O. McGarity* and *Albert H. Meyerhoff;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Anthony T. Caso.*

Before the Civil Rights Act of 1964, 78 Stat. 241, became law, Johnson Controls did not employ any woman in a battery-manufacturing job. In June 1977, however, it announced its first official policy concerning its employment of women in lead-exposure work:

> "[P]rotection of the health of the unborn child is the immediate and direct responsibility of the prospective parents. While the medical profession and the company can support them in the exercise of this responsibility, it cannot assume it for them without simultaneously infringing their rights as persons.
>
> ". . . . Since not all women who can become mothers wish to become mothers (or will become mothers), it would appear to be illegal discrimination to treat all who are capable of pregnancy as though they will become pregnant." App. 140.

Consistent with that view, Johnson Controls "stopped short of excluding women capable of bearing children from lead exposure," *id.*, at 138, but emphasized that a woman who expected to have a child should not choose a job in which she would have such exposure. The company also required a woman who wished to be considered for employment to sign a statement that she had been advised of the risk of having a child while she was exposed to lead. The statement informed the woman that although there was evidence "that women exposed to lead have a higher rate of abortion," this evidence was "not as clear . . . as the relationship between cigarette smoking and cancer," but that it was, "medically speaking, just good sense not to run that risk if you want children and do not want to expose the unborn child to risk, however small . . . ." *Id.*, at 142–143.

Five years later, in 1982, Johnson Controls shifted from a policy of warning to a policy of exclusion. Between 1979 and 1983, eight employees became pregnant while maintaining blood lead levels in excess of 30 micrograms per deciliter. Tr. of Oral Arg. 25, 34. This appeared to be the critical level

noted by the Occupational Safety and Health Administration (OSHA) for a worker who was planning to have a family. See 29 CFR § 1910.1025 (1990). The company responded by announcing a broad exclusion of women from jobs that exposed them to lead:

> "[I]t is [Johnson Controls'] policy that women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." App. 85–86.

The policy defined "women . . . capable of bearing children" as "[a]ll women except those whose inability to bear children is medically documented." *Id.*, at 81. It further stated that an unacceptable work station was one where, "over the past year," an employee had recorded a blood lead level of more than 30 micrograms per deciliter or the work site had yielded an air sample containing a lead level in excess of 30 micrograms per cubic meter. *Ibid.*

II

In April 1984, petitioners filed in the United States District Court for the Eastern District of Wisconsin a class action challenging Johnson Controls' fetal-protection policy as sex discrimination that violated Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.* Among the individual plaintiffs were petitioners Mary Craig, who had chosen to be sterilized in order to avoid losing her job, Elsie Nason, a 50-year-old divorcee, who had suffered a loss in compensation when she was transferred out of a job where she was exposed to lead, and Donald Penney, who had been denied a request for a leave of absence for the purpose of lowering his lead level because he intended to become a father. Upon stipulation of the parties, the District Court certified a class consisting of "all past, present and future production and maintenance employees" in United Auto Workers bar-

gaining units at nine of Johnson Controls' plants "who have been and continue to be affected by [the employer's] Fetal Protection Policy implemented in 1982." No. 84–C–0472 (Feb. 25, 1985), pp. 1, 2.

The District Court granted summary judgment for defendant-respondent Johnson Controls. 680 F. Supp. 309 (1988). Applying a three-part business necessity defense derived from fetal-protection cases in the Courts of Appeals for the Fourth and Eleventh Circuits, the District Court concluded that while "there is a disagreement among the experts regarding the effect of lead on the fetus," the hazard to the fetus through exposure to lead was established by "a considerable body of opinion"; that although "[e]xpert opinion has been provided which holds that lead also affects the reproductive abilities of men and women . . . [and] that these effects are as great as the effects of exposure of the fetus . . . a great body of experts are of the opinion that the fetus is more vulnerable to levels of lead that would not affect adults"; and that petitioners had "failed to establish that there is an acceptable alternative policy which would protect the fetus." *Id.*, at 315–316. The court stated that, in view of this disposition of the business necessity defense, it did not "have to undertake a bona fide occupational qualification's *[sic]* (BFOQ) analysis." *Id.*, at 316, n. 5.

The Court of Appeals for the Seventh Circuit, sitting en banc, affirmed the summary judgment by a 7-to-4 vote. 886 F. 2d 871 (1989). The majority held that the proper standard for evaluating the fetal-protection policy was the defense of business necessity; that Johnson Controls was entitled to summary judgment under that defense; and that even if the proper standard was a BFOQ, Johnson Controls still was entitled to summary judgment.

The Court of Appeals, see *id.*, at 883–885, first reviewed fetal-protection opinions from the Eleventh and Fourth Circuits. See *Hayes* v. *Shelby Memorial Hospital*, 726 F. 2d 1543 (CA11 1984), and *Wright* v. *Olin Corp.*, 697 F. 2d 1172

(CA4 1982). Those opinions established the three-step business necessity inquiry: whether there is a substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus. 886 F. 2d, at 885. The Court of Appeals agreed with the Eleventh and Fourth Circuits that "the components of the business necessity defense the courts of appeals and the EEOC have utilized in fetal protection cases balance the interests of the employer, the employee and the unborn child in a manner consistent with Title VII." *Id.*, at 886. The court further noted that, under *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), the burden of persuasion remained on the plaintiff in challenging a business necessity defense, and—unlike the Fourth and Eleventh Circuits—it thus imposed the burden on the plaintiffs for all three steps. 886 F. 2d, at 887–893. Cf. *Hayes*, 726 F. 2d, at 1549, and *Wright*, 697 F. 2d, at 1187.

Applying this business necessity defense, the Court of Appeals ruled that Johnson Controls should prevail. Specifically, the court concluded that there was no genuine issue of material fact about the substantial health-risk factor because the parties agreed that there was a substantial risk to a fetus from lead exposure. 886 F. 2d, at 888–889. The Court of Appeals also concluded that, unlike the evidence of risk to the fetus from the mother's exposure, the evidence of risk from the father's exposure, which petitioners presented, "is, at best, speculative and unconvincing." *Id.*, at 889. Finally, the court found that petitioners had waived the issue of less discriminatory alternatives by not adequately presenting it. It said that, in any event, petitioners had not produced evidence of less discriminatory alternatives in the District Court. *Id.*, at 890–893.

Having concluded that the business necessity defense was the appropriate framework and that Johnson Controls satis-

fied that standard, the court proceeded to discuss the BFOQ defense and concluded that Johnson Controls met that test, too. *Id.*, at 893–894. The en banc majority ruled that industrial safety is part of the essence of respondent's business, and that the fetal-protection policy is reasonably necessary to further that concern. Quoting *Dothard* v. *Rawlinson*, 433 U. S. 321, 335 (1977), the majority emphasized that, in view of the goal of protecting the unborn, "more is at stake" than simply an individual woman's decision to weigh and accept the risks of employment. 886 F. 2d, at 898.

Judges Cudahy and Posner dissented and would have reversed the judgment and remanded the case for trial. Judge Cudahy explained: "It may (and should) be difficult to establish a BFOQ here but I would afford the defendant an opportunity to try." *Id.*, at 901. "[T]he BFOQ defense need not be narrowly limited to matters of worker productivity, product quality and occupational safety." *Id.*, at 902, n. 1. He concluded that this case's "painful complexities are manifestly unsuited for summary judgment." *Id.*, at 902.

Judge Posner stated: "I think it a mistake to suppose that we can decide this case once and for all on so meager a record." *Ibid.* He, too, emphasized that, under Title VII, a fetal-protection policy which explicitly applied just to women could be defended only as a BFOQ. He observed that Title VII defines a BFOQ defense as a "'bona fide occupational qualification reasonably necessary to the normal operation'" of a business, and that "the 'normal operation' of a business encompasses ethical, legal, and business concerns about the effects of an employer's activities on third parties." *Id.*, at 902 and 904. He emphasized, however, that whether a particular policy is lawful is a question of fact that should ordinarily be resolved at trial. *Id.*, at 906. Like Judge Cudahy, he stressed that "it will be the rare case where the lawfulness of such a policy can be decided on the defendant's motion for summary judgment." *Ibid.*

Judge Easterbrook, also in dissent and joined by Judge Flaum, agreed with Judges Cudahy and Posner that the only defense available to Johnson Controls was the BFOQ. He concluded, however, that the BFOQ defense would not prevail because respondent's stated concern for the health of the unborn was irrelevant to the operation of its business under the BFOQ. He also viewed the employer's concern as irrelevant to a woman's ability or inability to work under the Pregnancy Discrimination Act's amendment to Title VII, 92 Stat. 2076, 42 U. S. C. §2000e(k). Judge Easterbrook also stressed what he considered the excessive breadth of Johnson Controls' policy. It applied to all women (except those with medical proof of incapacity to bear children) although most women in an industrial labor force do not become pregnant, most of those who do become pregnant will have blood lead levels under 30 micrograms per deciliter, and most of those who become pregnant with levels exceeding that figure will bear normal children anyway. 886 F. 2d, at 912–913. "Concerns about a tiny minority of women cannot set the standard by which all are judged." *Id.*, at 913.

With its ruling, the Seventh Circuit became the first Court of Appeals to hold that a fetal-protection policy directed exclusively at women could qualify as a BFOQ. We granted certiorari, 494 U. S. 1055 (1990), to resolve the obvious conflict between the Fourth, Seventh, and Eleventh Circuits on this issue, and to address the important and difficult question whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant.[1]

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[1] Since our grant of certiorari, the Sixth Circuit has reversed a District Court's summary judgment for an employer that had excluded fertile female employees from foundry jobs involving exposure to specified concentrations of airborne lead. See *Grant* v. *General Motors Corp.*, 908 F. 2d 1303 (1990). The court said: "We agree with the view of the dissenters in *Johnson Controls* that fetal protection policies perforce amount to overt sex discrimination, which cannot logically be recast as disparate impact and

III

The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. § 2000e–2(a), prohibits sex-based classifications in terms and conditions of employment, in hiring and discharging decisions, and in other employment decisions that adversely affect an employee's status.[2] Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender. Respondent assumes as much in its brief before this Court. Brief for Respondent 17, n. 24.

Nevertheless, the Court of Appeals assumed, as did the two appellate courts that already had confronted the issue, that sex-specific fetal-protection policies do not involve facial discrimination. 886 F. 2d, at 886–887; *Hayes*, 726 F. 2d, at 1547; *Wright*, 697 F. 2d, at 1190. These courts analyzed the policies as though they were facially neutral and had only a

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cannot be countenanced without proof that infertility is a BFOQ. . . . [P]laintiff . . . has alleged a claim of overt discrimination that her employer may justify only through the BFOQ defense." *Id.*, at 1310.

In *Johnson Controls, Inc.* v. *Fair Employment & Housing Comm'n*, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990), the court held respondent's fetal-protection policy invalid under California's fair-employment law.

[2] The statute reads:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

discriminatory effect upon the employment opportunities of women. Consequently, the courts looked to see if each employer in question had established that its policy was justified as a business necessity. The business necessity standard is more lenient for the employer than the statutory BFOQ defense. The Court of Appeals here went one step further and invoked the burden-shifting framework set forth in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), thus requiring petitioners to bear the burden of persuasion on all questions. 886 F. 2d, at 887–888. The court assumed that because the asserted reason for the sex-based exclusion (protecting women's unconceived offspring) was ostensibly benign, the policy was not sex-based discrimination. That assumption, however, was incorrect.

First, Johnson Controls' policy classifies on the basis of gender and childbearing capacity, rather than fertility alone. Respondent does not seek to protect the unconceived children of all its employees. Despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only with the harms that may befall the unborn offspring of its female employees. Accordingly, it appears that Johnson Controls would have lost in the Eleventh Circuit under *Hayes* because its policy does not "effectively and equally protec[t] the offspring of all employees." 726 F. 2d, at 1548. This Court faced a conceptually similar situation in *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971), and found sex discrimination because the policy established "one hiring policy for women and another for men—each having pre-school-age children." *Id.*, at 544. Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing.

Our conclusion is bolstered by the Pregnancy Discrimination Act (PDA), 42 U. S. C. § 2000e(k), in which Congress explicitly provided that, for purposes of Title VII, discrimination "'on the basis of sex'" includes discrimination "because

of or on the basis of pregnancy, childbirth, or related medical conditions."[3] "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 684 (1983). In its use of the words "capable of bearing children" in the 1982 policy statement as the criterion for exclusion, Johnson Controls explicitly classifies on the basis of potential for pregnancy. Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. Respondent has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex.

We concluded above that Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females. Moreover, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination. In *Martin Marietta*, *supra*, the motives underlying the employers' express exclusion of women did not alter the intentionally discriminatory character of the policy. Nor did the arguably benign motives lead to consideration of a business necessity defense. The ques-

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[3] The Act added subsection (k) to § 701 of the Civil Rights Act of 1964 and reads in pertinent part:

"The terms 'because of sex' or 'on the basis of sex' [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ."

tion in that case was whether the discrimination in question could be justified under § 703(e) as a BFOQ. The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) and thus may be defended only as a BFOQ.

The enforcement policy of the Equal Employment Opportunity Commission accords with this conclusion. On January 24, 1990, the EEOC issued a Policy Guidance in the light of the Seventh Circuit's decision in the present case. App. to Pet. for Cert. 127a. The document noted: "For the plaintiff to bear the burden of proof in a case in which there is direct evidence of a facially discriminatory policy is wholly inconsistent with settled Title VII law." *Id.*, at 133a. The Commission concluded: "[W]e now think BFOQ is the better approach." *Id.*, at 134a.

In sum, Johnson Controls' policy "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702, 711 (1978), quoting Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1170 (1971). We hold that Johnson Controls' fetal-protection policy is sex discrimination forbidden under Title VII unless respondent can establish that sex is a "bona fide occupational qualification."

IV

Under § 703(e)(1) of Title VII, an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e–2(e)(1). We therefore turn to the question whether Johnson Controls' fetal-protection pol-

icy is one of those "certain instances" that come within the BFOQ exception.

The BFOQ defense is written narrowly, and this Court has read it narrowly. See, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 332–337 (1977); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 122–125 (1985). We have read the BFOQ language of § 4(f) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 603, as amended, 29 U. S. C. § 623(f)(1), which tracks the BFOQ provision in Title VII, just as narrowly. See *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400 (1985). Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703.

The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. The statute thus limits the situations in which discrimination is permissible to "certain instances" where sex discrimination is "reasonably necessary" to the "normal operation" of the "particular" business. Each one of these terms—certain, normal, particular—prevents the use of general subjective standards and favors an objective, verifiable requirement. But the most telling term is "occupational"; this indicates that these objective, verifiable requirements must concern job-related skills and aptitudes.

JUSTICE WHITE defines "occupational" as meaning related to a job. *Post*, at 212, n. 1. According to him, any discriminatory requirement imposed by an employer is "job-related" simply because the employer has chosen to make the requirement a condition of employment. In effect, he argues that sterility may be an occupational qualification for women because Johnson Controls has chosen to require it. This reading of "occupational" renders the word mere surplusage. "Qualification" by itself would encompass an employer's idiosyncratic requirements. By modifying "qualification" with "occupational," Congress narrowed the term to qualifications that affect an employee's ability to do the job.

Johnson Controls argues that its fetal-protection policy falls within the so-called safety exception to the BFOQ. Our cases have stressed that discrimination on the basis of sex because of safety concerns is allowed only in narrow circumstances. In *Dothard* v. *Rawlinson*, this Court indicated that danger to a woman herself does not justify discrimination. 433 U. S., at 335. We there allowed the employer to hire only male guards in contact areas of maximum-security male penitentiaries only because more was at stake than the "individual woman's decision to weigh and accept the risks of employment." *Ibid.* We found sex to be a BFOQ inasmuch as the employment of a female guard would create real risks of safety to others if violence broke out because the guard was a woman. Sex discrimination was tolerated because sex was related to the guard's ability to do the job—maintaining prison security. We also required in *Dothard* a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength although it might be a fairly accurate one.

Similarly, some courts have approved airlines' layoffs of pregnant flight attendants at different points during the first five months of pregnancy on the ground that the employer's policy was necessary to ensure the safety of passengers. See *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d 670 (CA9 1980); *Burwell* v. *Eastern Air Lines, Inc.*, 633 F. 2d 361 (CA4 1980), cert. denied, 450 U. S. 965 (1981); *Condit* v. *United Air Lines, Inc.*, 558 F. 2d 1176 (CA4 1977), cert. denied, 435 U. S. 934 (1978); *In re National Airlines, Inc.*, 434 F. Supp. 249 (SD Fla. 1977). In two of these cases, the courts pointedly indicated that fetal, as opposed to passenger, safety was best left to the mother. *Burwell*, 633 F. 2d, at 371; *National Airlines*, 434 F. Supp., at 259.

We considered safety to third parties in *Western Airlines, Inc.* v. *Criswell*, *supra*, in the context of the ADEA. We focused upon "the nature of the flight engineer's tasks," and the "actual capabilities of persons over age 60" in relation to

those tasks. 472 U. S., at 406. Our safety concerns were not independent of the individual's ability to perform the assigned tasks, but rather involved the possibility that, because of age-connected debility, a flight engineer might not properly assist the pilot, and might thereby cause a safety emergency. Furthermore, although we considered the safety of third parties in *Dothard* and *Criswell*, those third parties were indispensable to the particular business at issue. In *Dothard*, the third parties were the inmates; in *Criswell*, the third parties were the passengers on the plane. We stressed that in order to qualify as a BFOQ, a job qualification must relate to the "'essence,'" *Dothard*, 433 U. S., at 333 (emphasis deleted), or to the "central mission of the employer's business," *Criswell*, 472 U. S., at 413.

JUSTICE WHITE ignores the "essence of the business" test and so concludes that "protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons *(Dothard)* or flying airplanes *(Criswell)*." *Post*, at 217. By limiting his discussion to cost and safety concerns and rejecting the "essence of the business" test that our case law has established, he seeks to expand what is now the narrow BFOQ defense. Third-party safety considerations properly entered into the BFOQ analysis in *Dothard* and *Criswell* because they went to the core of the employee's job performance. Moreover, that performance involved the central purpose of the enterprise. *Dothard*, 433 U. S., at 335 ("The essence of a correctional counselor's job is to maintain prison security"); *Criswell*, 472 U. S., at 413 (the central mission of the airline's business was the safe transportation of its passengers). JUSTICE WHITE attempts to transform this case into one of customer safety. The unconceived fetuses of Johnson Controls' female employees, however, are neither customers nor third parties whose safety is essential to the business of battery manufacturing. No one can disregard the possibility of injury to future children; the BFOQ, how-

ever, is not so broad that it transforms this deep social concern into an essential aspect of battery making.

Our case law, therefore, makes clear that the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job. This approach is consistent with the language of the BFOQ provision itself, for it suggests that permissible distinctions based on sex must relate to ability to perform the duties of the job. Johnson Controls suggests, however, that we expand the exception to allow fetal-protection policies that mandate particular standards for pregnant or fertile women. We decline to do so. Such an expansion contradicts not only the language of the BFOQ and the narrowness of its exception, but also the plain language and history of the PDA.

The PDA's amendment to Title VII contains a BFOQ standard of its own: Unless pregnant employees differ from others "in their ability or inability to work," they must be "treated the same" as other employees "for all employment-related purposes." 42 U. S. C. § 2000e(k). This language clearly sets forth Congress' remedy for discrimination on the basis of pregnancy and potential pregnancy. Women who are either pregnant or potentially pregnant must be treated like others "similar in their ability . . . to work." *Ibid.* In other words, women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.

JUSTICE WHITE asserts that the PDA did not alter the BFOQ defense. *Post*, at 218. He arrives at this conclusion by ignoring the second clause of the Act, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U. S. C. § 2000e(k). Until this day, every Member of this Court had acknowledged that "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be

treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work." *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272, 297 (1987) (WHITE, J., dissenting). JUSTICE WHITE now seeks to read the second clause out of the Act.

The legislative history confirms what the language of the PDA compels. Both the House and Senate Reports accompanying the legislation indicate that this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children. See Amending Title VII, Civil Rights Act of 1964, S. Rep. No. 95–331, pp. 4–6 (1977):

> "Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees . . . .
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> . . . . . .
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> "[U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue."

See also Prohibition of Sex Discrimination Based on Pregnancy, H. R. Rep. No. 95–948, pp. 3–6 (1978).

This history counsels against expanding the BFOQ to allow fetal-protection policies. The Senate Report quoted above states that employers may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work. Employment late in pregnancy often imposes risks on the unborn child, see Chavkin, Walking a Tightrope: Pregnancy, Parenting, and Work, in Double Exposure 196, 196–202 (W. Chavkin ed. 1984), but Congress indicated that the employer may take into account only the woman's ability to get her job done. See Becker, From *Muller v. Oregon* to Fetal Vulnerability Policies, 53 U. Chi.

L. Rev. 1219, 1255–1256 (1986). With the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself.

We conclude that the language of both the BFOQ provision and the PDA which amended it, as well as the legislative history and the case law, prohibit an employer from discriminating against a woman because of her capacity to become pregnant unless her reproductive potential prevents her from performing the duties of her job. We reiterate our holdings in *Criswell* and *Dothard* that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the "essence" of the particular business.[4]

V

We have no difficulty concluding that Johnson Controls cannot establish a BFOQ. Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the

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[4] JUSTICE WHITE predicts that our reaffirmation of the narrowness of the BFOQ defense will preclude considerations of privacy as a basis for sex-based discrimination. *Post*, at 219–220, n. 8. We have never addressed privacy-based sex discrimination and shall not do so here because the sex-based discrimination at issue today does not involve the privacy interests of Johnson Controls' customers. Nothing in our discussion of the "essence of the business test," however, suggests that sex could not constitute a BFOQ when privacy interests are implicated. See, *e. g.*, *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191 (ED Ark. 1981) (essence of obstetrics nurse's business is to provide sensitive care for patient's intimate and private concerns), vacated as moot, 671 F. 2d 1100 (CA8 1982).

PDA. Johnson Controls has attempted to exclude women because of their reproductive capacity. Title VII and the PDA simply do not allow a woman's dismissal because of her failure to submit to sterilization.

Nor can concerns about the welfare of the next generation be considered a part of the "essence" of Johnson Controls' business. Judge Easterbrook in this case pertinently observed: "It is word play to say that 'the job' at Johnson [Controls] is to make batteries without risk to fetuses in the same way 'the job' at Western Air Lines is to fly planes without crashing." 886 F. 2d, at 913.

Johnson Controls argues that it must exclude all fertile women because it is impossible to tell which women will become pregnant while working with lead. This argument is somewhat academic in light of our conclusion that the company may not exclude fertile women at all; it perhaps is worth noting, however, that Johnson Controls has shown no "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 235 (CA5 1969), quoted with approval in *Dothard*, 433 U. S., at 333. Even on this sparse record, it is apparent that Johnson Controls is concerned about only a small minority of women. Of the eight pregnancies reported among the female employees, it has not been shown that any of the babies have birth defects or other abnormalities. The record does not reveal the birth rate for Johnson Controls' female workers, but national statistics show that approximately nine percent of all fertile women become pregnant each year. The birthrate drops to two percent for blue collar workers over age 30. See Becker, 53 U. Chi. L. Rev., at 1233. Johnson Controls' fear of prenatal injury, no matter how sincere, does not begin to show that substantially all of its fertile women employees are incapable of doing their jobs.

VI

A word about tort liability and the increased cost of fertile women in the workplace is perhaps necessary. One of the dissenting judges in this case expressed concern about an employer's tort liability and concluded that liability for a potential injury to a fetus is a social cost that Title VII does not require a company to ignore. 886 F. 2d, at 904–905. It is correct to say that Title VII does not prevent the employer from having a conscience. The statute, however, does prevent sex-specific fetal-protection policies. These two aspects of Title VII do not conflict.

More than 40 States currently recognize a right to recover for a prenatal injury based either on negligence or on wrongful death. See, *e. g.*, *Wolfe* v. *Isbell*, 291 Ala. 327, 333–334, 280 So. 2d 758, 763 (1973); *Simon* v. *Mullin*, 34 Conn. Supp. 139, 147, 380 A. 2d 1353, 1357 (1977). See also Note, 22 Suffolk U. L. Rev. 747, 754–756, and nn. 54, 57, and 58 (1988) (listing cases). According to Johnson Controls, however, the company complies with the lead standard developed by OSHA and warns its female employees about the damaging effects of lead. It is worth noting that OSHA gave the problem of lead lengthy consideration and concluded that "there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy." 43 Fed. Reg. 52952, 52966 (1978). See also *id.*, at 54354, 54398. Instead, OSHA established a series of mandatory protections which, taken together, "should effectively minimize any risk to the fetus and newborn child." *Id.*, at 52966. See 29 CFR § 1910.1025(k)(ii) (1990). Without negligence, it would be difficult for a court to find liability on the part of the employer. If, under general tort principles, Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best.

Although the issue is not before us, JUSTICE WHITE observes that "it is far from clear that compliance with Title VII will pre-empt state tort liability." *Post*, at 213. The cases relied upon by him to support his prediction, however, are inapposite. For example, in *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), we considered a California statute that expanded upon the requirements of the PDA and concluded that the statute was not pre-empted by Title VII because it was not inconsistent with the purposes of the federal statute and did not require an act that was unlawful under Title VII. *Id.*, at 291–292. Here, in contrast, the tort liability that JUSTICE WHITE fears will punish employers for *complying* with Title VII's clear command. When it is impossible for an employer to comply with both state and federal requirements, this Court has ruled that federal law pre-empts that of the States. See, *e. g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963).

This Court faced a similar situation in *Farmers Union* v. *WDAY, Inc.*, 360 U. S. 525 (1959). In *WDAY*, it held that § 315(a) of the Federal Communications Act of 1934 barred a broadcasting station from removing defamatory statements contained in speeches broadcast by candidates for public office. It then considered a libel action which arose as a result of a speech made over the radio and television facilities of WDAY by a candidate for the 1956 senatorial race in North Dakota. It held that the statutory prohibition of censorship carried with it an immunity from liability for defamatory statements made by the speaker. To allow libel actions "would sanction the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the licensee." *Id.*, at 531. It concluded:

> "We are aware that causes of action for libel are widely recognized throughout the States. But we have not hesitated to abrogate state law where satisfied that

its enforcement would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*, at 535, quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 773 (1947).

If state tort law furthers discrimination in the workplace and prevents employers from hiring women who are capable of manufacturing the product as efficiently as men, then it will impede the accomplishment of Congress' goals in enacting Title VII. Because Johnson Controls has not argued that it faces any costs from tort liability, not to mention crippling ones, the pre-emption question is not before us. We therefore say no more than that the concurrence's speculation appears unfounded as well as premature.

The tort-liability argument reduces to two equally unpersuasive propositions. First, Johnson Controls attempts to solve the problem of reproductive health hazards by resorting to an exclusionary policy. Title VII plainly forbids illegal sex discrimination as a method of diverting attention from an employer's obligation to police the workplace. Second, the specter of an award of damages reflects a fear that hiring fertile women will cost more. The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. See *Manhart*, 435 U. S., at 716–718, and n. 32. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the "decision to forbid special treatment of pregnancy despite the social costs associated therewith." *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1085, n. 14 (1983) (opinion of MARSHALL, J.). See *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989).

We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the

survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them.

VII

Our holding today that Title VII, as so amended, forbids sex-specific fetal-protection policies is neither remarkable nor unprecedented. Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. See, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412 (1908). Congress in the PDA prohibited discrimination on the basis of a woman's ability to become pregnant. We do no more than hold that the PDA means what it says.

It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.

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

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, concurring in part and concurring in the judgment.

The Court properly holds that Johnson Controls' fetal-protection policy overtly discriminates against women, and thus is prohibited by Title VII of the Civil Rights Act of 1964 unless it falls within the bona fide occupational qualification (BFOQ) exception, set forth at 42 U. S. C. § 2000e–2(e). The Court erroneously holds, however, that the BFOQ defense is so narrow that it could never justify a sex-specific fetal-protection policy. I nevertheless concur in the judgment of reversal because on the record before us summary judgment in favor of Johnson Controls was improperly en-

tered by the District Court and affirmed by the Court of Appeals.

I

In evaluating the scope of the BFOQ defense, the proper starting point is the language of the statute. Cf. *Demarest* v. *Manspeaker*, 498 U. S. 184, 190 (1991); *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 237 (1990). Title VII forbids discrimination on the basis of sex, except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e–2(e)(1). For the fetal-protection policy involved in this case to be a BFOQ, therefore, the policy must be "reasonably necessary" to the "normal operation" of making batteries, which is Johnson Controls' "particular business." Although that is a difficult standard to satisfy, nothing in the statute's language indicates that it could *never* support a sex-specific fetal-protection policy.[1]

On the contrary, a fetal-protection policy would be justified under the terms of the statute if, for example, an employer could show that exclusion of women from certain jobs was reasonably necessary to avoid substantial tort liability. Common sense tells us that it is part of the normal operation of business concerns to avoid causing injury to third parties, as well as to employees, if for no other reason than to avoid

[1] The Court's heavy reliance on the word "'occupational'" in the BFOQ statute, *ante*, at 201, is unpersuasive. *Any* requirement for employment can be said to be an occupational qualification, since "occupational" merely means related to a job. See Webster's Third New International Dictionary 1560 (1976). Thus, Johnson Controls' requirement that employees engaged in battery manufacturing be either male or nonfertile clearly is an "occupational qualification." The issue, of course, is whether that qualification is "reasonably necessary to the normal operation" of Johnson Controls' business. It is telling that the Court offers no case support, either from this Court or the lower federal courts, for its interpretation of the word "occupational."

tort liability and its substantial costs. This possibility of tort liability is not hypothetical; every State currently allows children born alive to recover in tort for prenatal injuries caused by third parties, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 55, p. 368 (5th ed. 1984), and an increasing number of courts have recognized a right to recover even for prenatal injuries caused by torts committed prior to conception, see 3 F. Harper, F. James, & O. Gray, Law of Torts § 18.3, pp. 677–678, n. 15 (2d ed. 1986).

The Court dismisses the possibility of tort liability by no more than speculating that if "Title VII bans sex-specific fetal-protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently, the basis for holding an employer liable seems remote at best." *Ante*, at 208. Such speculation will be small comfort to employers. First, it is far from clear that compliance with Title VII will pre-empt state tort liability, and the Court offers no support for that proposition.[2] Second, although warnings may preclude claims by injured *employees*, they will not preclude claims by injured children because the general rule is that parents cannot waive causes of action on behalf of their children, and the parents' negligence will not be imputed to the children.[3] Finally, although state tort liabil-

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[2] Cf. *English* v. *General Electric Co.*, 496 U. S. 72 (1990) (state law action for intentional infliction of emotional distress not pre-empted by Energy Reorganization Act of 1974); *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272, 290–292 (1987) (state statute requiring the provision of leave and reinstatement to employees disabled by pregnancy not pre-empted by the Pregnancy Discrimination Act (PDA), 92 Stat. 2076, 42 U. S. C. § 2000e(k)); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984) (state punitive damages claim not pre-empted by federal laws regulating nuclear powerplants); *Bernstein* v. *Aetna Life & Casualty*, 843 F. 2d 359, 364–365 (CA9 1988) ("It is well-established that Title VII does not pre-empt state common law remedies"); see also 42 U. S. C. § 2000e–7.

[3] See, *e. g.*, *In re Estate of Infant Fontaine*, 128 N. H. 695, 700, 519 A. 2d 227, 230 (1986); *Collins* v. *Eli Lilly Co.*, 116 Wis. 2d 166, 200, n. 14, 342

ity for prenatal injuries generally requires negligence, it will be difficult for employers to determine in advance what will constitute negligence. Compliance with OSHA standards, for example, has been held not to be a defense to state tort or criminal liability. See *National Solid Wastes Management Assn.* v. *Killian*, 918 F. 2d 671, 680, n. 9 (CA7 1990) (collecting cases); see also 29 U. S. C. § 653(b)(4). Moreover, it is possible that employers will be held strictly liable, if, for example, their manufacturing process is considered "abnormally dangerous." See Restatement (Second) of Torts § 869, Comment *b* (1979).

Relying on *Los Angeles Dept. of Water and Power* v. *Manhart*, 435 U. S. 702 (1978), the Court contends that tort liability cannot justify a fetal-protection policy because the extra costs of hiring women is not a defense under Title VII. *Ante*, at 210. This contention misrepresents our decision in *Manhart*. There, we held that a requirement that female employees contribute more than male employees to a pension fund, in order to reflect the greater longevity of women, constituted discrimination against women under Title VII because it treated them as a class rather than as individuals. 435 U. S., at 708, 716–717. We did not in that case address in any detail the nature of the BFOQ defense, and we certainly did not hold that cost was irrelevant to the BFOQ analysis. Rather, we merely stated in a footnote that "there has been no showing that sex distinctions are reasonably necessary to the normal operation of the Department's retirement plan." *Id.*, at 716, n. 30. We further noted that although Title VII does not contain a "cost-justification defense comparable to the affirmative defense available in a price dis-

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N. W. 2d 37, 53, n. 14, cert. denied, 469 U. S. 826 (1984); *Doyle* v. *Bowdoin College*, 403 A. 2d 1206, 1208, n. 3 (Me. 1979); *Littleton* v. *Jordan*, 428 S. W. 2d 472 (Tex. Civ. App. 1968); *Fallaw* v. *Hobbs*, 113 Ga. App. 181, 182–183, 147 S. E. 2d 517, 519 (1966); see also Restatement (Second) of Torts § 488(1) (1965).

crimination suit," "no defense based on the *total* cost of employing men and women was attempted in this case." *Id.*, at 716–717, and n. 32.

Prior decisions construing the BFOQ defense confirm that the defense is broad enough to include considerations of cost and safety of the sort that could form the basis for an employer's adoption of a fetal-protection policy. In *Dothard* v. *Rawlinson*, 433 U. S. 321 (1977), the Court held that being male was a BFOQ for "contact" guard positions in Alabama's maximum-security male penitentiaries. The Court first took note of the actual conditions of the prison environment: "In a prison system where violence is the order of the day, where inmate access to guards is facilitated by dormitory living arrangements, where every institution is understaffed, and where a substantial portion of the inmate population is composed of sex offenders mixed at random with other prisoners, there are few visible deterrents to inmate assaults on women custodians." *Id.*, at 335–336. The Court also stressed that "[m]ore [was] at stake" than a risk to individual female employees: "The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel." *Ibid.* Under those circumstances, the Court observed that "it would be an oversimplification to characterize [the exclusion of women] as an exercise in 'romantic paternalism.' Cf. *Frontiero* v. *Richardson*, 411 U. S. 677, 684." *Id.*, at 335.

We revisited the BFOQ defense in *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400 (1985), this time in the context of the Age Discrimination in Employment Act of 1967 (ADEA). There, we endorsed the two-part inquiry for evaluating a BFOQ defense used by the Court of Appeals for the Fifth Circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976). First, the job qualification must not be "so peripheral to the central mission of the employer's business" that no dis-

crimination could be "'reasonably *necessary* to the normal operation of the particular business.'" 472 U. S., at 413. Although safety is *not* such a peripheral concern, *id.*, at 413, 419,[4] the inquiry "'adjusts to the safety factor'"—"'[t]he greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications,'" *id.*, at 413 (quoting *Tamiami*, *supra*, at 236). Second, the employer must show either that all or substantially all persons excluded "'"would be unable to perform safely and efficiently the duties of the job involved,"'" or that it is "'"impossible or highly impractical"'" to deal with them on an individual basis. 472 U. S., at 414 (quoting *Tamiami*, *supra*, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228, 235 (CA5 1969))). We further observed that this inquiry properly takes into account an employer's interest in safety—"[w]hen an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is 'reasonably necessary' to safe operation of the business." 472 U. S., at 419.

Dothard and *Criswell* make clear that avoidance of substantial safety risks to third parties is *inherently* part of both an employee's ability to perform a job and an employer's

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[4] An example of a "peripheral" job qualification was in *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA5), cert. denied, 404 U. S. 950 (1971). There, the Fifth Circuit held that being female was not a BFOQ for the job of flight attendant, despite a determination by the trial court that women were better able than men to perform the "nonmechanical" functions of the job, such as attending to the passengers' psychological needs. The court concluded that such nonmechanical functions were merely "tangential" to the normal operation of the airline's business, noting that "[n]o one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another." 442 F. 2d, at 388.

"normal operation" of its business. Indeed, in both cases, the Court approved the statement in *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, *supra*, that an employer could establish a BFOQ defense by showing that "all or substantially all women would be unable to perform *safely and efficiently* the duties of the job involved." *Id.*, at 235 (emphasis added). See *Criswell*, 472 U. S., at 414; *Dothard*, *supra*, at 333. The Court's statement in this case that "the safety exception is limited to instances in which sex or pregnancy actually interferes with the employee's ability to perform the job," *ante*, at 204, therefore adds no support to its conclusion that a fetal-protection policy could never be justified as a BFOQ. On the facts of this case, for example, protecting fetal safety while carrying out the duties of battery manufacturing is as much a legitimate concern as is safety to third parties in guarding prisons *(Dothard)* or flying airplanes *(Criswell)*.[5]

Dothard and *Criswell* also confirm that costs are relevant in determining whether a discriminatory policy is reasonably necessary for the normal operation of a business. In *Dothard*, the safety problem that justified exclusion of women from the prison guard positions was largely a result of inadequate staff and facilities. See 433 U. S., at 335. If the cost of employing women could not be considered, the employer there should have been required to hire more staff and restructure the prison environment rather than exclude women. Similarly, in *Criswell* the airline could have been

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[5] I do not, as the Court asserts, *ante*, at 203, reject the "'essence of the business'" test. Rather, I merely reaffirm the obvious—that safety to third parties is part of the "essence" of most if not all businesses. Of course, the BFOQ inquiry "'adjusts to the safety factor.'" *Criswell*, 472 U. S., at 413 (quoting *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224, 236 (CA5 1976)). As a result, more stringent occupational qualifications may be justified for jobs involving higher safety risks, such as flying airplanes. But a recognition that the importance of safety varies among businesses does not mean that safety is completely irrelevant to the essence of a job such as battery manufacturing.

required to hire more pilots and install expensive monitoring devices rather than discriminate against older employees. The BFOQ statute, however, reflects "Congress' unwillingness to require employers to change the very nature of their operations." *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 242 (1989) (plurality opinion).

The PDA, contrary to the Court's assertion, *ante*, at 204, did not restrict the scope of the BFOQ defense. The PDA was only an amendment to the "Definitions" section of Title VII, 42 U. S. C. § 2000e, and did not purport to eliminate or alter the BFOQ defense. Rather, it merely clarified Title VII to make it clear that pregnancy and related conditions are included within Title VII's antidiscrimination provisions. As we have already recognized, "the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles." *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans* v. *Norris*, 463 U. S. 1073, 1085, n. 14 (1983).[6]

This interpretation is confirmed by the PDA's legislative history. As discussed in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 678–679, and n. 17 (1983), the PDA was designed to overrule the decision in *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976), where the Court

[6] Contrary to the Court's assertion, *ante*, at 204–205, neither the majority decision nor the dissent in *California Federal Savings and Loan Assn.* v. *Guerra*, 479 U. S. 272 (1987), is relevant to the issue whether the PDA altered the BFOQ standard for pregnancy-related discrimination. In that case, the Court held that the PDA did not pre-empt a state law requiring employers to provide leave and reinstatement to pregnant employees. The Court reasoned that the PDA was not intended to prohibit all employment practices that favor pregnant women. *Id.*, at 284–290. The dissent disagreed with that conclusion, arguing that the state statute was pre-empted because the PDA's language that pregnant employees "shall be treated the same for all employment-related purposes" appeared to forbid preferential treatment of pregnant workers. *Id.*, at 297–298. Obviously, the dispute in that case between the majority and the dissent was purely over what constituted *discrimination* under Title VII, as amended by the PDA, not over the scope of the BFOQ defense.

had held that "an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.*, at 136. The PDA thus "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News*, *supra*, at 684. It does not, however, alter the standards for employer *defenses*. The Senate Report, for example, stated that the PDA "defines sex discrimination, as proscribed in the existing statute, to include these physiological occurrences [pregnancy, childbirth, and related medical conditions] peculiar to women; *it does not change the application of Title VII to sex discrimination in any other way*." S. Rep. No. 95–331, pp. 3–4 (1977) (emphasis added). Similarly, the House Report stated that "[p]regnancy-based distinctions will be subject to the same scrutiny *on the same terms* as other acts of sex discrimination proscribed in the existing statute." H. R. Rep. No. 95–948, p. 4 (1978) (emphasis added).[7]

In enacting the BFOQ standard, "Congress did not ignore the public interest in safety." *Criswell*, 472 U. S., at 419. The Court's narrow interpretation of the BFOQ defense in this case, however, means that an employer cannot exclude even *pregnant* women from an environment highly toxic to their fetuses. It is foolish to think that Congress intended such a result, and neither the language of the BFOQ exception nor our cases requires it.[8]

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[7] Even if the PDA *did* establish a separate BFOQ standard for pregnancy-related discrimination, if a female employee could only perform the duties of her job by imposing substantial safety and liability risks, she would not be "similar in [her] ability or inability to work" as a male employee, under the terms of the PDA. See 42 U. S. C. § 2000e(k).

[8] The Court's cramped reading of the BFOQ defense is also belied by the legislative history of Title VII, in which three examples of permissible sex discrimination were mentioned—a female nurse hired to care for an elderly woman, an all-male professional baseball team, and a masseur. See 110 Cong. Rec. 2718 (1964) (Rep. Goodell); *id.*, at 7212–7213 (interpretive memorandum introduced by Sens. Clark and Case); *id.*, at 2720 (Rep.

II

Despite my disagreement with the Court concerning the scope of the BFOQ defense, I concur in reversing the Court of Appeals because that court erred in affirming the District Court's grant of summary judgment in favor of Johnson Controls. First, the Court of Appeals erred in failing to consider the level of risk avoidance that was part of Johnson Controls' "normal operation." Although the court did conclude that there was a "substantial risk" to fetuses from lead exposure in fertile women, 886 F. 2d 871, 879–883, 898 (CA7 1989), it merely meant that there was a high risk that *some* fetal injury would occur absent a fetal-protection policy. That analysis, of course, fails to address the *extent* of fetal injury that is likely to occur.[9] If the fetal-protection policy insists on a risk-avoidance level substantially higher than other risk lev-

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Multer). In none of those situations would gender "actually interfer[e] with the employee's ability to perform the job," as required today by the Court, *ante*, at 204.

The Court's interpretation of the BFOQ standard also would seem to preclude considerations of privacy as a basis for sex-based discrimination, since those considerations do not relate directly to an employee's physical ability to perform the duties of the job. The lower federal courts, however, have consistently recognized that privacy interests may justify sex-based requirements for certain jobs. See, *e. g.*, *Fesel* v. *Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (Del. 1978), aff'd, 591 F. 2d 1334 (CA3 1979) (nurse's aide in retirement home); *Jones* v. *Hinds General Hospital*, 666 F. Supp. 933 (SD Miss. 1987) (nursing assistant); *Local 567 American Federation of State, County, and Municipal Employees, AFL–CIO* v. *Michigan Council 25, American Federation of State, County, and Municipal Employees, AFL–CIO*, 635 F. Supp. 1010 (ED Mich. 1986) (mental health workers); *Norwood* v. *Dale Maintenance System, Inc.*, 590 F. Supp. 1410 (ND Ill. 1984) (washroom attendant); *Backus* v. *Baptist Medical Center*, 510 F. Supp. 1191 (ED Ark. 1981) (nursing position in obstetrics and gynecology department of hospital), vacated as moot, 671 F. 2d 1100 (CA8 1982).

[9] Apparently, between 1979 and 1983, only eight employees at Johnson Controls became pregnant while maintaining high blood lead levels, and only one of the babies born to this group later recorded an elevated blood lead level. See *ante*, at 191; 886 F. 2d, at 876–877.

els tolerated by Johnson Controls such as risks to employees and consumers, the policy should not constitute a BFOQ.[10]

Second, even without more information about the normal level of risk at Johnson Controls, the fetal-protection policy at issue here reaches too far. This is evident both in its presumption that, absent medical documentation to the contrary, all women are fertile regardless of their age, see *id.*, at 876, n. 8, and in its exclusion of presumptively fertile women from positions that might result in a promotion to a position involving high lead exposure, *id.*, at 877. There has been no showing that either of those aspects of the policy is reasonably necessary to ensure safe and efficient operation of Johnson Controls' battery-manufacturing business. Of course, these infirmities in the company's policy do not warrant invalidating the entire fetal-protection program.

Third, it should be recalled that until 1982 Johnson Controls operated without an exclusionary policy, and it has not identified any grounds for believing that its current policy is reasonably necessary to its normal operations. Although it is now more aware of some of the dangers of lead exposure, *id.*, at 899, it has not shown that the risks of fetal harm or the costs associated with it have substantially increased. Cf. *Manhart*, 435 U. S., at 716, n. 30, in which we rejected a BFOQ defense because the employer had operated prior to the discrimination with no significant adverse effects.

Finally, the Court of Appeals failed to consider properly petitioners' evidence of harm to offspring caused by lead exposure in males. The court considered that evidence only in its discussion of the business necessity standard, in which it focused on whether *petitioners* had met their burden of proof. 886 F. 2d, at 889–890. The burden of proving that a discriminatory qualification is a BFOQ, however, rests with

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[10] It is possible, for example, that alternatives to exclusion of women, such as warnings combined with frequent blood testings, would sufficiently minimize the risk such that it would be comparable to other risks tolerated by Johnson Controls.

the employer. See, *e. g.*, *Price Waterhouse*, 490 U. S., at 248; *Dothard*, 433 U. S., at 333. Thus, the court should have analyzed whether the evidence was sufficient for petitioners to survive summary judgment in light of *respondent's* burden of proof to establish a BFOQ. Moreover, the court should not have discounted the evidence as "speculative," 886 F. 2d, at 889, merely because it was based on animal studies. We have approved the use of animal studies to assess risks, see *Industrial Union Dept.* v. *American Petroleum Institute*, 448 U. S. 607, 657, n. 64 (1980), and OSHA uses animal studies in establishing its lead control regulations, see *United Steelworkers of America, AFL–CIO–CLC* v. *Marshall*, 208 U. S. App. D. C. 60, 128, n. 97, 647 F. 2d 1189, 1257, n. 97 (1980), cert. denied, 453 U. S. 913 (1981). It seems clear that if the Court of Appeals had properly analyzed that evidence, it would have concluded that summary judgment against petitioners was not appropriate because there was a dispute over a material issue of fact.

As Judge Posner observed below:

> "The issue of the legality of fetal protection is as novel and difficult as it is contentious and the most sensible way to approach it at this early stage is on a case-by-case basis, involving careful examination of the facts as developed by the full adversary process of a trial. The record in this case is too sparse. The district judge jumped the gun. By affirming on this scanty basis we may be encouraging incautious employers to adopt fetal protection policies that could endanger the jobs of millions of women for minor gains in fetal safety and health.
>
> "But although the defendant did not present enough evidence to warrant the grant of summary judgment in its favor, there is no ground for barring it from presenting additional evidence at trial. Therefore it would be equally precipitate for us to direct the entry of judgment in the plaintiffs' favor . . . ." 886 F. 2d, at 908.

JUSTICE SCALIA, concurring in the judgment.

I generally agree with the Court's analysis, but have some reservations, several of which bear mention.

First, I think it irrelevant that there was "evidence in the record about the debilitating effect of lead exposure on the male reproductive system," *ante*, at 198. Even without such evidence, treating women differently "on the basis of pregnancy" constitutes discrimination "on the basis of sex," because Congress has unequivocally said so. Pregnancy Discrimination Act, 92 Stat. 2076, 42 U. S. C. § 2000e(k).

Second, the Court points out that "Johnson Controls has shown no factual basis for believing that all or substantially all women would be unable to perform safely . . . the duties of the job involved," *ante*, at 207 (internal quotation marks omitted). In my view, this is not only "somewhat academic in light of our conclusion that the company may not exclude fertile women at all," *ibid.*; it is entirely irrelevant. By reason of the Pregnancy Discrimination Act, it would not matter if all pregnant women placed their children at risk in taking these jobs, just as it does not matter if no men do so. As Judge Easterbrook put it in his dissent below: "Title VII gives parents the power to make occupational decisions affecting their families. A legislative forum is available to those who believe that such decisions should be made elsewhere." 886 F. 2d 871, 915 (CA7 1989).

Third, I am willing to assume, as the Court intimates, *ante*, at 208–211, that any action required by Title VII cannot give rise to liability under state tort law. That assumption, however, does not answer the question whether an action *is* required by Title VII (including the BFOQ provision) even if it is subject to liability under state tort law. It is perfectly reasonable to believe that Title VII has *accommodated* state tort law through the BFOQ exception. However, all that need be said in the present case is that Johnson has not demonstrated a substantial risk of tort liability—which is

alone enough to defeat a tort-based assertion of the BFOQ exception.

Last, the Court goes far afield, it seems to me, in suggesting that increased cost alone—short of "costs . . . so prohibitive as to threaten the survival of the employer's business," *ante*, at 210—cannot support a BFOQ defense. See *ante*, at 206. I agree with JUSTICE WHITE's concurrence, *ante*, at 214, that nothing in our prior cases suggests this, and in my view it is wrong. I think, for example, that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive. In the present case, however, Johnson has not asserted a cost-based BFOQ.

I concur in the judgment of the Court.

SALVE REGINA COLLEGE *v.* RUSSELL

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

No. 89–1629. Argued November 27, 1990—Decided March 20, 1991

Respondent Russell filed a diversity action in the District Court, alleging, *inter alia*, that petitioner college, located in Rhode Island, had breached an implied agreement to educate her when it asked her to withdraw from its nursing program for failing to meet certain weight loss commitments. The court denied petitioner's motion for a directed verdict, concluding that the Rhode Island Supreme Court would apply the commercial doctrine of substantial performance in an academic setting, such that Russell could prevail even though she had not fully complied with the contract's terms. The jury returned a verdict for Russell, which the Court of Appeals affirmed. Applying the appellate deference that it customarily accords to interpretations of state law made by federal judges of that State, the Court of Appeals found that the District Court's state-law determination did not constitute reversible error.

Held: Courts of appeals must review *de novo* district courts' state-law determinations. Pp. 231–240.

(a) The general rule of independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. Courts of appeals are structurally suited to the collaborative juridical process that promotes decisional accuracy. They are able to devote their primary attention to legal issues. They have the advantage of refined briefs which bring to bear on the legal issues more information and more comprehensive analysis than was provided to the district judge. And they employ multijudge panels that permit reflective dialogue and collective judgment. Pp. 231–233.

(b) Departure from the rule of independent appellate review is not warranted by the exercise of diversity jurisdiction. Appellate deference to the district court's state-law determination is inconsistent with the aims of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, to discourage forum shopping and to avoid inequitable administration of the laws, since it invites divergent development of state law among the federal trial courts within a single State and creates a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Such deference is also contrary to this Court's cases decided after *Erie*. See, *e. g.*, *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261. Pp. 233–235.

(c) Russell's argument that appellate courts professing adherence to the deference rule actually are reviewing *de novo* the district court state-law determinations is rejected. Courts of appeals that profess deference are, in fact, deferring. When *de novo* review is compelled, no form of appellate deference is acceptable. Russell's argument that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit is based on overbroad generalizations and is foreclosed by this Court's decision in *Erie*. Pp. 235–239.

890 F. 2d 484, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which MARSHALL, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and STEVENS, JJ., joined, *post*, p. 240.

Steven E. Snow argued the cause and filed a brief for petitioner.

Edward T. Hogan argued the cause for respondent. With him on the brief was *Thomas S. Hogan*.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The concept of a federal general common law, lurking (to use Justice Holmes' phrase) as a "brooding omnipresence in the sky," was questioned for some time before being firmly rejected in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting); *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (dissenting opinion). *Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State, absent a federal statutory or constitutional directive to the contrary. 304 U. S., at 78. See also 28 U. S. C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the

**Stephen M. Shapiro, Mark I. Levy,* and *James D. Holzhauer* filed a brief for Ford Motor Co. as *amicus curiae* urging affirmance.

United States, in cases where they apply"). In decisions after *Erie*, this Court made clear that state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: "with the aid of such light as [is] afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Meredith* v. *Winter Haven*, 320 U. S. 228, 238 (1943). See also *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 208–209 (1938) ("Application of the 'State law' to the present case . . . does not present the disputants with duties difficult or strange").

In this case, we must decide specifically whether a federal court of appeals may review a district court's determination of state law under a standard less probing than that applied to a determination of federal law.

I

The issue presented arises out of a contract dispute between a college and one of its students. Petitioner Salve Regina College is an institution of higher education located in Newport, R. I. Respondent Sharon L. Russell was admitted to the college and began her studies as a freshman in 1982. The following year, respondent sought admission to the college's nursing department in order to pursue a bachelor of science degree in nursing. She was accepted by the department and began her nursing studies in the fall of 1983.

Respondent, who was 5′6″ tall, weighed in excess of 300 pounds when she was accepted in the nursing program. Immediately after the 1983 school year began, respondent's weight became a topic of commentary and concern by officials of the nursing program. Respondent's first year in the program was marked by a series of confrontations and negotiations concerning her obesity and its effect upon her ability to complete the clinical requirements safely and satisfactorily. During her junior year, respondent signed a document that was designated as a "contract" and conditioned her further

participation in the nursing program upon weekly attendance at a weight-loss seminar and a realized average loss of two pounds per week. When respondent failed to meet these commitments, she was asked to withdraw from the program and did so. She transferred to a nursing program at another college, but had to repeat her junior year in order to satisfy the transferee institution's 2-year residency requirement. As a consequence, respondent's nursing education took five years rather than four. She also underwent surgery for her obesity. In 1987, respondent successfully completed her nursing education, and she is now a registered nurse.

Soon after leaving Salve Regina College, respondent filed this civil action in the United States District Court for the District of Rhode Island. She asserted, among others, claims based on (1) intentional infliction of emotional distress, (2) invasion of privacy, and (3) nonperformance by the college of its implied agreement to educate respondent.[1] Subject-matter jurisdiction in the District Court was based on diversity of citizenship. See 28 U. S. C. § 1332. The parties agree that the law of Rhode Island applies to all substantive aspects of the action. See *Erie R. Co.* v. *Tompkins*, *supra*.

At the close of plaintiff-respondent's case in chief, the District Court directed a verdict for the individual defendants on all three of the remaining claims, and for the college on the claims for intentional infliction of emotional distress and

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[1] The amended complaint named the college and five faculty members as defendants and alleged discrimination in violation of the Rehabilitation Act of 1973, 87 Stat. 355, as amended, 29 U. S. C. § 701 *et seq.*; denial of due process and unconstitutional interference with her liberty and property interests; negligent and intentional infliction of emotional distress; invasion of privacy; wrongful dismissal; violation of express and implied covenants of good faith and fair dealing; and breach of contract. The District Court entered summary judgment for the defendants except as to the three state-law claims for intentional infliction of emotional distress, invasion of privacy, and breach of contract. 649 F. Supp. 391, 407 (1986). It determined that it need not consider "the plausibility of federal question jurisdiction." *Id.*, at 393, n. 1.

invasion of privacy. App. 82. The court, however, denied the college's motion for a directed verdict on the breach-of-contract claim, reasoning that "a legitimate factual issue" remained concerning whether "there was substantial performance by the plaintiff in her overall contractual relationship at Salve Regina." *Id.*, at 88.

At the close of all the evidence, the college renewed its motion for a directed verdict. It argued that under Rhode Island law the strict commercial doctrine of substantial performance did not apply in the general academic context. Therefore, according to petitioner, because respondent admitted she had not fulfilled the terms of the contract, the college was entitled to judgment as a matter of law.

The District Court denied petitioner's motion. *Id.*, at 92. Acknowledging that the Supreme Court of Rhode Island, to that point, had limited the application of the substantial-performance doctrine to construction contracts, the District Court nonetheless concluded, as a matter of law, that the Supreme Court of Rhode Island would apply that doctrine to the facts of respondent's case. *Id.*, at 90–91. The Federal District Judge based this conclusion, in part, on his observation that "I was a state trial judge for 18 and ½ years, and I have a feel for what the Rhode Island Supreme Court will do or won't do." *Id.*, at 91. Accordingly, the District Court submitted the breach-of-contract claim to the jury. The court instructed the jury:

> "The law provides that substantial and not exact performance accompanied by good faith is what is required in a case of a contract of this type. It is not necessary that the plaintiff have fully and completely performed every item specified in the contract between the parties. It is sufficient if there has been substantial performance, not necessarily full performance, so long as the substantial performance was in good faith and in compliance with the contract, except for some minor and relatively unimportant deviation or omission." *Id.*, at 97.

The jury returned a verdict for respondent, and determined that the damages were $30,513.40. *Id.*, at 113. Judgment was entered. *Id.*, at 115. Both respondent and petitioner appealed.

The United States Court of Appeals for the First Circuit affirmed. 890 F. 2d 484 (1989). It first upheld the District Court's directed verdict dismissing respondent's claims for intentional infliction of emotional distress and invasion of privacy. *Id.*, at 487–488. It then turned to petitioner's argument that the District Court erred in submitting the breach-of-contract claim to the jury. Rejecting petitioner's argument that, under Rhode Island law, the doctrine of substantial performance does not apply in the college-student context, the court stated:

> "In this case of first impression, the district court held that the Rhode Island Supreme Court would apply the substantial performance standard to the contract in question. In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis* v. *Rhode Island Hospital Trust Nat'l Bank*, 744 F. 2d 893, 896 (1st Cir. 1984); *O'Rourke* v. *Eastern Air Lines Inc.*, 730 F. 2d 842, 847 (2d Cir. 1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." *Id.*, at 489.

Petitioner college sought a writ of certiorari from this Court. It alleged that the Court of Appeals erred in deferring to the District Court's determination of state law.[2] A

[2] See Coenen, To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn. L. Rev. 899 (1989), and the many cases cited therein. See also Note, What is the Proper Standard for Reviewing a District Court's Interpretation of State Substantive Law?, 54 U. Cin. L. Rev. 215 (1985), and Note, A Nondeferential Standard for Appellate Review of State Law Decisions by Federal District Courts, 42 Wash. & Lee L. Rev. 1311 (1985). See, however, Woods,

majority of the Courts of Appeals, although varying in their phraseology, embrace a rule of deference similar to that articulated by the Court of Appeals in this case. See, *e. g.*, *Norton* v. *St. Paul Fire & Marine Ins. Co.*, 902 F. 2d 1355, 1357 (CA8 1990) ("In general, we accord substantial deference to a district court's interpretation of the law of the state in which it sits"), and *Self* v. *Wal-Mart Stores, Inc.*, 885 F. 2d 336, 339 (CA6 1989) ("[W]e should give 'considerable weight' to the trial court's views on such questions of local law"). Two Courts of Appeals, however, have broken ranks recently with their sister Circuits. They have concluded that a district-court determination of state law is subject to plenary review by the appellate court. See *Craig* v. *Lake Asbestos of Quebec, Ltd.*, 843 F. 2d 145, 148 (CA3 1988), and *In re McLinn*, 739 F. 2d 1395 (CA9 1984) (en banc, with a divided vote). We granted certiorari to resolve the conflict. 497 U. S. 1023 (1990).

II

We conclude that a court of appeals should review *de novo* a district court's determination of state law. As a general matter, of course, the courts of appeals are vested with plenary appellate authority over final decisions of district courts. See 28 U. S. C. § 1291. The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.

Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs. Thus,

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The *Erie* Enigma: Appellate Review of Conclusions of Law, 26 Ariz. L. Rev. 755 (1984), and Note, The Law/Fact Distinction and Unsettled State Law in the Federal Courts, 64 Texas L. Rev. 157 (1985).

trial judges often must resolve complicated legal questions without benefit of "extended reflection [or] extensive information." Coenen, To Defer or Not to Defer: a Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn. L. Rev. 899, 923 (1989).

Courts of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multijudge panels, see 28 U. S. C. §§ 46(b) and (c), that permit reflective dialogue and collective judgment. Over 30 years ago, Justice Frankfurter accurately observed:

> "Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions." *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 458–459 (1959) (dissenting opinion).

Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review. Petitioner readily acknowledges the importance of a district court's reasoning to the appellate court's review. See Tr. of Oral Arg. 11, 19–22. Any expertise possessed by the district court will inform the structure and content of its conclusions of law and thereby become evident to the reviewing court. If the court of appeals finds that the district court's analytical sophistica-

tion and research have exhausted the state-law inquiry, little more need be said in the appellate opinion. Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions. Thus, an appropriately respectful application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions. See Fed. Rule Civ. Proc. 52(a) (requiring the district court to "state separately its conclusions of law").

Those circumstances in which Congress or this Court has articulated a standard of deference for appellate review of district-court determinations reflect an accommodation of the respective institutional advantages of trial and appellate courts. In deference to the unchallenged superiority of the district court's factfinding ability, Rule 52(a) commands that a trial court's findings of fact "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In addition, it is "especially common" for issues involving supervision of litigation to be reviewed for abuse of discretion. See *Pierce* v. *Underwood*, 487 U. S. 552, 558, n. 1 (1988). Finally, we have held that deferential review of mixed questions of law and fact is warranted when it appears that the district court is "better positioned" than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine. *Miller* v. *Fenton*, 474 U. S. 104, 114 (1985); see also *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 402 (1990) ("[T]he district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"); *Pierce*, 487 U. S., at 562 ("[T]he question whether the Government's litigating position has been 'substantially justified' is . . . a multifarious and novel question, little susceptible, for the time being at least, of useful generalization").

Nothing about the exercise of diversity jurisdiction alters these functional components of decisionmaking or otherwise

warrants departure from a rule of independent appellate review. Actually, appellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in *Erie*. The twin aims of the *Erie* doctrine—"discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna* v. *Plumer*, 380 U. S. 460, 468 (1965)—are components of the goal of doctrinal coherence advanced by independent appellate review. As respondent has conceded, deferential appellate review invites divergent development of state law among the federal trial courts even within a single State. Tr. of Oral Arg. 34–36. Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. Cf. *Erie*, 304 U. S., at 74–75 ("[The rule of *Swift* v. *Tyson*, 16 Pet. 1 (1842)] made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court"). Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of *Erie*.

Although some might say that this Court has not spoken with a uniformly clear voice on the issue of deference to a district judge's determination of state law, a careful consideration of our cases makes apparent the duty of appellate courts to provide meaningful review of such a determination. In a series of cases decided soon after *Erie*, the Court noted that the appellate courts had applied general federal law instead of the law of the respective States, and remanded to the Courts of Appeals for consideration of the applicable principles of state law. See, *e. g.*, *New York Life Ins. Co.* v. *Jackson*, 304 U. S. 261 (1938), and *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263 (1938). It is true that in *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198 (1956),

this Court remanded the case to the District Court for application of state law. The Court noted, however, that the law of the State was firmly settled, and emphasized: "Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of [state] law." *Id.*, at 205.[3]

III

In urging this Court to adopt the deferential standard embraced by the majority of the Courts of Appeals, respondent offers two arguments. First, respondent suggests that the appellate courts professing adherence to the rule of deference actually are reviewing *de novo* the district-court determinations of state law. Second, respondent presses the familiar contention that district judges are better arbiters of unsettled state law because they have exposure to the judicial system of the State in which they sit. We reject each of these arguments.

A

Respondent primarily contends that the Courts of Appeals that claim to accord special consideration to the District Court's state-law expertise actually undertake plenary review of a determination of state law. According to respondent, this is simply *de novo* review "cloth[ed] in 'deferential' robes." Brief for Respondent 15. In support of this contention, respondent refers to several decisions in which the appellate court has announced that it is bound to review deferentially a district court's determination of state law, yet nonetheless has found that determination to constitute re-

[3] The dissent inexplicably relies on several cases in which this Court declined to review *de novo* questions of state law to support the dissent's contention that it is "quite natural" for appellate judges to rely on the "experience" of district judges. See *post*, at 241–242. We are not persuaded that the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction has any relevance to the obligation of courts of appeals to review *de novo* those legal issues properly before them.

versible error. *Aframe Export Corp.* v. *Metallurgiki Halyps, S. A.*, 772 F. 2d 1358, 1370 (CA7 1985); *Norton* v. *St. Paul Fire & Marine Ins. Co.*, 902 F. 2d 1355 (CA8 1990). Respondent also relies on cases in which the Courts of Appeals, while articulating a rule of deference, acknowledge their obligation to scrutinize closely the District Court's legal conclusions. See *Foster* v. *National Union Fire Ins. Co. of Pittsburgh*, 902 F. 2d 1316 (CA8 1990). See also *In re McLinn*, 739 F. 2d, at 1405 (dissenting opinion) ("The majority overreacts to a problem that is basically one of terminology").

We decline the invitation to assume that courts of appeals craft their opinions disingenuously. The fact that an appellate court overturns an erroneous determination of state law in no way indicates that the appellate court is not applying the rule of deference articulated in the opinion. The cases cited by respondent confirm this. In *Foster*, for example, the Court of Appeals articulated a rule of deference, yet cautioned: "We have not, however, failed to closely examine the matter ourselves." 902 F. 2d, at 1318. Respondent would have us interpret this caveat as an acknowledgment of the appellate court's obligation to review the state-law question *de novo*. See Brief for Respondent 17–18, and n. 23. The Court of Appeals, however, expressly acknowledged that it would not reverse the District Court's determination "unless its analysis is 'fundamentally deficient . . . , without a reasonable basis, or contrary to a reported state-court opinion.'" *Foster*, 902 F. 2d, at 1318 (citations omitted). After reviewing the applicable law in some detail, the Court of Appeals concluded: "[T]he district court's interpretation of the applicable Arkansas law is certainly not deficient in analysis and is reasonable." *Id.*, at 1320. This neither purports to be, nor is, a conclusion following from *de novo* review.

Nor does it suffice to recognize that little substantive difference may separate the form of deference articulated and applied by the several Courts of Appeals and the independent appellate review urged by petitioner. Respondent argues

that the subtle differences between these standards are insufficient to warrant intrusion into the manner in which appellate courts review state-law determinations. A variation of this argument forms the framework upon which the dissent in *McLinn* rests. See 739 F. 2d, at 1404 ("By giving 'substantial deference,' or . . . 'great weight,' to the decisions of the district courts, appellate courts do not suspend their own thought processes").

As a practical matter, respondent and the dissent in *McLinn* frequently may be correct. We do not doubt that in many cases the application of a rule of deference in lieu of independent review will not affect the outcome of an appeal. In many diversity cases the controlling issues of state law will have been squarely resolved by the state courts, and a district court's adherence to the settled rule will be indisputably correct. See, *e. g.*, *Bernhardt*, 350 U. S., at 204–205. In a case where the controlling question of state law remains unsettled, it is not unreasonable to assume that the considered judgment of the court of appeals frequently will coincide with the reasoned determination of the district court. Where the state-law determinations of the two courts diverge, the choice between these standards of review is of no significance if the appellate court concludes that the district court was clearly wrong.[4]

Thus, the mandate of independent review will alter the appellate outcome only in those few cases where the appellate

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[4] Of course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized. Rhode Island provides a certification procedure. See Rhode Island Supreme Court Rule 6 (1989).

See, however, *Lehman Brothers* v. *Schein*, 416 U. S. 386, 390–391 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court") (footnote omitted).

court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error. See, *e. g.*, *In re McLinn*, 739 F. 2d, at 1397 ("The panel indicated that if the question of law were reviewed under the deferential standard that we have applied in the past, which permits reversal only for clear error, then they would affirm; but if they were to review the determination under an independent de novo standard, they would reverse"). These few instances, however, make firm our conviction that the difference between a rule of deference and the duty to exercise independent review is "much more than a mere matter of degree." *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501 (1984). When *de novo* review is compelled, no form of appellate deference is acceptable.

B

Respondent and her *amicus* also argue that *de novo* review is inappropriate because, as a general matter, a district judge is better positioned to determine an issue of state law than are the judges on the court of appeals. This superior capacity derives, it is said, from the regularity with which a district judge tries a diversity case governed by the law of the forum State, and from the extensive experience that the district judge generally has had as practitioner or judge in the forum State. See Brief for Respondent 7–10; Brief for Ford Motor Co. as *Amicus Curiae* 9–11.

We are unpersuaded. As an initial matter, this argument seems to us to be founded fatally on overbroad generalizations. Moreover, and more important, the proposition that a district judge is better able to "intuit" the answer to an unsettled question of state law is foreclosed by our holding in *Erie*. The very essence of the *Erie* doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge. Almost 35 years ago, Professor Kurland stated: "Certainly, if the law

is not a brooding omnipresence in the sky over the United States, neither is it a brooding omnipresence in the sky of Vermont, or New York or California." Kurland, Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale L. J. 187, 217 (1957). See *Southern Pacific Co.*, 244 U. S., at 222 (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified"). Similarly, the bases of state law are as equally communicable to the appellate judges as they are to the district judge. To the extent that the available state law on a controlling issue is so unsettled as to admit of no reasoned divination, we can see no sense in which a district judge's prior exposure or nonexposure to the state judiciary can be said to facilitate the rule of reason.[5]

IV

The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*. The Court of Appeals in this

[5] "As a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts frequently have voiced reluctance to substitute their own view of the state law for that of the district judge. As a matter of judicial administration, this seems defensible. But there is some tendency to go beyond that proposition and to say that if the trial court has reached a permissible conclusion under state law, the appellate court cannot reverse even if it thinks the state law to be otherwise, thereby treating the question of state law much as if it were a question of fact. The determination of state law, however, is a legal question, and although the considered decision of a district judge experienced in the law of a state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court." 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4507, pp. 106–110 (1982) (footnotes omitted).

case therefore erred in deferring to the local expertise of the District Court.

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

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE STEVENS join, dissenting.

I do not believe we need to delve into such abstractions as "deferential" review, on the one hand, as opposed to what the Court's opinion calls, at various places, "plenary," "independent," and *"de novo"* review, on the other, in order to decide this case. The critical language used by the Court of Appeals, and quoted in this Court's opinion, is this:

> "In view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state, *Dennis* v. *Rhode Island Hospital Trust Nat'l Bank*, 744 F. 2d 893, 896 (1st Cir. 1984); *O'Rourke* v. *Eastern Air Lines Inc.*, 730 F. 2d 842, 847 (2d Cir. 1984), we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." 890 F. 2d 484, 489 (CA1 1989).

In order to determine the Court of Appeals' views as to "customary appellate deference," it seems only fair to refer to the page in *Dennis* v. *Rhode Island Hospital Trust Nat. Bank*, 744 F. 2d 893 (CA1 1984), to which the court cites. There we find this language:

> "[I]n a diversity case such as this one, involving a technical subject matter primarily of state concern, we are 'reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices.'" *Id.*, at 896 (citation omitted).

The court does not say that it *always* defers to a district court's conclusions of law. Rather, it states that it is reluctant to substitute its own view of state law for that of a judge "who is familiar with that state's law and practices." In this case, the court concluded that the opinion of a District Judge with 18½ years of experience as a trial judge was entitled to some appellate deference.

This seems to me a rather sensible observation. A district court's insights are particularly valuable to an appellate court in a case such as this where the state law is unsettled. In such cases, the courts' task is to try to *predict* how the highest court of that State would decide the question. A judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State. It therefore makes perfect sense for an appellate court judge with no local experience to accord special weight to a local judge's assessment of state court trends.

If we must choose among Justice Holmes' aphorisms to help decide this case, I would opt for his observation that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). And it does no harm to recall that the Members of this Court have no monopoly on experience; judges of the courts of appeals and of the district courts surely possess it just as we do. That the experience of appellate judges should lead them to rely, in appropriate situations, on the experience of district judges who have practiced law in the State in which they sit before taking the bench seems quite natural.

For this very reason, this Court has traditionally given special consideration or "weight" to the district judge's perspective on local law. See *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198, 204 (1956) ("Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is"); *United States* v. *Hohri*, 482 U. S. 64, 74, n. 6 (1987) ("[L]ocal

federal district judges . . . are likely to be familiar with the applicable state law. . . . Indeed, a district judge's determination of a state-law question usually is reviewed with great deference"); *Bishop* v. *Wood*, 426 U. S. 341, 346, and n. 10 (1976) ("[T]his Court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").

But the Court today decides that this intuitively sensible deference is available only to this Court, and not to the courts of appeals. It then proceeds to instruct the courts of appeals and the district courts on their respective functions in the federal judicial system, and how they should go about exercising them. Questions of law are questions of law, they are told, whether they be of state law or federal law, and must all be processed through an identical decisional mold.

I believe this analysis unduly compartmentalizes things which have up to now been left to common sense and good judgment. Federal courts of appeals perform a different role when they decide questions of state law than they do when they decide questions of federal law. In the former case, these courts are not sources of law but only reflections of the jurisprudence of the courts of a State. While in deciding novel federal questions, courts of appeals are likely to ponder the policy implications as well as the decisional law, only the latter need be considered in deciding questions of state law. To my mind, therefore, it not only violates no positive law but also is a sensible allocation of resources to recognize these differences by deferring to the views of the district court where such deference is felt warranted.

I think we run a serious risk that our reach will exceed our grasp when we attempt to impose a rigid logical framework on the courts of appeals in place of a less precise but tolerably well-functioning approach adopted by those courts. I agree with the Court that a court of appeals should not "abdicate"

its obligation to decide questions of state law presented in a diversity case. But by according weight to the conclusion of a particular district judge on the basis of his experience and special knowledge of state law, an appellate court does not "suspend [its] own thought processes." *In re McLinn*, 739 F. 2d 1395, 1404 (CA9 1984) (Schroeder, J., dissenting). I think the Court of Appeals did no more than that here, and I therefore dissent from the reversal of its judgment.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ARABIAN AMERICAN OIL CO. ET AL.

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

No. 89–1838. Argued January 16, 1991—Decided March 26, 1991*

Petitioner Boureslan, a naturalized United States citizen born in Lebanon and working in Saudi Arabia, was discharged by his employer, respondent Arabian American Oil Company, a Delaware corporation. After filing a charge with petitioner Equal Employment Opportunity Commission (EEOC), he instituted suit in the District Court, seeking relief under, *inter alia*, Title VII of the Civil Rights Act of 1964 on the ground that he had been discriminated against because of his race, religion, and national origin. In dismissing this claim, the court ruled that it lacked subject-matter jurisdiction because Title VII's protections do not extend to United States citizens employed abroad by American employers. The Court of Appeals affirmed.

Held: Title VII does not apply extraterritorially to regulate the employment practices of United States firms that employ American citizens abroad. Petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the clearly expressed affirmative congressional intent that is required to overcome the well-established presumption against statutory extraterritoriality. Pp. 248–259.

(a) Petitioners argue unpersuasively that Title VII's "broad jurisdictional language"—which extends the Act's protections to commerce "between a State and any place outside thereof"—evinces a clear intent to legislate extraterritorially. The language relied on is ambiguous, does not speak directly to the question presented here, and constitutes boilerplate language found in any number of congressional Acts, none of which have been held to apply overseas. Petitioners' argument also finds no support in this Court's decisions, which have repeatedly held that even statutes containing broad language in their definitions of "commerce" that expressly refer to "*foreign* commerce" do not apply abroad. See, *e. g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 15, 19. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 286, distinguished. Pp. 249–253.

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*Together with No. 89–1845, *Boureslan* v. *Arabian American Oil Co., et al.*, also on certiorari to the same court.

(b) Petitioners also argue unpersuasively that Title VII's "alien exemption" clause—which renders the statute inapplicable "to an employer with respect to the employment of aliens outside any State"—clearly manifests the necessary congressional intent to cover employers of United States *citizens* working abroad. If petitioners were correct, there would be no statutory basis for distinguishing between American employers and foreign employers. Absent clearer evidence of congressional intent, this Court is unwilling to ascribe to Congress a policy which would raise difficult international law issues by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce. This conclusion is fortified by other factors suggesting a purely domestic focus, including Title VII's failure even to mention foreign nations or proceedings despite a number of provisions indicating a concern that the sovereignty and laws of States not be unduly interfered with, and the Act's failure to provide any mechanisms for its overseas enforcement. It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures, as it did in amending the Age Discrimination in Employment Act of 1967 (ADEA) to apply abroad. Pp. 253–256.

(c) Petitioners' contention that this Court should defer to the EEOC's position that Title VII applies abroad is rejected. The EEOC's interpretation does not fare well under the deference standards set forth in *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 140–146, since the interpretation has been neither contemporaneous with Title VII's enactment nor consistent with an earlier, contrary position enunciated by the EEOC closer to the date the statute came into law, since the EEOC offers no basis in its experience for the change, and since the interpretation lacks support in the statute's plain language. Although this Court does not wholly discount the interpretation, it is of insufficient weight, even when considered in combination with petitioners' other arguments, to overcome the presumption against extraterritorial application. Pp. 256–258.

(d) Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has legislated extraterritoriality, including its amendment of the ADEA. Congress may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that this Court cannot. Pp. 258–259.

892 F. 2d 1271, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opin-

ion concurring in part and concurring in the judgment, *post*, p. 259. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 260.

Solicitor General Starr argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 89–1838 were *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Stephen L. Nightingale*, *Donald R. Livingston*, and *Gwendolyn Young Reams*. *Michael A. Maness* and *Gerald M. Birnberg* filed a brief for petitioner in No. 89–1845.

Paul L. Friedman argued the cause for respondents in both cases. With him on the brief were *Thomas J. O'Sullivan*, *Anne D. Smith*, *John D. Roady*, *V. Scott Kneese*, and *Gregory B. Richards*.†

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad. The United States Court of Appeals for the Fifth

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†Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Jane M. Picker*, *Sidney Picker, Jr.*, *Isabelle Katz Pinzler*, and *John A. Powell;* for the International Human Rights Law Group by *Robert Plotkin* and *Steven M. Schneebaum;* for the Lawyers' Committee for Civil Rights Under Law by *Gary B. Born*, *Robert F. Mullen*, *David S. Tatel*, *Norman Redlich*, *Thomas J. Henderson*, and *Richard T. Seymour;* and for NAACP Legal Defense and Educational Fund, Inc., et al., by *Julius LeVonne Chambers* and *Charles Stephen Ralston*.

Briefs of *amici curiae* urging affirmance were filed for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Edward E. Potter;* for the Rule of Law Committee et al. by *Cecil J. Olmstead;* for the Society for Human Resources Management by *Kenneth Kirschner*, *John E. Parauda*, and *Lawrence Z. Lorber;* and for the Washington Legal Foundation by *Jeffrey I. Zuckerman*, *Daniel J. Popeo*, and *Paul D. Kamenar*.

Circuit held that it does not, and we agree with that conclusion.

Petitioner Boureslan is a naturalized United States citizen who was born in Lebanon. The respondents are two Delaware corporations, Arabian American Oil Company (Aramco), and its subsidiary, Aramco Service Company (ASC). Aramco's principal place of business is Dhahran, Saudi Arabia, and it is licensed to do business in Texas. ASC's principal place of business is Houston, Texas.

In 1979, Boureslan was hired by ASC as a cost engineer in Houston. A year later he was transferred, at his request, to work for Aramco in Saudi Arabia. Boureslan remained with Aramco in Saudi Arabia until he was discharged in 1984. After filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission), he instituted this suit in the United States District Court for the Southern District of Texas against Aramco and ASC. He sought relief under both state law and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §§2000e—2000e–17, on the ground that he was harassed and ultimately discharged by respondents on account of his race, religion, and national origin.

Respondents filed a motion for summary judgment on the ground that the District Court lacked subject-matter jurisdiction over Boureslan's claim because the protections of Title VII do not extend to United States citizens employed abroad by American employers. The District Court agreed and dismissed Boureslan's Title VII claim; it also dismissed his state-law claims for lack of pendent jurisdiction and entered final judgment in favor of respondents. A panel for the Fifth Circuit affirmed. After vacating the panel's decision and rehearing the case en banc, the court affirmed the District Court's dismissal of Boureslan's complaint. Both Boureslan and the EEOC petitioned for certiorari. We granted both petitions for certiorari to resolve this important issue of statutory interpretation. 498 U. S. 808 (1990).

Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States. Cf. *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 284–285 (1949); *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957). Whether Congress has in fact exercised that authority in these cases is a matter of statutory construction. It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States.

It is a longstanding principle of American law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros.*, 336 U. S., at 285. This "canon of construction . . . is a valid approach whereby unexpressed congressional intent may be ascertained." *Ibid.* It serves to protect against unintended clashes between our laws and those of other nations which could result in international discord. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 20–22 (1963).

In applying this rule of construction, we look to see whether "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Foley Bros.*, *supra*, at 285. We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is "the affirmative intention of the Congress clearly expressed," *Benz*, *supra*, at 147, we must presume it "is primarily concerned with domestic conditions." *Foley Bros.*, *supra*, at 285.

Boureslan and the EEOC contend that the language of Title VII evinces a clearly expressed intent on behalf of Congress to legislate extraterritorially. They rely principally on two provisions of the statute. First, petitioners argue that the statute's definitions of the jurisdictional terms "em-

ployer" and "commerce" are sufficiently broad to include United States firms that employ American citizens overseas. Second, they maintain that the statute's "alien exemption" clause, 42 U. S. C. § 2000e–1, necessarily implies that Congress intended to protect American citizens from employment discrimination abroad. Petitioners also contend that we should defer to the EEOC's consistently held position that Title VII applies abroad. We conclude that petitioners' evidence, while not totally lacking in probative value, falls short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders.

Title VII prohibits various discriminatory employment practices based on an individual's race, color, religion, sex, or national origin. See §§ 2000e–2, 2000e–3. An employer is subject to Title VII if it has employed 15 or more employees for a specified period and is "engaged in an industry affecting commerce." An industry affecting commerce is "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [(LMRDA)] [29 U. S. C. 401 et seq.]." § 2000e(h). "Commerce," in turn, is defined as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." § 2000e(g).

Petitioners argue that by its plain language, Title VII's "broad jurisdictional language" reveals Congress' intent to extend the statute's protections to employment discrimination anywhere in the world by a United States employer who affects trade "between a State and any place outside thereof." More precisely, they assert that since Title VII

defines "States" to include States, the District of Columbia, and specified territories, the clause "between a State and any place outside thereof" must be referring to areas beyond the territorial limit of the United States. Reply Brief for Petitioner EEOC 3.

Respondents offer several alternative explanations for the statute's expansive language. They contend that the "or between a State and any place outside thereof" clause "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" but not to "regulate conduct exclusively *within* a foreign country." Brief for Respondents 21, n. 14. They also argue that since the definitions of the terms "employer," "commerce," and "industry affecting commerce" make no mention of "commerce with foreign nations," Congress cannot be said to have intended that the statute apply overseas. In support of this argument, respondents point to Title II of the Civil Rights Act of 1964, governing public accommodation, which specifically defines commerce as it applies to foreign nations. Finally, respondents argue that while language present in the first bill considered by the House of Representatives contained the terms "foreign commerce" and "foreign nations," those terms were deleted by the Senate before the Civil Rights Act of 1964 was passed. They conclude that these deletions "[are] inconsistent with the notion of a clearly expressed congressional intent to apply Title VII extraterritorially." *Id.*, at 7.

We need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application discussed above. Each is plausible, but no more persuasive than that. The language relied upon by petitioners—and it is they who must make the affirmative showing—is ambiguous, and does not speak directly to the question presented here. The intent of Congress as to the extraterritorial application of this

statute must be deduced by inference from boilerplate language which can be found in any number of congressional Acts, none of which have ever been held to apply overseas. See, *e. g.*, Consumer Product Safety Act, 15 U. S. C. § 2052 (a)(12); Federal Food, Drug, and Cosmetic Act, 21 U. S. C. § 321(b); Transportation Safety Act of 1974, 49 U. S. C. App. § 1802(1); Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 401 *et seq.*; Americans with Disabilities Act of 1990, 42 U. S. C. § 1201 *et seq.*

Petitioners' reliance on Title VII's jurisdictional provisions also finds no support in our case law; we have repeatedly held that even statutes that contain broad language in their definitions of "commerce" that expressly refer to "*foreign* commerce" do not apply abroad. For example, in *New York Central R. Co.* v. *Chisholm*, 268 U. S. 29 (1925), we addressed the extraterritorial application of the Federal Employers' Liability Act (FELA), 45 U. S. C. § 51 *et seq.* FELA provides that common carriers by railroad while engaging in "interstate or foreign commerce" or commerce between "any of the States or territories and any foreign nation or nations" shall be liable in damages to its employees who suffer injuries resulting from their employment. § 51. Despite this broad jurisdictional language, we found that the Act "contains no words which definitely disclose an intention to give it extraterritorial effect," *Chisholm*, *supra*, at 31, and therefore there was no jurisdiction under FELA for a damages action by a United States citizen employed on a United States railroad who suffered fatal injuries at a point 30 miles north of the United States border into Canada.

Similarly, in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963), we addressed whether Congress intended the National Labor Relations Act (NLRA), 29 U. S. C. §§ 151–168, to apply overseas. Even though the NLRA contained broad language that referred by its terms to foreign commerce, § 152(6), this Court refused to find a congressional intent to apply the statute abroad

because there was not "any specific language" in the Act reflecting congressional intent to do so. *McCulloch*, *supra*, at 19.

The EEOC places great weight on an assertedly similar "broad jurisdictional grant in the Lanham Act" that this Court held applied extraterritorially in *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 286 (1952). Brief for Petitioner in No. 89–1838, p. 12. In *Steele*, we addressed whether the Lanham Act, designed to prevent deceptive and misleading use of trademarks, applied to acts of a United States citizen consummated in Mexico. The Act defined commerce as "all commerce which may lawfully be regulated by Congress." 15 U. S. C. § 1127. The stated intent of the statute was "to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce." *Ibid.* While recognizing that "the legislation of Congress will not extend beyond the boundaries of the United States unless a contrary legislative intent appears," the Court concluded that in light of the fact that the allegedly unlawful conduct had some effects within the United States, coupled with the Act's "broad jurisdictional grant" and its "sweeping reach into 'all commerce which may lawfully be regulated by Congress,'" the statute was properly interpreted as applying abroad. *Steele*, *supra*, at 285, 287.

The EEOC's attempt to analogize these cases to *Steele* is unpersuasive. The Lanham Act by its terms applies to "all commerce which may lawfully be regulated by Congress." The Constitution gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. Since the Act expressly stated that it applied to the extent of Congress' power over commerce, the Court in *Steele* concluded that Congress intended that the statute apply abroad. By contrast, Title VII's more limited, boilerplate "commerce" language does not support such an expansive construction of congressional intent. Moreover, unlike

the language in the Lanham Act, Title VII's definition of "commerce" was derived expressly from the LMRDA, a statute that this Court had held, prior to the enactment of Title VII, did not apply abroad. *McCulloch, supra,* at 15.

Thus petitioners' argument based on the jurisdictional language of Title VII fails both as a matter of statutory language and of our previous case law. Many Acts of Congress are based on the authority of that body to regulate commerce among the several States, and the parts of these Acts setting forth the basis for legislative jurisdiction will obviously refer to such commerce in one way or another. If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.

Petitioners argue that Title VII's "alien exemption provision," 42 U. S. C. § 2000e–1, "clearly manifests an intention" by Congress to protect United States citizens with respect to their employment outside of the United States. The alien-exemption provision says that the statute "shall not apply to an employer with respect to the employment of aliens outside any State." Petitioners contend that from this language a negative inference should be drawn that Congress intended Title VII to cover United States *citizens* working abroad for United States employers. There is "[n]o other plausible explanation [that] the alien exemption exists," they argue, because "[i]f Congress believed that the statute did not apply extraterritorially, it would have had no reason to include an exemption for a certain category of individuals employed outside the United States." Brief for Petitioner in No. 89–1838, pp. 12–13. Since "[t]he statute's jurisdictional provisions cannot possibly be read to confer coverage only upon aliens employed outside the United States," petitioners conclude that "Congress could not rationally have enacted an exemption for the employment of aliens abroad if it intended to fore-

close *all* potential extraterritorial applications of the statute." *Id.*, at 13.

Respondents resist petitioners' interpretation of the alien-exemption provision and assert two alternative *raisons d'être* for that language. First, they contend that since aliens are included in the statute's definition of employee,* and the definition of commerce includes possessions as well as "States," the purpose of the exemption is to provide that employers of aliens in the possessions of the United States are not covered by the statute. Thus, the "outside any State" clause means outside any State, but within the control of the United States. Respondents argue that "[t]his reading of the alien exemption provision is consistent with and supported by the historical development of the provision" because Congress' inclusion of the provision was a direct response to this Court's interpretation of the term "possessions" in the Fair Labor Standards Act in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377 (1948), to include leased bases in foreign nations that were within the control of the United States. Brief for Respondents 27. They conclude that the alien-exemption provision was included "to limit the impact of *Vermilya-Brown* by excluding from coverage employers of aliens in areas under U. S. control that" were not encompassed within Title VII's definition of the term "State." *Id.*, at 29.

Second, respondents assert that by negative implication, the exemption "confirm[s] the coverage of aliens in the United States." *Id.*, at 26. They contend that this inter-

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*Title VII defines "employee" as:

"an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision." 42 U. S. C. § 2000e(f).

pretation is consistent with our conclusion in *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86 (1973), that aliens within the United States are protected from discrimination both because Title VII uses the term "individual" rather than "citizen," and because of the alien-exemption provision.

If petitioners are correct that the alien-exemption clause means that the statute applies to employers overseas, we see no way of distinguishing in its application between United States employers and foreign employers. Thus, a French employer of a United States citizen in France would be subject to Title VII—a result at which even petitioners balk. The EEOC assures us that in its view the term "employer" means only "American employer," but there is no such distinction in this statute and no indication that the EEOC in the normal course of its administration had produced a reasoned basis for such a distinction. Without clearer evidence of congressional intent to do so than is contained in the alien-exemption clause, we are unwilling to ascribe to that body a policy which would raise difficult issues of international law by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce.

This conclusion is fortified by the other elements in the statute suggesting a purely domestic focus. The statute as a whole indicates a concern that it not unduly interfere with the sovereignty and laws of the States. See, *e. g.*, 42 U. S. C. § 2000h–4 (stating that the Act should not be construed to exclude the operation of state law or invalidate any state law unless inconsistent with the purposes of the Act); § 2000e–5 (requiring the EEOC to accord substantial weight to findings of state or local authorities in proceedings under state or local law); § 2000e–7 (providing that nothing in Title VII shall affect the application of state or local law unless such law requires or permits practices that would be unlawful under Title VII); §§ 2000e–5(c), (d), and (e) (provisions addressing deferral to state discrimination pro-

ceedings). While Title VII consistently speaks in terms of "States" and state proceedings, it fails even to mention foreign nations or foreign proceedings.

Similarly, Congress failed to provide any mechanisms for overseas enforcement of Title VII. For instance, the statute's venue provisions, § 2000e–5(f)(3), are ill-suited for extraterritorial application as they provide for venue only in a judicial district in the State where certain matters related to the employer occurred or were located. And the limited investigative authority provided for the EEOC, permitting the Commission only to issue subpoenas for witnesses and documents from "any place in the United States or any Territory or possession thereof," 29 U. S. C. § 161, incorporated by reference into 42 U. S. C. § 2000e–9, suggests that Congress did not intend for the statute to apply abroad.

It is also reasonable to conclude that had Congress intended Title VII to apply overseas, it would have addressed the subject of conflicts with foreign laws and procedures. In amending the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, to apply abroad, Congress specifically addressed potential conflicts with foreign law by providing that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve an employee in a workplace in a foreign country, and compliance with [the ADEA] would cause such employer . . . to violate the laws of the country in which such workplace is located." § 623(f)(1). Title VII, by contrast, fails to address conflicts with the laws of other nations.

Finally, the EEOC, as one of the two federal agencies with primary responsibility for enforcing Title VII, argues that we should defer to its "consistent" construction of Title VII, first formally expressed in a statement issued after oral argument but before the Fifth Circuit's initial decision in this case, Policy Statement No. N–915.033, BNA EEOC Compliance Manual § 605:0055 (Apr. 1989), "to apply to discrimination against

American citizens outside the United States." Brief for Petitioner in No. 89–1838, p. 22. Citing a 1975 letter from the EEOC's General Counsel, 1983 testimony by its Chairman, and a 1985 decision by the Commission, it argues that its consistent administrative interpretations "reinforce" the conclusion that Congress intended Title VII to apply abroad.

In *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 140–146 (1976), we addressed the proper deference to be afforded the EEOC's guidelines. Recognizing that "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations," we held that the level of deference afforded "'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.*, at 141, 142 (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)).

The EEOC's interpretation does not fare well under these standards. As an initial matter, the position taken by the Commission "contradicts the position which [it] had enunciated at an earlier date, closer to the enactment of the governing statute." *General Electric Co.*, *supra*, at 142. The Commission's early pronouncements on the issue supported the conclusion that the statute was limited to domestic application. See 29 CFR § 1606.1(c) (1971) ("Title VII . . . protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin"). While the Commission later intimated that the statute applied abroad, this position was not expressly reflected in its policy guidelines until some 24 years after the passage of the statute. The EEOC offers no basis in its experience for the change. The EEOC's interpretation of the statute here thus has been neither contemporaneous with its enactment nor consistent since the statute came into law. As discussed above, it also lacks support in the plain language of the stat-

ute. While we do not wholly discount the weight to be given to the 1988 guideline, its persuasive value is limited when judged by the standards set forth in *Skidmore*. Accord, *Southeastern Community College* v. *Davis*, 442 U. S. 397, 411–412 (1979); *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978); *Espinoza* v. *Farah Mfg. Co.*, 414 U. S., at 93–94. We are of the view that, even when considered in combination with petitioners' other arguments, the EEOC's interpretation is insufficiently weighty to overcome the presumption against extraterritorial application.

Our conclusion today is buttressed by the fact that "[w]hen it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 440 (1989). Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute. See, *e. g.*, the Export Administration Act of 1979, 50 U. S. C. App. § 2415(2) (defining "United States person" to include "any domestic concern (including any permanent domestic establishment of any foreign concern) and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern"); Coast Guard Act, 14 U. S. C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U. S. C. § 7 (Criminal Code extends to high seas); 19 U. S. C. § 1701 (Customs enforcement on the high seas); Comprehensive Anti-Apartheid Act of 1986, 22 U. S. C. § 5001(5)(A) (definition of "national of the United States" as "a natural person who is a citizen of the United States . . ."); the Logan Act, 18 U. S. C. § 953 (applying Act to "[a]ny citizen . . . wherever he may be . . ."). Indeed, after several courts had held that the ADEA did not apply overseas, Congress amended § 11(f) to provide: "The term 'employee' includes any individual who is a citizen of the United States em-

ployed by an employer in a workplace in a foreign country." 29 U. S. C. § 630(f). Congress also amended § 4(g)(1), which states: "If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer." § 623(h)(1). The expressed purpose of these changes was to "mak[e] provisions of the Act apply to citizens of the United States employed in foreign countries by U. S. corporations or their subsidiaries." S. Rep. No. 98–467, p. 2 (1984). Congress, should it wish to do so, may similarly amend Title VII and in doing so will be able to calibrate its provisions in a way that we cannot.

Petitioners have failed to present sufficient affirmative evidence that Congress intended Title VII to apply abroad. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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

I join the judgment of the Court and its opinion except that portion, *ante*, at 256–258, asserting that the views of the Equal Employment Opportunity Commission—not only with respect to the particular point at issue here but apparently as a general matter—are not entitled to the deference normally accorded administrative agencies under *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). The case relied upon for the proposition that the EEOC's interpretations have only the force derived from their "power to persuade" was decided in an era when we were disposed to give deference (as opposed to "persuasive force") only to so-called "legislative regulations." The reasoning of *General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976) was not that the EEOC (singled out from other agencies) was not entitled to deference, but that the EEOC's *guidelines*, like the guidelines of all agencies without explicit rulemaking

power, could not be considered legislative rules and therefore could not be accorded deference. See *id.*, at 141.

In an era when our treatment of agency positions is governed by *Chevron*, the "legislative rules vs. other action" dichotomy of *Gilbert* is an anachronism; and it is not even a correct description of that anachronism to say that *Gilbert* held that the EEOC (as opposed to all agency action other than legislative rules) is not entitled to deference. We recognized that only three years ago in *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107 (1988)—which case, rather than *Gilbert*, was our last word on deference to the EEOC. We said, in language quite familiar from our cases following *Chevron*, that "the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *Id.*, at 115. *Commercial Office Products* has not been overruled (or even mentioned) in today's opinion, so that the state of the law regarding deference to the EEOC is left unsettled.

I would resolve these cases by assuming, without deciding, that the EEOC was entitled to deference on the particular point in question. But deference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ. Given the presumption against extraterritoriality that the Court accurately describes, and the requirement that the intent to overcome it be "clearly expressed," it is in my view not reasonable to give effect to mere implications from the statutory language as the EEOC has done. Cf. Sunstein, Law and Administration after *Chevron*, 90 Colum. L. Rev. 2071, 2114 (1990).

On all other points, I join the opinion of the Court.

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

Like any issue of statutory construction, the question whether Title VII protects United States citizens from discrimination by United States employers abroad turns solely on congressional intent. As the majority recognizes, our in-

quiry into congressional intent in this setting is informed by the traditional "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). But contrary to what one would conclude from the majority's analysis, this canon is *not* a "clear statement" rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will. Rather, as our case law applying the presumption against extraterritoriality well illustrates, a court may properly rely on this presumption only after exhausting all of the traditional tools "whereby unexpressed congressional intent may be ascertained." *Ibid.* When these tools are brought to bear on the issue in this case, the conclusion is inescapable that Congress *did* intend Title VII to protect United States citizens from discrimination by United States employers operating overseas. Consequently, I dissent.

I

Because it supplies the driving force of the majority's analysis, I start with "[t]he canon . . . that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Ibid.* The majority recasts this principle as "the need to make *a clear statement* that a statute applies overseas." *Ante*, at 258 (emphasis added). So conceived, the presumption against extraterritoriality allows the majority to derive meaning from various instances of statutory silence—from Congress' failure, for instance, "to mention foreign nations or foreign proceedings," *ante*, at 256, "to provide any mechanisms for overseas enforcement," *ibid.*, or to "addres[s] the subject of conflicts with foreign laws and procedures," *ante*, at 256. At other points, the majority relies on its reformulation of the presumption to avoid the "need [to] choose between . . . competing interpretations" of affirmative statu-

tory language that the majority concludes "does not speak *directly* to the question" of extraterritoriality. *Ante*, at 250 (emphasis added). In my view, the majority grossly distorts the effect of this rule of construction upon conventional techniques of statutory interpretation.

Our most extensive discussion of the presumption against extraterritoriality can be found in *Foley Brothers*, *supra*. The issue in that case was whether the Eight Hour Law—a statute regulating the length of the workday of employees hired to perform contractual work for the United States—applied to construction projects in foreign nations. After noting "the assumption that Congress is primarily concerned with domestic conditions," the Court concluded that there was "nothing in the Act itself, as amended, nor in the legislative history, which would lead to the belief that Congress entertained any intention other than the normal one in this case." 336 U. S., at 285. The Court put particular emphasis on "[t]he scheme of the Act," including Congress' failure to draw a "distinction . . . therein between laborers who are aliens and those who are citizens of the United States." *Id.*, at 286. "The absence of any [such] distinction," the Court explained, "indicates . . . that the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress." *Ibid.* The Court also engaged in extended analyses of the legislative history of the statute, see *id.*, at 286–288, and of pertinent administrative interpretations, see *id.*, at 288–290.

The range of factors that the Court considered in *Foley Brothers* demonstrates that the presumption against extraterritoriality is *not* a "clear statement" rule. Clear-statement rules operate less to reveal *actual* congressional intent than to shield important values from an *insufficiently strong* legislative intent to displace them. See, *e. g.*, *Webster* v. *Doe*, 486 U. S. 592, 601, 603 (1988); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242–243 (1985); *Kent* v. *Dulles*, 357

U. S. 116, 130 (1958). When they apply, such rules foreclose inquiry into extrinsic guides to interpretation, see, *e. g.*, *Dellmuth* v. *Muth*, 491 U. S. 223, 230 (1989), and even compel courts to select less plausible candidates from within the range of permissible constructions, see, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). The Court's analysis in *Foley Brothers* was by no means so narrowly constrained. Indeed, the Court considered the entire range of conventional sources "whereby *unexpressed* congressional intent may be ascertained," 336 U. S., at 285 (emphasis added),[1] including legislative history, statutory structure, and administrative interpretations. Subsequent applications of the presumption against extraterritoriality confirm that we have not imposed the drastic clear-statement burden upon Congress before giving effect to its intention that a particular enactment apply beyond the national boundaries. See, *e. g.*, *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 286–287 (1952) (relying on "broad jurisdictional grant" to find intention that Lanham Act applies abroad).

The majority converts the presumption against extraterritoriality into a clear-statement rule in part through selective quotation. Thus, the majority reports that the Court in *New York Central R. Co.* v. *Chisholm*, 268 U. S. 29 (1925), declined to construe the Federal Employers' Liability Act to apply extraterritorially because it concluded that the statute "'contains no words which definitely disclose an intention to give it extraterritorial effect,'" *ante*, at 251, quoting 268 U. S., at 31. The majority omits the remainder of the quoted sentence, which states, "nor do *the circumstances* require an inference of such purpose." 268 U. S., at 31 (emphasis added). Similarly, the majority notes that the Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10 (1963), did not find "'any specific language'" in the National

[1] The majority quotes this language, see *ante*, at 248, but then proceeds to disregard it completely in the course of its analysis.

Labor Relations Act indicating that Congress expected the statute to apply to foreign-flag ships. *Ante*, at 252, quoting 372 U. S., at 19. The full sentence states: "But, as in *Benz* [v. *Compania Naviera Hidalgo, S. A*, 353 U. S. 138 (1957)], [petitioners] have been unable to point to any specific language in the Act itself *or in its extensive legislative history* that reflects such a congressional intent." 372 U. S., at 19 (emphasis added).

The majority also overstates the strength of the presumption by drawing on language from cases involving a wholly independent rule of construction: "that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .'" *McCulloch* v. *Sociedad Nacional*, *supra*, at 21, quoting *The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.); see *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 146–147 (1957). At issue in *Benz* was whether the Labor Management Relations Act of 1947 "applie[d] to a controversy involving damages resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port." *Id.*, at 138–139. Construing the statute to apply under such circumstances would have displaced labor regulations that were founded on the law of another nation and that were applicable solely to foreign nationals. *Id.*, at 139, 142, 146. In language quoted in the majority's opinion, see *ante*, at 248, the Court stated that there must be present "the affirmative intention of the Congress clearly expressed" before it would infer that Congress intended courts to enter "such a delicate field of international relations." *Benz*, *supra*, at 147. Similarly, in *McCulloch*, the Court focused on the absence of "'the affirmative intention of the Congress clearly expressed,'" in declining to apply the National Labor Relations Act to foreign-flag vessels with foreign crews. 372 U. S., at 22, quoting *Benz*, *supra*, at 147. Extraterritorial application in *McCulloch* would have violated not only "the

well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship," 372 U. S., at 21, but also regulations issued by the State Department, see *id.*, at 20, and n. 11.

Far from equating *Benz* and *McCulloch*'s clear-statement rule with *Foley*'s presumption against extraterritoriality, the Court has until now recognized that *Benz* and *McCulloch* are reserved for settings in which the extraterritorial application of a statute would "implicat[e] sensitive issues of the authority of the Executive over relations with foreign nations." *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979); see *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982) (*McCulloch* rule designed to avoid constructions that raise "foreign policy implications"); *Longshoremen* v. *Ariadne Shipping Co.*, 397 U. S. 195, 198–199 (1970) (declining to follow *Benz* and *McCulloch* in setting in which United States citizens were employed by foreign vessels). The strictness of the *McCulloch* and *Benz* presumption permits the Court to avoid, if possible, the separation-of-powers and international-comity questions associated with construing a statute to displace the domestic law of another nation. See *NLRB* v. *Catholic Bishop of Chicago*, *supra*, at 500. Nothing nearly so dramatic is at stake when Congress merely seeks to regulate the conduct of United States nationals abroad. See *Steele* v. *Bulova Watch Co.*, *supra*, at 285–286; *Skiriotes* v. *Florida*, 313 U. S. 69, 73–74 (1941).[2]

Because petitioners advance a construction of Title VII that would extend its extraterritorial reach only to United States nationals, it is the weak presumption of *Foley Brothers*, not the strict clear-statement rule of *Benz* and *Mc-*

[2] It is also worth noting that although we have construed *McCulloch* and *Benz* as embodying a clear-statement rule, see *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500 (1979), the Court in both *Benz*, see 353 U. S., at 142–146, and *McCulloch*, see 372 U. S., at 19, consulted the legislative history of the statutes at issue in those cases before concluding that neither applied to the facts before the Court.

Culloch, that should govern our inquiry here. Under *Foley Brothers*, a court is not free to invoke the presumption against extraterritoriality until it has exhausted all available indicia of Congress' intent on this subject. Once these indicia are consulted and given effect in this case, I believe there can be no question that Congress intended Title VII to protect United States citizens from discrimination by United States employers abroad.

II

A

Title VII states:

> "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1).

Under the statute, "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees," § 2000e(b); "[t]he term 'commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof. . . ." § 2000e(g).

These terms are broad enough to encompass discrimination by United States employers abroad. Nothing in the text of the statute indicates that the protection of an "individual" from employment discrimination depends on the location of that individual's workplace; nor does anything in the statute indicate that employers whose businesses affect commerce between "a State and any other place outside thereof" are exempted when their discriminatory conduct occurs beyond the Nation's borders. While conceding that it is "plausible" to infer from the breadth of the statute's central prohibition that Congress intended Title VII to apply extraterritorially,

ante, at 250, the majority goes to considerable lengths to show that this language is not sufficient to overcome the majority's clear-statement conception of the presumption against extraterritoriality. However, petitioners claim no more—and need claim no more, given additional textual evidence of Congress' intent—than that this language is *consistent* with a legislative expectation that Title VII apply extraterritorially, a proposition that the majority does not dispute.

Confirmation that Congress did *in fact* expect Title VII's central prohibition to have an extraterritorial reach is supplied by the so-called "alien exemption" provision. The alien-exemption provision states that Title VII "shall not apply to an employer with respect to the employment of aliens *outside any State*." 42 U. S. C. § 2000e–1 (emphasis added).[3] Absent an intention that Title VII *apply* "outside any State," Congress would have had no reason to craft this extraterritorial exemption. And because only discrimination against aliens is exempted, employers remain accountable for discrimination against United States citizens abroad.

The inference arising from the alien-exemption provision is more than sufficient to rebut the presumption against extraterritoriality. Compare *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1 (1989). In *Union Gas*, we considered the question whether Congress had stated with sufficient clarity its intention to abrogate the States' Eleventh Amendment immunity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. Based on a limited exemption provision directed at the States, we concluded that Congress had spoken with sufficient clarity; absent "a background understanding" that the general terms of the statute had made the States amenable to suit, we explained,

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[3] For purposes of Title VII, "[t]he term 'State' includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U. S. C. 1331 et seq.]." 42 U. S. C. § 2000e(i).

the limited exemption "would [have] be[en] unnecessary." *Id.*, at 8. If this logic is sufficiently sharp to pierce the dense armor afforded the States by the clear-statement abrogation rule of *Atascadero State Hospital* v. *Scanlon*, 473 U. S., at 242–243; accord, *Dellmuth* v. *Muth*, 491 U. S., at 230, then the same logic necessarily overcomes the much weaker presumption against extraterritoriality recognized in *Foley Brothers*.

The history of the alien-exemption provision confirms the inference that Congress expected Title VII to have extraterritorial application. As I have explained, the Court in *Foley Brothers* declined to construe the Eight Hour Law to apply extraterritorially in large part because of "[t]he absence of any distinction between citizen and alien labor" under the Law:

> "Unless we were to read such a distinction into the statute we should be forced to conclude . . . that Congress intended to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land. . . . An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose." 336 U. S., at 286.

The language comprising the alien-exemption provision first appeared in an employment-discrimination bill introduced only seven weeks after the Court decided *Foley Brothers*, see H. R. 4453, 81st Cong., 1st Sess. (1949), and was clearly aimed at insulating that legislation from the concern that prevented the Court from adopting an extraterritorial construction of the Eight Hour Law. The legislative history surrounding Title VII leaves no doubt that Congress had extraterritorial application in mind when it revived the alien-exemption provision from the earlier antidiscrimination bill:

> "In section 4 of the Act, a limited exception is provided for employers with respect to employment of aliens outside of any State . . . . *The intent of [this] exemption is to remove conflicts of law which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise.*" H. R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963) (emphasis added), reprinted in Civil Rights, Hearings on H. R. 7152, as amended, before Subcommittee No. 5 of the Committee on the Judiciary, 88th Cong., 1st Sess., 2303 (Civil Rights Hearings).[4]

See also S. Rep. No. 867, 88th Cong., 2d Sess., 11 (1964) ("Exempted from the bill are . . . U. S. employers employing citizens of foreign countries *in foreign lands*" (emphasis added)).

Notwithstanding the basic rule of construction requiring courts to give effect to all of the statutory language, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979), the majority never advances an alternative explanation of the alien-exemption provision that is consistent with the majority's own conclusion that Congress intended Title VII to have a purely domestic focus. The closest that the majority comes to attempting to give meaning to the alien-exemption provision is to identify without endorsement "two alternative *raisons d'être* for that language" offered by respondents. *Ante*, at 254. Neither of these explanations is even minimally persuasive.

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[4] The alien-exemption provision was originally part of H. R. 405, 88th Cong., 1st Sess. (1963), reprinted in Civil Rights Hearings, at 2330. This bill, along with others, was incorporated (with amendments immaterial to the alien-exemption provision) into H. R. 7152, the bill that became the Civil Rights Act of 1964. See H. R. Rep. No. 914, 88th Cong. 1st Sess., 57 (1963) (additional views of Rep. Meader). The Committee Report accompanying H. R. 405 was likewise incorporated into the record of committee hearings held on the various bills from which H. R. 7152 derived. See Civil Rights Hearings, at 2300.

The first is the suggestion that the alien-exemption provision indicates, by negative implication, merely that aliens are covered by Title VII if they are employed *in the United States*. This construction hardly makes sense of the statutory language as a whole; indeed, it hardly makes sense. Under respondents' construction of the statute, no one—neither citizen nor alien—is protected from discrimination abroad. Thus, in order to credit respondents' interpretation of the alien-exemption provision, we must attribute to Congress a decision to enact a completely superfluous exemption solely as a means of signaling its intent that aliens be protected from employment discrimination in this Nation. In addition to being extremely improbable, such a legislative subterfuge would have been completely unnecessary, for as we indicated in *Espinoza* v. *Farah Mfg. Co.*, 414 U. S. 86 (1973), Congress clearly communicated its intent to cover aliens working in this country by prohibiting discrimination against "any individual." See *id.*, at 95.

Respondents' second explanation is that Congress included the alien-exemption provision in anticipation that courts would otherwise construe Title VII to apply to companies employing aliens in United States "possessions," an outcome supposedly dictated by this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377 (1948). This explanation may very well be true, but it only corroborates the conclusion that Congress expected Title VII to apply extraterritorially. Although there is no fixed legal meaning for the term "possession," see *id.*, at 386, it is clear that possessions, like foreign nations, are extraterritorial jurisdictions to which the presumption against extraterritorial application of a statute attaches. See *Foley Bros.*, *supra*, at 285.[5] Because only one rule of construction applies to both types of jurisdiction, a

[5] The presumption was overcome in *Vermilya-Brown* because the legislation at issue in that case *expressly* applied to United States "possessions." See 335 U. S., at 379, 386; see also *Foley Bros.*, 336 U. S. 281, 285 (1949).

court following *Vermilya-Brown* and *Foley Brothers* would have reached the *same* conclusion about the applicability of Title VII to companies employing aliens in possessions and to companies employing aliens in foreign nations. Consequently, if Congress believed that the alien-exemption provision was necessary to protect employers in the former class, it would have had just as much reason to believe that the provision was necessary to protect employers in the latter. In any case, the specific history surrounding the alien-exemption provision makes clear that Congress had the situation of "U. S. employers employing citizens of foreign countries *in foreign lands*" firmly in mind when it enacted that provision. S. Rep. No. 867, *supra*, at 11 (emphasis added).

B

Rather than attempting to reconcile its interpretation of Title VII with the language and legislative history of the alien-exemption provision, the majority contents itself with pointing out various legislative silences that, in the majority's view, communicate a congressional intent to limit Title VII to instances of domestic employment discrimination. In particular, the majority claims that, had Congress intended to give Title VII an extraterritorial reach, it "would have addressed the subject of conflicts with foreign laws and procedures," *ante*, at 256, and would have "provide[d] . . . mechanisms for overseas enforcement," including special venue provisions and extraterritorial investigatory powers for the Equal Employment Opportunity Commission (EEOC), see *ibid.* The majority also emphasizes Congress' failure to draw an express distinction between extraterritorial application of Title VII to United States employers and extraterritorial application of Title VII to foreign employers. See *ante*, at 255. In my view, none of these supposed omissions detracts from the conclusion that Congress intended Title VII to apply extraterritorially.

The majority is simply incorrect in its claim that Congress disregarded the subject of conflicts with foreign law. Congress addressed this concern by enacting the alien-exemption provision, the announced purpose of which was "*to remove conflicts of law* which might otherwise exist between the United States and a foreign nation in the employment of aliens outside the United States by an American enterprise." H. R. Rep. No. 570, at 4, reprinted in Civil Rights Hearings, at 2303 (emphasis added). As I have explained, the alien-exemption provision is tailored to avert the very type of potential conflict that prevented the Court from construing the Eight Hour Law to apply extraterritorially in *Foley Brothers*. Congress could have gone further in addressing the topic of conflicts, but it is not our position to second-guess the balance struck by Congress in this respect.

The majority also misrepresents the character of Title VII's venue provisions. Title VII provides that venue is proper in various districts related to the underlying charge of discrimination, but also states that

> "if the [employer] is not found within any such district, such an action may be brought within the judicial district in which the [employer] has his principal office." 42 U. S. C. § 2000e–5(f)(3).

"Principal office" venue would extend to any United States employer doing business abroad. Identical language is found in the venue provision of the Jones Act, 46 U. S. C. App. § 688(a), which under appropriate circumstances applies to injuries occurring outside the territorial jurisdiction of the United States, see generally *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U. S. 306, 308–309 (1970).[6]

[6] In addition, a United States citizen who suffers employment discrimination abroad may bring a Title VII action against the United States employer in state court, see *Yellow Freight System, Inc.* v. *Donnelly*, 494 U. S. 820 (1990), to which the venue provisions of Title VII clearly would not apply, see *Bainbridge* v. *Merchants & Miners Transp. Co.*, 287 U. S. 278, 280–281 (1932).

Nor can any inference be drawn from the scope of the EEOC's investigatory powers under the statute. Title VII directs the EEOC to conduct an investigation "[w]henever a charge is filed" under the statute, 42 U. S. C. § 2000e–5(b); it also states that the EEOC is to "have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated," § 2000e–8(a). Far from imposing a geographic limitation on either of these powers, Title VII states that the EEOC may "exercise any or all its powers" in the District of Columbia (the site of the EEOC's principal office) or "at *any other place.*" § 2000e–4(f) (emphasis added).

Title VII does limit the reach of the subpoena power of the EEOC, see § 2000e–9; 29 U. S. C. § 161(1), but this limitation does not detract from the potential extraterritorial reach of the agency's investigatory powers. See *FTC* v. *Compagnie De Saint-Gobain-Pont-A-Mousson*, 205 U. S. App. D. C. 172, 194, 636 F. 2d 1300, 1322 (1980) (territorial limitation on subpoena power does not prevent extraterritorial investigations). Moreover, Congress has also declined to give extraterritorial-subpoena power to either the EEOC under the Age Discrimination in Employment Act (ADEA), 29 U. S. C. §§ 209, 626(a); 15 U. S. C. § 49, or to the Securities and Exchange Commission under the Securities Exchange Act of 1934, 15 U. S. C. § 78u(b), even though the former statute expressly applies abroad, 29 U. S. C. §§ 623(h)(1), 630(f),[7] and the latter is widely recognized as doing so, see

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[7] Congress' amendment of the ADEA to give it extraterritorial application does not reflect a congressional intent that Title VII be confined to domestic application. Congress amended the ADEA in response to lower-court decisions construing the ADEA to apply only domestically. These decisions *distinguished* the ADEA from Title VII in this respect, noting that the former did not contain a provision analogous to the alien-exemption provision. See *Cleary* v. *United States Lines, Inc.*, 728 F. 2d 607, 609 (CA3 1984); see also *Pfeiffer* v. *Wm. Wrigley Jr. Co.*, 755 F. 2d 554, 559 (CA7 1985). Sponsors of the ADEA amendment explained that it would

Turley, "When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality, 84 Nw. U. L. Rev. 598, 613–617 (1990). In short, there simply is no correlation between the scope of an agency's subpoena power and the extraterritorial reach of the statute that the agency is charged with enforcing.

Finally, the majority overstates the importance of Congress' failure expressly to disclaim extraterritorial application of Title VII to foreign employers. As I have discussed, our cases recognize that application of United States law to *United States nationals* abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to *foreign nationals* abroad. See *Steele* v. *Bulova Watch Co.*, 344 U. S., at 285–286; *Skiriotes* v. *Florida*, 313 U. S., at 73–74. It is the latter situation that typically presents the foreign-policy and conflicts-of-law concerns that underlie the clear-statement rule of *McCulloch* and *Benz*. Because two different rules of construction apply depending on the national identity of the regulated parties, the *same* statute might be construed to apply extraterritorially to United States nationals but *not* to foreign nationals. Compare *Steele* v. *Bulova Watch Co.*, *supra*, at 285–287 (applying Lanham Act to United States national for conduct abroad) with *Vanity Fair Mills, Inc.* v. *T. Eaton Co.*, 234 F. 2d 633, 642–643 (CA2) (declining to apply Lanham Act to foreign national for conduct abroad), cert. denied, 352 U. S. 871 (1956). Cf. *Webster* v. *Doe*, 486 U. S., at 599–601, 603 (finding language in judicial-review statute to have different meanings depending on applicability of different rules of construction).

The legislative history of Title VII, moreover, furnishes direct support for such a construction. See H. R. Rep. No. 570, at 4 (explaining that alien-exemption provision applies to "employment of aliens outside the United States by *an*

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make the ADEA and Title VII coextensive in their extraterritorial reach. See 129 Cong. Rec. 34499 (1983) (statement of Sen. Grassley).

American enterprise" (emphasis added)), reprinted in Civil Rights Hearings, at 2303; S. Rep. No. 867, at 11 (alien-exemption provision directed at "*U. S. employers* employing citizens of foreign countries in foreign lands" (emphasis added)); see also EEOC Policy Statement No. 125, BNA EEOC Compliance Manual 605:0061 (April 1989) (construing nationality of employer abroad to be "significant" under Title VII). Thus, although the issue is not before us in this case, we would not be at a loss for interpretive resources for narrowing Title VII's extraterritorial reach to United States employers should such a construction be necessary in order to avoid conflicts with foreign law.

III

The extraterritorial application of Title VII is supported not only by its language and legislative history but also by pertinent administrative interpretations. See *Foley Bros.*, 336 U. S., at 288. Since 1975, the EEOC has been on record as construing Title VII to apply to United States companies employing United States citizens abroad:

> "Section [2000e–2(a)(1)] provides that it is unlawful to discriminate against 'any individual' with respect to his employment. . . . The only exception to 'any individual' appears to be that contained in Section [2000e–1], i. e., aliens working outside the U. S. and to employees of certain religious and educational institutions.
>
> "Giving Section [2000e–1] its normal meaning would indicate a Congressional intent to exclude from the coverage of the statute aliens employed by covered employers working in the employers' operations outside of the United States.
>
> "The reason for such exclusions is obvious; employment conditions in foreign countries are beyond the control of Congress. The section does not similarly exempt from the provisions of the Act, U. S. Citizens employed abroad by U. S. employers. If Section [2000e–1] is to

> have any meaning at all, therefore, it is necessary to construe it as expressing a Congressional intent to extend the coverage of Title VII to include employment conditions of citizens in overseas operations of domestic corporations at the same time it excludes aliens of the domestic corporation from the operation of the statute." Letter from W. Carey, EEOC General Counsel, to Senator Frank Church (Mar. 14, 1975), reprinted in App. 48–49.

The agency has reiterated this interpretation in various decisions and policy pronouncements since then. See, *e. g.*, EEOC Dec. No. 85–16 (Sept. 16, 1985), 38 FEP Cases 1889, 1891–1892; EEOC Policy Statement No. 125, *supra*, at 605:005 to 605:0057. "[I]t is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 115 (1988).

In this case, moreover, the EEOC's interpretation is reinforced by the long-standing interpretation of the Department of Justice, the agency with secondary enforcement responsibility under Title VII. See *Sheet Metal Workers* v. *EEOC*, 478 U. S. 421, 465–466 (1986) (plurality opinion) (deference owed Department of Justice interpretation of Title VII). Stating the position of the Department, then-Assistant Attorney General Scalia testified before Congress:

> "With respect to discrimination in employment by private companies and individuals, Title VII of the 1964 Civil Rights Act, as amended, prohibits a broad range of 'unlawful employment practices' by any private employer 'engaged in any industry affecting commerce who has fifteen or more employees.' . . . Once again the [statute] contains an exemption 'with respect to the employment of aliens outside any State,' which implies that it is

applicable to the employment of United States citizens by covered employers anywhere in the world." Foreign Investment and Arab Boycott Legislation, Hearings before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., 165 (1975).

The majority offers no response to the view of the Department of Justice. It discounts the force of the EEOC's views on the ground that the EEOC has been inconsistent. The majority points to a 1970 EEOC regulation in which the agency declared that "Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin." 29 CFR § 1606.1(c) (1971). According to the majority, the inconsistency between § 1606.1(c) and the EEOC's 1975 pronouncement deprives the latter of persuasive force. See *ante*, at 257.

This conclusion is based on a misreading of § 1606.1(c). Obviously, it does not follow from the EEOC's recognition that Title VII applies to "both citizens and noncitizens, domiciled or residing in the United States" that the agency understood Title VII to apply to *no one outside* the United States. The context of the regulation confirms that the EEOC meant no such thing. The agency promulgated § 1606.1 in order to announce its interpretation of Title VII's ban on national-origin discrimination. See §§ 1606.1(a)–(b), (d). The agency emphasized that Title VII "protects all individuals, both citizens and noncitizens, domiciled or residing in the United States" only to underscore that neither the citizenship nor the residency status of an individual affects this statutory prohibition. Indeed, the EEOC could not have stated that Title VII protects "both citizens *and* noncitizens" from national-origin discrimination *outside* the United States because such an interpretation would have been inconsistent with the alien-exemption provision. At the very time that

§ 1606.1 was in effect, the EEOC was representing to Congress that Title VII did protect United States citizens from discrimination by United States employers abroad. See Letter from William A. Carey, EEOC General Counsel, *supra*, at 275–276. The majority's insistence that the EEOC was contradicting itself fails to give the agency the deference that it is due on the interpretation of its own regulations. See *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

In sum, there is no reason not to give effect to the considered and consistently expressed views of the two agencies assigned to enforce Title VII.

IV

In the hands of the majority, the presumption against extraterritoriality is transformed from a "valid approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.*, 336 U. S., at 285, into a barrier to any genuine inquiry into the sources that reveal Congress' actual intentions. Because the language, history, and administrative interpretations of the statute all support application of Title VII to United States companies employing United States citizens abroad, I dissent.

Syllabus

ARIZONA *v.* FULMINANTE

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 89–839. Argued October 10, 1990—Decided March 26, 1991

After respondent Fulminante's 11-year-old stepdaughter was murdered in Arizona, he left the State, was convicted of an unrelated federal crime, and was incarcerated in a federal prison in New York. There he was befriended by Anthony Sarivola, a fellow inmate who was a paid informant for the Federal Bureau of Investigation and was masquerading as an organized crime figure. When Sarivola told Fulminante that he knew Fulminante was getting tough treatment from other inmates because of a rumor that he was a child murderer, and offered him protection in exchange for the truth, Fulminante admitted that he had killed the girl and provided details about the crime. After Fulminante was released from prison, he also confessed to Sarivola's future wife, whom he had never met before. Subsequently, he was indicted in Arizona for first-degree murder. The trial court denied his motion to suppress, *inter alia*, the confession to Sarivola, rejecting his contention that it was coerced and thus barred by the Fifth and Fourteenth Amendments. He was convicted and sentenced to death. The State Supreme Court held that the confession was coerced and that this Court's precedent precluded the use of harmless-error analysis in such a case. It remanded the case for a new trial without the use of the confession.

Held: The judgment is affirmed.

161 Ariz. 237, 778 P. 2d 602, affirmed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I, II, and IV, concluding that:

1. The State Supreme Court properly concluded that Fulminante's confession was coerced. The court applied the appropriate test, totality of the circumstances, cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226, to determine the confession's voluntariness and plainly found that Fulminante was motivated to confess by a fear of physical violence, absent protection from his friend Sarivola. The court's finding, permissible on this record, that there was a credible threat of physical violence is sufficient to support a finding of coercion. *Blackburn* v. *Alabama*, 361 U. S. 199, 206. Pp. 285–288.

2. Under harmless-error analysis, which the Court has determined applies to the admission of coerced confessions, *post*, at 306–312, the State has failed to meet its burden of establishing, beyond a reasonable

doubt, that the admission of Fulminante's confession to Sarivola was harmless. Pp. 295–302.

(a) A defendant's confession is like no other evidence. It is probably the most probative and damaging evidence that can be admitted against him, and, if it is a full confession, a jury may be tempted to rely on it alone in reaching its decision. The risk that a coerced confession is unreliable, coupled with the profound impact that it has upon the jury, requires a reviewing court to exercise extreme caution before determining that the confession's admission was harmless. Pp. 295–296.

(b) The evidence shows that the State has failed to meet its burden. First, the transcript reveals that both the trial court and the State recognized that a successful prosecution depended on the jury believing both confessions, since it is unlikely that the physical and circumstantial evidence alone would have been sufficient to convict. Second, the jury's assessment of the second confession could easily have depended on the presence of the first. The jury might have believed that the two confessions reinforced and corroborated each other, since the only evidence corroborating some aspects of the second confession was in the first confession. Without that confession, the jurors might have found the wife's story unbelievable because the second confession was given under questionable circumstances, and they might have believed that she was motivated to lie in order to receive favorable treatment from federal authorities for herself and her husband. Third, the admission of the first confession led to the admission of evidence about Sarivola's organized crime connections, which depicted Fulminante as someone who willingly sought out the company of criminals and, thus, was prejudicial to him. Finally, it is impossible to say beyond a reasonable doubt that the judge, who, during the sentencing phase, relied on evidence that could only be found in the two confessions, would have passed the same sentence without the confession. Pp. 296–302.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Part II, concluding that the harmless-error rule adopted in *Chapman* v. *California*, 386 U. S. 18, is applicable to the admission of involuntary confessions. The admission of such a confession is a "trial error," which occurs during a case's presentation to the trier of fact and may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt. See, *e. g.*, *Clemons* v. *Mississippi*, 494 U. S. 738. A trial error differs markedly from violations that are structural defects in the constitution of the trial mechanism and thus defy analysis by harmless-error standards. *Gideon* v. *Wainwright*, 372 U. S. 335; *Tumey* v. *Ohio*,

273 U. S. 510, distinguished. It is also not the type of error that transcends the criminal process. In fact, it is impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment, whose admission is subject to harmless-error analysis, see, *e. g.*, *Milton* v. *Wainwright*, 407 U. S. 371, and those elicited in violation of the Fourteenth Amendment, since both confessions have the same evidentiary impact and may have been elicited by equally egregious conduct. Pp. 306–312.

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III, and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C. J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III, *post*, p. 302. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 313.

Barbara M. Jarrett, Senior Assistant Attorney General of Arizona, argued the cause for petitioner. With her on the briefs were *Robert K. Corbin*, Attorney General, and *Jessica Gifford Funkhouser*.

Paul J. Larkin, Jr., 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*, *Deputy Solicitor General Bryson*, and *Joel M. Gershowitz*.

Stephen R. Collins, by appointment of the Court, 495 U. S. 902, argued the cause and filed a brief for respondent.*

**Gregory U. Evans*, *Daniel B. Hales*, *Joseph A. Morris*, *George D. Webster*, *Jack E. Yelverton*, *Fred E. Inbau*, *Wayne W. Schmidt*, *Bernard J. Farber*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

H. Gerald Beaver and *Richard B. Glazier* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

JUSTICE WHITE delivered an opinion, Parts I, II, and IV of which are the opinion of the Court, and Part III of which is a dissenting opinion.†

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. The court also held that the harmless-error rule could not be used to save the conviction. We affirm the judgment of the Arizona court, although for different reasons than those upon which that court relied.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of the body, it was impossible to tell whether she had been sexually assaulted.

Fulminante's statements to police concerning Jeneane's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges of possession of a firearm by a felon.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became

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†JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join this opinion in its entirety; JUSTICE SCALIA joins Parts I and II; and JUSTICE KENNEDY joins Parts I and IV.

friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any involvement in Jeneane's death. During one conversation, he told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

Sarivola learned more one evening in October 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was "starting to get some tough treatment and whatnot" from other inmates because of the rumor. App. 83. Sarivola offered to protect Fulminante from his fellow inmates, but told him, "'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'" *Ibid.* Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head. *Id.*, at 84–85.

Sarivola was released from prison in November 1983. Fulminante was released the following May, only to be arrested the next month for another weapons violation. On September 4, 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison, as well as a second confes-

sion he had given to Donna Sarivola, then Anthony Sarivola's fiancée and later his wife, following his May 1984 release from prison. He asserted that the confession to Sarivola was coerced, and that the second confession was the "fruit" of the first. *Id.*, at 6–8. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confessions were voluntary. *Id.*, at 44, 63. The State introduced both confessions as evidence at trial, and on December 19, 1985, Fulminante was convicted of Jeneane's murder. He was subsequently sentenced to death.

Fulminante appealed, arguing, among other things, that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced, but initially determined that the admission of the confession at trial was harmless error, because of the overwhelming nature of the evidence against Fulminante. 161 Ariz. 237, 778 P. 2d 602 (1988). Upon Fulminante's motion for reconsideration, however, the court ruled that this Court's precedent precluded the use of the harmless-error analysis in the case of a coerced confession. *Id.*, at 262, 778 P. 2d, at 627. The court therefore reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola.[1] Because of dif-

[1] In its initial opinion, the Arizona Supreme Court had determined that the second confession, to Donna Sarivola, was not the "fruit of the poisonous tree," because it was made six months after the confession to Sarivola; it occurred after Fulminante's need for protection from Sarivola presumably had ended; and it took place in the course of a casual conversation with someone who was not an agent of the State. 161 Ariz. 237, 246, 778 P. 2d 602, 611 (1988). The court adhered to this determination in its supplemental opinion. *Id.*, at 262, 778 P. 2d, at 627. This aspect of the Arizona Supreme Court's decision is not challenged here.

fering views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless-error analysis, we granted the State's petition for certiorari, 494 U. S. 1055 (1990). Although a majority of this Court finds that such a confession is subject to a harmless-error analysis, for the reasons set forth below, we affirm the judgment of the Arizona court.

II

We deal first with the State's contention that the court below erred in holding Fulminante's confession to have been coerced. The State argues that it is the totality of the circumstances that determines whether Fulminante's confession was coerced, cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973), but contends that rather than apply this standard, the Arizona court applied a "but for" test, under which the court found that but for the promise given by Sarivola, Fulminante would not have confessed. Brief for Petitioner 14–15. In support of this argument, the State points to the Arizona court's reference to *Bram* v. *United States*, 168 U. S. 532 (1897). Although the Court noted in *Bram* that a confession cannot be obtained by "'any direct or implied promises, however slight, nor by the exertion of any improper influence,'" *id.*, at 542–543 (quoting 3 H. Smith & A. Keep, Russell on Crimes and Misdemeanors 478 (6th ed. 1896)), it is clear that this passage from *Bram*, which under current precedent does not state the standard for determining the voluntariness of a confession, was not relied on by the Arizona court in reaching its conclusion. Rather, the court cited this language as part of a longer quotation from an Arizona case which accurately described the State's burden of proof for establishing voluntariness. See 161 Ariz., at 244, 778 P. 2d, at 609 (citing *State* v. *Thomas*, 148 Ariz. 225, 227, 714 P. 2d 395, 397 (1986); *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964); and *Bram*, *supra*, at 542–543). Indeed, the Arizona Supreme Court stated that a "determination regarding

the voluntariness of a confession . . . must be viewed in a totality of the circumstances," 161 Ariz., at 243, 778 P. 2d, at 608, and under that standard plainly found that Fulminante's statement to Sarivola had been coerced.

In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that "because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates." *Ibid.* In addition, Sarivola was aware that Fulminante had been receiving "'rough treatment from the guys.'" *Id.*, at 244, n. 1, 778 P. 2d, at 609, n. 1. Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to Jeneane's murder, *id.*, at 243, 778 P. 2d, at 608, and "[i]n response to Sarivola's offer of protection, [Fulminante] confessed." *Id.*, at 244, 778 P. 2d, at 609. Agreeing with Fulminante that "Sarivola's promise was 'extremely coercive,'" *id.*, at 243, 778 P. 2d, at 608, the Arizona court declared: "[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant's life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word." *Id.*, at 262, 778 P. 2d, at 627.[2]

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[2] There are additional facts in the record, not relied upon by the Arizona Supreme Court, which also support a finding of coercion. Fulminante possesses low average to average intelligence; he dropped out of school in the fourth grade. Record 88i, 88o. He is short in stature and slight in build. *Id.*, at 88. Although he had been in prison before, *ibid.*, he had not always adapted well to the stress of prison life. While incarcerated at the age of 26, he had "felt threatened by the [prison] population," *id.*, at 88x, and he therefore requested that he be placed in protective custody. Once there, however, he was unable to cope with the isolation and was admitted to a psychiatric hospital. *Id.*, at 88t–88b1. The Court has previously recognized that factors such as these are relevant in determining whether a defendant's will has been overborne. See, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560, 567 (1958) (lack of education); *Reck* v. *Pate*, 367 U. S. 433, 441

We normally give great deference to the factual findings of the state court. *Davis* v. *North Carolina*, 384 U. S. 737, 741 (1966); *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568, 603–604 (1961). Nevertheless, "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985). See also *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978); *Davis*, *supra*, at 741–742; *Haynes*, *supra*, at 515; *Chambers* v. *Florida*, 309 U. S. 227, 228–229 (1940).

Although the question is a close one, we agree with the Arizona Supreme Court's conclusion that Fulminante's confession was coerced.[3] The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent;[4] a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). See also *Culombe*, *supra*, at 584; *Reck* v. *Pate*, 367 U. S. 433, 440–441 (1961); *Rogers* v. *Richmond*, 365 U. S. 534, 540 (1961); *Payne* v. *Arkansas*, 356 U. S. 560, 561

(1961) (low intelligence). Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226 (1973) (listing potential factors); *Culombe* v. *Connecticut*, 367 U. S. 568, 602 (1961) (same). In addition, we note that Sarivola's position as Fulminante's friend might well have made the latter particularly susceptible to the former's entreaties. See *Spano* v. *New York*, 360 U. S. 315, 323 (1959).

[3] Our prior cases have used the terms "coerced confession" and "involuntary confession" interchangeably "by way of convenient shorthand." *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960). We use the former term throughout this opinion, as that is the term used by the Arizona Supreme Court.

[4] The parties agree that Sarivola acted as an agent of the Government when he questioned Fulminante about the murder and elicited the confession. Brief for Petitioner 19; Brief for Respondent 2.

(1958); *Watts* v. *Indiana*, 338 U. S. 49, 52 (1949). As in *Payne*, where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U. S., at 564–565, 567, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. Accepting the Arizona court's finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante's will was overborne in such a way as to render his confession the product of coercion.

III

Four of us, JUSTICES MARSHALL, BLACKMUN, STEVENS, and myself, would affirm the judgment of the Arizona Supreme Court on the ground that the harmless-error rule is inapplicable to erroneously admitted coerced confessions. We thus disagree with the Justices who have a contrary view.

The majority today abandons what until now the Court has regarded as the "axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond*, 365 U. S. 534 [(1961)], and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York*, 324 U. S. 401 [(1945)]; *Stroble* v. *California*, 343 U. S. 181 [(1952)]; *Payne* v. *Arkansas*, 356 U. S. 560." *Jackson* v. *Denno*, 378 U. S. 368, 376 (1964). The Court has repeatedly stressed that the view that the admission of a coerced confession can be harmless error because of the other evidence to support the verdict is "an impermissible doctrine," *Lynumn* v. *Illinois*, 372 U. S. 528, 537 (1963); for "the admission in ev-

idence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment," *Payne*, *supra*, at 568. See also *Rose* v. *Clark*, 478 U. S. 570, 578, n. 6 (1986); *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979); *Lego* v. *Twomey*, 404 U. S. 477, 483 (1972); *Chapman* v. *California*, 386 U. S. 18, 23, and n. 8 (1967); *Haynes* v. *Washington*, *supra*, at 518; *Blackburn* v. *Alabama*, *supra*, at 206; *Spano* v. *New York*, 360 U. S. 315, 324 (1959); *Brown* v. *Allen*, 344 U. S. 443, 475 (1953); *Stroble* v. *California*, 343 U. S. 181, 190 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 63 (1951); *Haley* v. *Ohio*, 332 U. S. 596, 599 (1948); *Malinski* v. *New York*, 324 U. S. 401, 404 (1945); *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, n. 1 (1944). As the decisions in *Haynes* and *Payne*, *supra*, show, the rule was the same even when another confession of the defendant had been properly admitted into evidence. Today, a majority of the Court, without any justification, cf. *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984), overrules this vast body of precedent without a word and in so doing dislodges one of the fundamental tenets of our criminal justice system.

In extending to coerced confessions the harmless-error rule of *Chapman* v. *California*, *supra*, the majority declares that because the Court has applied that analysis to numerous other "trial errors," there is no reason that it should not apply to an error of this nature as well. The four of us remain convinced, however, that we should abide by our cases that have refused to apply the harmless-error rule to coerced confessions, for a coerced confession is fundamentally different from other types of erroneously admitted evidence to which the rule has been applied. Indeed, as the majority concedes, *Chapman* itself recognized that prior cases "have indicated that there are some constitutional rights so basic to a fair trial that their infraction can *never* be treated as harmless error," and it placed in that category the constitutional rule against using a defendant's coerced confession against

him at his criminal trial. 386 U. S., at 23, and n. 8 (emphasis added). Moreover, cases since *Chapman* have reiterated the rule that using a defendant's coerced confession against him is a denial of due process of law regardless of the other evidence in the record aside from the confession. *Lego* v. *Twomey*, *supra*, at 483; *Mincey* v. *Arizona*, 437 U. S., at 398; *New Jersey* v. *Portash*, *supra*, at 459; *Rose* v. *Clark*, *supra*, at 577, 578, and n. 6.

Chapman specifically noted three constitutional errors that could not be categorized as harmless error: using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge. The majority attempts to distinguish the use of a coerced confession from the other two errors listed in *Chapman* first by distorting the decision in *Payne*, and then by drawing a meaningless dichotomy between "trial errors" and "structural defects" in the trial process. Viewing *Payne* as merely rejecting a test whereby the admission of a coerced confession could stand if there were "sufficient evidence," other than the confession, to support the conviction, the majority suggests that the Court in *Payne* might have reached a different result had it been considering a harmless-error test. *Post*, at 309 (opinion of REHNQUIST, C. J.). It is clear, though, that in *Payne* the Court recognized that *regardless* of the amount of other evidence, "the admission in evidence, over objection, of the coerced confession vitiates the judgment," because "where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession." 356 U. S., at 568. The inability to assess its effect on a conviction causes the admission at trial of a coerced confession to "defy analysis by 'harmless-error' standards," cf. *post*, at 309 (opinion of REHNQUIST, C. J.), just as certainly as do deprivation of counsel and trial before a biased judge.

The majority also attempts to distinguish "trial errors" which occur "during the presentation of the case to the jury," *post*, at 307, and which it deems susceptible to harmless-error analysis, from "structural defects in the constitution of the trial mechanism," *post*, at 309, which the majority concedes cannot be so analyzed. This effort fails, for our jurisprudence on harmless error has not classified so neatly the errors at issue. For example, we have held susceptible to harmless-error analysis the failure to instruct the jury on the presumption of innocence, *Kentucky* v. *Whorton*, 441 U. S. 786 (1979), while finding it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable-doubt standard, *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979). These cases cannot be reconciled by labeling the former "trial error" and the latter not, for both concern the exact same stage in the trial proceedings. Rather, these cases can be reconciled only by considering the nature of the right at issue and the effect of an error upon the trial. A jury instruction on the presumption of innocence is not constitutionally required in every case to satisfy due process, because such an instruction merely offers an additional safeguard beyond that provided by the constitutionally required instruction on reasonable doubt. See *Whorton*, *supra*, at 789; *Taylor* v. *Kentucky*, 436 U. S. 478, 488–490 (1978). While it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt. In addition, omission of a reasonable-doubt instruction, though a "trial error," distorts the very structure of the trial because it creates the risk that the jury will convict the defendant even if the State has not met its required burden of proof. Cf. *Cool* v. *United States*, 409 U. S. 100, 104 (1972); *In re Winship*, 397 U. S. 358, 364 (1970).

These same concerns counsel against applying harmless-error analysis to the admission of a coerced confession. A defendant's confession is "probably the most probative and damaging evidence that can be admitted against him," *Cruz* v. *New York*, 481 U. S. 186, 195 (1987) (WHITE, J., dissenting), so damaging that a jury should not be expected to ignore it even if told to do so, *Bruton* v. *United States*, 391 U. S. 123, 140 (1968) (WHITE, J., dissenting), and because in any event it is impossible to know what credit and weight the jury gave to the confession. Cf. *Payne*, *supra*, at 568. Concededly, this reason is insufficient to justify a *per se* bar to the use of *any* confession. Thus, *Milton* v. *Wainwright*, 407 U. S. 371 (1972), applied harmless-error analysis to a confession obtained and introduced in circumstances that violated the defendant's Sixth Amendment right to counsel.[5] Similarly, the Courts of Appeals have held that the introduction of incriminating statements taken from defendants in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), is subject to treatment as harmless error.[6]

Nevertheless, in declaring that it is "impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment," *post*, at 312 (opinion of REHNQUIST, C. J.), the majority overlooks the obvious. Neither *Milton* v. *Wainwright* nor any of the other cases upon which

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[5] In *Satterwhite* v. *Texas*, 486 U. S. 249 (1988), and *Moore* v. *Illinois*, 434 U. S. 220 (1977), the harmless-error rule was applied to the admission of evidence in violation of the Sixth Amendment Counsel Clause, but in neither case did the error involve admitting a confession or an incriminating statement of the defendant, which was the case in *Milton* v. *Wainwright*.

[6] *Howard* v. *Pung*, 862 F. 2d 1348, 1351 (CA8 1988), cert. denied, 492 U. S. 920 (1989); *United States* v. *Johnson*, 816 F. 2d 918, 923 (CA3 1987); *Bryant* v. *Vose*, 785 F. 2d 364, 367 (CA1), cert. denied, 477 U. S. 907 (1986); *Martin* v. *Wainwright*, 770 F. 2d 918, 932 (CA11 1985), modified, 781 F. 2d 185, cert. denied, 479 U. S. 909 (1986); *United States* v. *Ramirez*, 710 F. 2d 535, 542–543 (CA9 1983); *Harryman* v. *Estelle*, 616 F. 2d 870, 875 (CA5) (en banc), cert. denied, 449 U. S. 860 (1980).

the majority relies involved a defendant's *coerced* confession, nor were there present in these cases the distinctive reasons underlying the exclusion of coerced incriminating statements of the defendant.[7] First, some coerced confessions may be untrustworthy. *Jackson* v. *Denno*, 378 U. S., at 385–386; *Spano* v. *New York*, 360 U. S., at 320. Consequently, admission of coerced confessions may distort the truth-seeking function of the trial upon which the majority focuses. More importantly, however, the use of coerced confessions, "whether true or false," is forbidden "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth," *Rogers* v. *Richmond*, 365 U. S., at 540–541; see also *Lego*, 404 U. S., at 485. This reflects the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will," *Blackburn* v. *Alabama*, 361 U. S., at 206–207, as well as "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves," *Spano*, *supra*, at 320–321. Thus, permitting a coerced confession to be part of the evidence on which a jury is free to base its verdict of guilty is inconsistent with the thesis that ours is not an

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[7] The same can be said of the *Miranda* cases. As the Court has recognized, a *Miranda* violation "does not mean that the statements received have actually been coerced, but only that the courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised." *Oregon* v. *Elstad*, 470 U. S. 298, 310 (1985). See also *New York* v. *Quarles*, 467 U. S. 649, 654 (1984).

inquisitorial system of criminal justice. Cf. *Chambers* v. *Florida*, 309 U. S., at 235–238.

As the majority concedes, there are other constitutional errors that invalidate a conviction even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error. For example, a judge in a criminal trial "is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see *Sparf & Hansen* v. *United States*, 156 U. S. 51, 105 (1895); *Carpenters* v. *United States*, 330 U. S. 395, 408 (1947), regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977). A defendant is entitled to counsel at trial, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and as *Chapman* recognized, violating this right can never be harmless error. 386 U. S., at 23, and n. 8. See also *White* v. *Maryland*, 373 U. S. 59 (1963), where a conviction was set aside because the defendant had not had counsel at a preliminary hearing without regard to the showing of prejudice. In *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), a defendant was found guilty beyond reasonable doubt, but the conviction had been set aside because of the unlawful exclusion of members of the defendant's race from the grand jury that indicted him, despite overwhelming evidence of his guilt. The error at the grand jury stage struck at fundamental values of our society and "undermine[d] the structural integrity of the criminal tribunal itself, and [was] not amenable to harmless-error review." *Id.*, at 263–264. *Vasquez*, like *Chapman*, also noted that rule of automatic reversal when a defendant is tried before a judge with a financial interest in the outcome, *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927), despite a lack of any indication that bias influenced the decision. *Waller* v. *Georgia*, 467 U. S. 39, 49 (1984), recognized that violation of the guarantee of a public trial required reversal without any showing of prejudice and even though the values

of a public trial may be intangible and unprovable in any particular case.

The search for truth is indeed central to our system of justice, but "certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Rose* v. *Clark*, 478 U. S., at 587 (STEVENS, J., concurring in judgment). The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession "abort[s] the basic trial process" and "render[s] a trial fundamentally unfair." *Id.*, at 577, 578, n. 6.

For the foregoing reasons the four of us would adhere to the consistent line of authority that has recognized as a basic tenet of our criminal justice system, before and after both *Miranda* and *Chapman*, the prohibition against using a defendant's coerced confession against him at his criminal trial. *Stare decisis* is "of fundamental importance to the rule of law," *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 494 (1987); the majority offers no convincing reason for overturning our long line of decisions requiring the exclusion of coerced confessions.

IV

Since five Justices have determined that harmless-error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola. Cf. *Pennsylvania* v. *Union Gas Co.*, 491 U. S. 1, 45 (1989) (WHITE, J., concurring in judgment in part and dissenting in part); *id.*, at 57 (O'CONNOR, J., dissenting). *Chapman* v. *California*, 386 U. S., at 24, made clear that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court has the power to review the record *de novo* in order to determine an error's harmlessness. See *ibid.*; *Satterwhite* v.

Texas, 486 U. S., at 258. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction. *Chapman*, *supra*, at 26. Five of us are of the view that the State has not carried its burden and accordingly affirm the judgment of the court below reversing respondent's conviction.

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton* v. *United States*, 391 U. S., at 139–140 (WHITE, J., dissenting). See also *Cruz* v. *New York*, 481 U. S., at 195 (WHITE, J., dissenting) (citing *Bruton*). While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

In the Arizona Supreme Court's initial opinion, in which it determined that harmless-error analysis could be applied to the confession, the court found that the admissible second confession to Donna Sarivola rendered the first confession to Anthony Sarivola cumulative. 161 Ariz., at 245–246, 778 P. 2d, at 610–611. The court also noted that circumstantial physical evidence concerning the wounds, the ligature around Jeneane's neck, the location of the body, and the presence of

motorcycle tracks at the scene corroborated the second confession. *Ibid.* The court concluded that "due to the overwhelming evidence adduced from the second confession, if there had not been a first confession, the jury would still have had the same basic evidence to convict" Fulminante. *Id.*, at 246, 778 P. 2d, at 611.

We have a quite different evaluation of the evidence. Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error. Three considerations compel this result.

First, the transcript discloses that both the trial court and the State recognized that a successful prosecution depended on the jury believing the two confessions. Absent the confessions, it is unlikely that Fulminante would have been prosecuted at all, because the physical evidence from the scene and other circumstantial evidence would have been insufficient to convict. Indeed, no indictment was filed until nearly two years after the murder.[8] App. 2. Although the police had suspected Fulminante from the beginning, as the prosecutor acknowledged in his opening statement to the jury, "[W]hat brings us to Court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife." *Id.*, at 65–66. After trial began, during a renewed hearing on Fulminante's motion to suppress, the trial court opined, "You know, I think from what little I know about this trial, the character of this man [Sarivola] for truthfulness or untruthfulness and his credibility is the centerpiece of this case, is it not?" The prosecutor responded, "It's very important, there's no doubt." *Id.*, at 62. Finally, in his

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[8] Although Fulminante had allegedly confessed to Donna Sarivola several months previously, police did not yet know of this confession, which Anthony Sarivola did not mention to them until June 1985. App. 90–92. They did, however, know of the first confession, which Fulminante had given to Anthony Sarivola nearly a year before.

closing argument, the prosecutor prefaced his discussion of the two confessions by conceding: "[W]e have a lot of [circumstantial] evidence that indicates that this is our suspect, this is the fellow that did it, but it's a little short as far as saying that it's proof that he actually put the gun to the girl's head and killed her. So it's a little short of that. We recognize that." 10 Tr. 75 (Dec. 17, 1985).

Second, the jury's assessment of the confession to Donna Sarivola could easily have depended in large part on the presence of the confession to Anthony Sarivola. Absent the admission at trial of the first confession, the jurors might have found Donna Sarivola's story unbelievable. Fulminante's confession to Donna Sarivola allegedly occurred in May 1984, on the day he was released from Ray Brook, as she and Anthony Sarivola drove Fulminante from New York to Pennsylvania. Donna Sarivola testified that Fulminante, whom she had never before met, confessed in detail about Jeneane's brutal murder in response to her casual question concerning why he was going to visit friends in Pennsylvania instead of returning to his family in Arizona. App. 167–168. Although she testified that she was "disgusted" by Fulminante's disclosures, *id.*, at 169, she stated that she took no steps to notify authorities of what she had learned, *id.*, at 172–173. In fact, she claimed that she barely discussed the matter with Anthony Sarivola, who was in the car and overheard Fulminante's entire conversation with Donna. *Id.*, at 174–175. Despite her disgust for Fulminante, Donna Sarivola later went on a second trip with him. *Id.*, at 173–174. Although Sarivola informed authorities that he had driven Fulminante to Pennsylvania, he did not mention Donna's presence in the car or her conversation with Fulminante. *Id.*, at 159–161. Only when questioned by authorities in June 1985 did Anthony Sarivola belatedly recall the confession to Donna more than a year before, and only then did he ask if she would be willing to discuss the matter with authorities. *Id.*, at 90–92.

Although some of the details in the confession to Donna Sarivola were corroborated by circumstantial evidence, many, including details that Jeneane was choked and sexually assaulted, were not. *Id.*, at 186–188. As to other aspects of the second confession, including Fulminante's motive and state of mind, the *only* corroborating evidence was the first confession to Anthony Sarivola.[9] No. CR 142821 (Super. Ct. Maricopa County, Ariz., Feb. 11, 1986), pp. 3–4. Thus, contrary to what the Arizona Supreme Court found, it is clear that the jury might have believed that the two confessions reinforced and corroborated each other. For this reason, one confession was *not* merely cumulative of the other. While in some cases two confessions, delivered on different occasions to different listeners, might be viewed as being independent of each other, cf. *Milton* v. *Wainwright*, 407 U. S. 371 (1972), it strains credulity to think that the jury so viewed the two confessions in this case, especially given the close relationship between Donna and Anthony Sarivola.

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[9] The inadmissible confession to Anthony Sarivola was itself subject to serious challenge. Sarivola's lack of moral integrity was demonstrated by his testimony that he had worked for organized crime during the time he was a uniformed police officer. App. 74–75, 104–105. His overzealous approach to gathering information for which he would be paid by authorities, *id.*, at 79, was revealed by his admission that he had fabricated a tape recording in connection with an earlier, unrelated FBI investigation, *id.*, at 96–98. He received immunity in connection with the information he provided. *Id.*, at 129. His eagerness to get in and stay in the federal Witness Protection Program provided a motive for giving detailed information to authorities. *Id.*, at 114, 129–131. During his first report of the confession, Sarivola failed to hint at numerous details concerning an alleged sexual assault on Jeneane; he mentioned them for the first time more than a year later during further interrogation, at which he also recalled, for the first time, the confession to Donna Sarivola. *Id.*, at 90–92, 148–149. The impeaching effect of each of these factors was undoubtedly undercut by the presence of the second confession, which, not surprisingly, recounted a quite similar story and thus corroborated the first confession. Thus, each confession, though easily impeachable if viewed in isolation, became difficult to discount when viewed in conjunction with the other.

The jurors could also have believed that Donna Sarivola had a motive to lie about the confession in order to assist her husband. Anthony Sarivola received significant benefits from federal authorities, including payment for information, immunity from prosecution, and eventual placement in the federal Witness Protection Program. App. 79, 114, 129–131. In addition, the jury might have found Donna motivated by her own desire for favorable treatment, for she, too, was ultimately placed in the Witness Protection Program. *Id.*, at 176, 179–180.

Third, the admission of the first confession led to the admission of other evidence prejudicial to Fulminante. For example, the State introduced evidence that Fulminante knew of Sarivola's connections with organized crime in an attempt to explain why Fulminante would have been motivated to confess to Sarivola in seeking protection. *Id.*, at 45–48, 67. Absent the confession, this evidence would have had no relevance and would have been inadmissible at trial. The Arizona Supreme Court found that the evidence of Sarivola's connections with organized crime reflected on Sarivola's character, not Fulminante's, and noted that the evidence could have been used to impeach Sarivola. 161 Ariz., at 245–246, 778 P. 2d, at 610–611. This analysis overlooks the fact that had the confession not been admitted, there would have been no reason for Sarivola to testify and thus no need to impeach his testimony. Moreover, we cannot agree that the evidence did not reflect on Fulminante's character as well, for it depicted him as someone who willingly sought out the company of criminals. It is quite possible that this evidence led the jury to view Fulminante as capable of murder.[10]

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[10] Fulminante asserts that other prejudicial evidence, including his prior felony convictions and incarcerations, and his prison reputation for untruthfulness, likewise would not have been admitted had the confession to Sarivola been excluded. Brief for Respondent 31–32. Because we find that the admission of the confession was not harmless in any event, we ex-

Finally, although our concern here is with the effect of the erroneous admission of the confession on Fulminante's conviction, it is clear that the presence of the confession also influenced the sentencing phase of the trial. Under Arizona law, the trial judge is the sentencer. Ariz. Rev. Stat. Ann. § 13–703(B) (1989). At the sentencing hearing, the admissibility of information regarding aggravating circumstances is governed by the rules of evidence applicable to criminal trials. § 13–703(C). In this case, "based upon admissible evidence produced at the trial," No. CR 142821, *supra*, at 2, the judge found that only one aggravating circumstance existed beyond a reasonable doubt, *i. e.*, that the murder was committed in "an *especially* heinous, cruel, and depraved manner." *Ibid.;* see § 13–703(F)(6). In reaching this conclusion, the judge relied heavily on evidence concerning the manner of the killing and Fulminante's motives and state of mind which could only be found in the two confessions. For example, in labeling the murder "cruel," the judge focused in part on Fulminante's alleged statements that he choked Jeneane and made her get on her knees and beg before killing her. No. CR 142821, *supra*, at 3. Although the circumstantial evidence was not inconsistent with this determination, neither was it sufficient to make such a finding beyond a reasonable doubt. Indeed, the sentencing judge acknowledged that the confessions were only partly corroborated by other evidence. *Ibid.*

In declaring that Fulminante "acted with an especially heinous and depraved state of mind," the sentencing judge relied solely on the two confessions. *Id.*, at 4. While the judge found that the statements in the confessions regarding the alleged sexual assault on Jeneane should not be considered on the issue of cruelty because they were not corroborated by other evidence, the judge determined that they were worthy of belief on the issue of Fulminante's state of

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press no opinion as to the effect any of this evidence might have had on Fulminante's conviction.

mind. *Ibid.* The judge then focused on Anthony Sarivola's statement that Fulminante had made vulgar references to Jeneane during the first confession, and on Donna Sarivola's statement that Fulminante had made similar comments to her. *Ibid.* Finally, the judge stressed that Fulminante's alleged comments to the Sarivolas concerning torture, choking, and sexual assault, "whether they all occurred or not," *ibid.*, depicted "a man who was bragging and relishing the crime he committed." *Id.*, at 5.

Although the sentencing judge might have reached the same conclusions even without the confession to Anthony Sarivola, it is impossible to say so beyond a reasonable doubt. Furthermore, the judge's assessment of Donna Sarivola's credibility, and hence the reliability of the second confession, might well have been influenced by the corroborative effect of the erroneously admitted first confession. Indeed, the fact that the sentencing judge focused on the similarities between the two confessions in determining that they were reliable suggests that either of the confessions alone, even when considered with all the other evidence, would have been insufficient to permit the judge to find an aggravating circumstance beyond a reasonable doubt as a requisite prelude to imposing the death penalty.

Because a majority of the Court has determined that Fulminante's confession to Anthony Sarivola was coerced and because a majority has determined that admitting this confession was not harmless beyond a reasonable doubt, we agree with the Arizona Supreme Court's conclusion that Fulminante is entitled to a new trial at which the confession is not admitted. Accordingly the judgment of the Arizona Supreme Court is

Affirmed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, JUSTICE KENNEDY and JUSTICE SOUTER join as to Parts I and II, and JUSTICE SCALIA joins as to Parts II and

III, delivered the opinion of the Court with respect to Part II, and a dissenting opinion with respect to Parts I and III.

The Court today properly concludes that the admission of an "involuntary" confession at trial is subject to harmless-error analysis. Nonetheless, the independent review of the record which we are required to make shows that respondent Fulminante's confession was not in fact involuntary. And even if the confession were deemed to be involuntary, the evidence offered at trial, including a second, untainted confession by Fulminante, supports the conclusion that any error here was certainly harmless.

I

The question whether respondent Fulminante's confession was voluntary is one of federal law. "Without exception, the Court's confession cases hold that the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination." *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985). In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we overturned a determination by the Supreme Court of Arizona that a statement of the defendant was voluntary, saying "we are not bound by the Arizona Supreme Court's holding that the statements were voluntary. Instead, this Court is under a duty to make an independent evaluation of the record." *Id.*, at 398.

The admissibility of a confession such as that made by respondent Fulminante depends upon whether it was voluntarily made. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."

Culombe v. *Connecticut*, 367 U. S. 568, 602 (1961) (quoted in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225–226 (1973)).

In this case the parties stipulated to the basic facts at the hearing in the Arizona trial court on respondent's motion to suppress the confession. Anthony Sarivola, an inmate at the Ray Brook Prison, was a paid confidential informant for the FBI. While at Ray Brook, various rumors reached Sarivola that Oreste Fulminante, a fellow inmate who had befriended Sarivola, had killed his stepdaughter in Arizona. Sarivola passed these rumors on to his FBI contact, who told him "to find out more about it." Sarivola, having already discussed the rumors with respondent on several occasions, asked him whether the rumors were true, adding that he might be in a position to protect Fulminante from physical recriminations in prison, but that "[he] must tell him the truth." Fulminante then confessed to Sarivola that he had in fact killed his stepdaughter in Arizona, and provided Sarivola with substantial details about the manner in which he killed the child. At the suppression hearing, Fulminante stipulated to the fact that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.'" App. 10. The trial court was also aware, through an excerpt from Sarivola's interview testimony which respondent appended to his reply memorandum, that Sarivola believed Fulminante's time was "running short" and that he would "have went out of the prison horizontally." *Id.*, at 28. The trial court found that respondent's confession was voluntary.

The Supreme Court of Arizona stated that the trial court committed no error in finding the confession voluntary based on the record before it. But it overturned the trial court's finding of voluntariness based on the more comprehensive trial record before it, which included, in addition to the facts stipulated at the suppression hearing, a statement made by Sarivola at the trial that "the defendant had been receiving 'rough treatment from the guys, and if the defendant would

tell the truth, he could be protected.'" 161 Ariz. 237, 244, n. 1, 778 P. 2d 602, 609, n. 1 (1989). It also had before it the presentence report, which showed that Fulminante was no stranger to the criminal justice system: He had six prior felony convictions and had been imprisoned on three prior occasions.

On the basis of the record before it, the Supreme Court stated:

> "Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was 'extremely coercive' because the 'obvious' inference from the promise was that his life would be in jeopardy if he did not confess. We agree." *Id.*, at 243, 778 P. 2d, at 608.

Exercising our responsibility to make the independent examination of the record necessary to decide this federal question, I am at a loss to see how the Supreme Court of Arizona reached the conclusion that it did. Fulminante offered no evidence that he believed that his life was in danger or that he in fact confessed to Sarivola in order to obtain the proffered protection. Indeed, he had stipulated that "[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's 'protection.'" App. 10. Sarivola's testimony that he told Fulminante that "if [he] would tell the truth, he could be protected," adds little if anything to the substance of the parties' stipulation. The decision of the Supreme Court of Arizona rests on an assumption that is squarely contrary to this stipulation, and one that is not supported by any testimony of Fulminante.

The facts of record in the present case are quite different from those present in cases where we have found confessions

to be coerced and involuntary. Since Fulminante was unaware that Sarivola was an FBI informant, there existed none of "the danger of coercion result[ing] from the interaction of custody and official interrogation." *Illinois* v. *Perkins*, 496 U. S. 292, 297 (1990). The fact that Sarivola was a Government informant does not by itself render Fulminante's confession involuntary, since we have consistently accepted the use of informants in the discovery of evidence of a crime as a legitimate investigatory procedure consistent with the Constitution. See, *e. g.*, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986); *United States* v. *White*, 401 U. S. 745 (1971); *Hoffa* v. *United States*, 385 U. S. 293, 304 (1966). The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola's company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons and presumably able to fend for himself. In concluding on these facts that Fulminante's confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.

II

Since this Court's landmark decision in *Chapman* v. *California*, 386 U. S. 18 (1967), in which we adopted the general rule that a constitutional error does not automatically require reversal of a conviction, the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless. See, *e. g.*, *Clemons* v. *Mississippi*, 494 U. S. 738, 752–754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite* v. *Texas*, 486 U. S. 249 (1988) (admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause); *Carella* v. *California*, 491 U. S. 263, 266 (1989)

(jury instruction containing an erroneous conclusive presumption); *Pope* v. *Illinois*, 481 U. S. 497, 501–504 (1987) (jury instruction misstating an element of the offense); *Rose* v. *Clark*, 478 U. S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane* v. *Kentucky*, 476 U. S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware* v. *Van Arsdall*, 475 U. S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen* v. *Spain*, 464 U. S. 114, 117–118, and n. 2 (1983) (denial of a defendant's right to be present at trial); *United States* v. *Hasting*, 461 U. S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U. S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); *Kentucky* v. *Whorton*, 441 U. S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore* v. *Illinois*, 434 U. S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Confrontation Clause); *Brown* v. *United States*, 411 U. S. 223, 231–232 (1973) (admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U. S. 371 (1972) (confession obtained in violation of *Massiah* v. *United States*, 377 U. S. 201 (1964)); *Chambers* v. *Maroney*, 399 U. S. 42, 52–53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U. S. 1, 10–11 (1970) (denial of counsel at a preliminary hearing in violation of the Sixth Amendment Counsel Clause).

The common thread connecting these cases is that each involved "trial error"—error which occurred during the presentation of the case to the jury, and which may therefore

be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt. In applying harmless-error analysis to these many different constitutional violations, the Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the "principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, *supra*, at 681 (citations omitted).

In *Chapman* v. *California*, *supra*, the Court stated:

> "Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal.
>
> "[8] See, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge)."
>
> *Id.*, at 23.

It is on the basis of this language in *Chapman* that JUSTICE WHITE in dissent concludes that the principle of *stare decisis* requires us to hold that an involuntary confession is not subject to harmless-error analysis. We believe that there are several reasons which lead to a contrary conclusion. In the first place, the quoted language from *Chapman* does not by its terms adopt any such rule in that case. The language that "[a]lthough our prior cases have indicated," coupled with the relegation of the cases themselves to a footnote, is more appropriately regarded as a historical reference to the holdings of these cases. This view is buttressed by an examination of the opinion in *Payne* v. *Arkansas*, 356 U. S. 560 (1958), which is the case referred to for the proposition that

an involuntary confession may not be subject to harmless-error analysis. There the Court said:

> "Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, an involuntary confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." *Id.*, at 567–568.

It is apparent that the State's argument which the Court rejected in *Payne* is not the harmless-error analysis later adopted in *Chapman*, but a much more lenient rule which would allow affirmance of a conviction if the evidence other than the involuntary confession was sufficient to sustain the verdict. This is confirmed by the dissent of Justice Clark in that case, which adopted the more lenient test. Such a test would, of course—unlike the harmless-error test—make the admission of an involuntary confession virtually risk free for the State.

The admission of an involuntary confession—a classic "trial error"—is markedly different from the other two constitutional violations referred to in the *Chapman* footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey* v. *Ohio*, 273 U. S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obvi-

ously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); the right to self-representation at trial, *McKaskle* v. *Wiggins*, 465 U. S. 168, 177–178, n. 8 (1984); and the right to public trial, *Waller* v. *Georgia*, 467 U. S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. "Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Rose* v. *Clark*, 478 U. S., at 577–578 (citation omitted).

It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category. The admission of an involuntary confession is a "trial error," similar in both degree and kind to the erroneous admission of other types of evidence. The evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth Amendment—of evidence seized in violation of the Fourth Amendment—or of a prosecutor's improper comment on a defendant's silence at trial in violation of the Fifth Amendment. When reviewing the erroneous admission of an involuntary confession, the appellate court, as it does with the admission of other forms of improperly admitted evidence, simply reviews the remainder of the evidence against the defendant to determine whether the admission of the confession was harmless beyond a reasonable doubt.

Nor can it be said that the admission of an involuntary confession is the type of error which "transcends the criminal process." This Court has applied harmless-error analysis to the violation of other constitutional rights similar in magnitude and importance and involving the same level of police misconduct. For instance, we have previously held that the admission of a defendant's statements obtained in violation of the Sixth Amendment is subject to harmless-error analysis. In *Milton* v. *Wainwright*, 407 U. S. 371 (1972), the Court held the admission of a confession obtained in violation of *Massiah* v. *United States*, 377 U. S. 201 (1964), to be harmless beyond a reasonable doubt. We have also held that the admission of an out-of-court statement by a nontestifying codefendant is subject to harmless-error analysis. *Brown* v. *United States*, 411 U. S., at 231–232; *Schneble* v. *Florida*, 405 U. S. 427 (1972); *Harrington* v. *California*, 395 U. S. 250 (1969). The inconsistent treatment of statements elicited in violation of the Sixth and Fourteenth Amendments, respectively, can be supported neither by evidentiary or deterrence concerns nor by a belief that there is something more "fundamental" about involuntary confessions. This is especially true in a case such as this one where there are no allegations of physical violence on behalf of the police. A confession obtained in violation of the Sixth Amendment has the same evidentiary impact as does a confession obtained in violation of a defendant's due process rights. Government misconduct that results in violations of the Fourth and Sixth Amendments may be at least as reprehensible as conduct that results in an involuntary confession. For instance, the prisoner's confession to an inmate-informer at issue in *Milton*, which the Court characterized as implicating the Sixth Amendment right to counsel, is similar on its facts to the one we face today. Indeed, experience shows that law enforcement violations of these constitutional guarantees can involve conduct as egregious as police conduct used to elicit statements in violation of the Fourteenth Amendment. It is thus

impossible to create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment.

Of course an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors—in particular cases it may be devastating to a defendant—but this simply means that a reviewing court will conclude in such a case that its admission was not harmless error; it is not a reason for eschewing the harmless-error test entirely. The Supreme Court of Arizona, in its first opinion in the present case, concluded that the admission of Fulminante's confession *was* harmless error. That court concluded that a second and more explicit confession of the crime made by Fulminante after he was released from prison was not tainted by the first confession, and that the second confession, together with physical evidence from the wounds (the victim had been shot twice in the head with a large calibre weapon at close range and a ligature was found around her neck) and other evidence introduced at trial rendered the admission of the first confession harmless beyond a reasonable doubt. 161 Ariz., at 245–246, 778 P. 2d, at 610–611.

III

I would agree with the finding of the Supreme Court of Arizona in its initial opinion—in which it believed harmless-error analysis was applicable to the admission of involuntary confessions—that the admission of Fulminante's confession was harmless. Indeed, this seems to me to be a classic case of harmless error: a second confession giving more details of the crime than the first was admitted in evidence and found to be free of any constitutional objection. Accordingly, I would affirm the holding of the Supreme Court of Arizona in its initial opinion and reverse the judgment which it ultimately rendered in this case.

JUSTICE KENNEDY, concurring in the judgment.

For the reasons stated by THE CHIEF JUSTICE, I agree that Fulminante's confession to Anthony Sarivola was not coerced. In my view, the trial court did not err in admitting this testimony. A majority of the Court, however, finds the confession coerced and proceeds to consider whether harmless-error analysis may be used when a coerced confession has been admitted at trial. With the case in this posture, it is appropriate for me to address the harmless-error issue.

Again for the reasons stated by THE CHIEF JUSTICE, I agree that harmless-error analysis should apply in the case of a coerced confession. That said, the court conducting a harmless-error inquiry must appreciate the indelible impact a full confession may have on the trier of fact, as distinguished, for instance, from the impact of an isolated statement that incriminates the defendant only when connected with other evidence. If the jury believes that a defendant has admitted the crime, it doubtless will be tempted to rest its decision on that evidence alone, without careful consideration of the other evidence in the case. Apart, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant's plea of innocence. For the reasons given by JUSTICE WHITE in Part IV of his opinion, I cannot with confidence find admission of Fulminante's confession to Anthony Sarivola to be harmless error.

The same majority of the Court does not agree on the three issues presented by the trial court's determination to admit Fulminante's first confession: whether the confession was inadmissible because coerced; whether harmless-error analysis is appropriate; and if so whether any error was harmless here. My own view that the confession was not coerced does not command a majority.

In the interests of providing a clear mandate to the Arizona Supreme Court in this capital case, I deem it proper to accept in the case now before us the holding of five Justices that the

confession was coerced and inadmissible. I agree with a majority of the Court that admission of the confession could not be harmless error when viewed in light of all the other evidence; and so I concur in the judgment to affirm the ruling of the Arizona Supreme Court.

Syllabus

UNITED STATES *v.* GAUBERT

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

No. 89–1793. Argued November 26, 1990—Decided March 26, 1991

When the events in this case occurred, the Home Owners' Loan Act of 1933 authorized the Federal Home Loan Bank Board (FHLBB) to prescribe rules and regulations providing "for the organization, incorporation, examination, and regulation" of federal savings and loan associations, and to issue charters, "giving primary consideration to the best practices of thrift institutions in the United States." 12 U. S. C. § 1464(a). Pursuant to the Act, the FHLBB and the Federal Home Loan Bank–Dallas (FHLB–D) undertook to advise about and oversee certain aspects of the operation of Independent American Savings Association (IASA), but instituted no formal action against the institution. At their request, respondent Gaubert, chairman of the board and IASA's largest stockholder, removed himself from IASA's management and posted security for his personal guarantee that IASA's net worth would exceed regulatory minimums. When the regulators threatened to close IASA unless its management and directors resigned, new management and directors were recommended by FHLB–D. Thereafter, FHLB–D became more involved in IASA's day-to-day business, recommending the hiring of a certain consultant to advise it on operational and financial matters; advising it concerning whether, when, and how its subsidiaries should be placed into bankruptcy; mediating salary disputes; reviewing the draft of a complaint to be used in litigation; urging it to convert from state to federal charter; and intervening when the state savings and loan department attempted to install a supervisory agent at IASA. The new directors soon announced that IASA had a substantial negative net worth, and the Federal Savings and Loan Insurance Corporation (FSLIC) assumed receivership of the institution. After his administrative tort claim was denied, Gaubert filed an action in the District Court against the United States under the Federal Tort Claims Act (FTCA), seeking damages for the lost value of his shares and for the property forfeited under his personal guarantee on the ground that the FHLBB and FHLB–D had been negligent in carrying out their supervisory activities. The court granted the Government's motion to dismiss on the ground that the regulators' actions fell within the discretionary function exception to the FTCA, 28 U. S. C. § 2680(a). The Court of Appeals reversed in part. Relying on *Indian Towing Co.* v. *United States*, 350 U. S. 61,

the court found that the claims concerning the regulators' activities after they assumed a supervisory role in IASA's day-to-day affairs were not "policy decisions," which fall within the exception, but were "operational actions," which do not.

Held:

1. The discretionary function exception covers acts involving an element of judgment or choice if they are based on considerations of public policy. It is the nature of the conduct rather than the status of the actor that governs whether the exception applies. In addition to protecting policymaking or planning functions and the promulgation of regulations to carry out programs, the exception also protects Government agents' actions involving the necessary element of choice and grounded in the social, economic, or political goals of a statute and regulations. If an employee obeys the direction of a mandatory regulation, the Government will be protected because the action will be deemed in furtherance of the policies which led to the regulation's promulgation; and if an employee violates a mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, there is a strong presumption that the agent's acts are grounded in policy when exercising that discretion. Pp. 322–325.

2. The Court of Appeals erred in holding that the discretionary function exception does not reach decisions made at the operational or management level of IASA. There is nothing in the description of a discretionary act that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs regularly requires judgment as to which of a range of permissive courses is the wisest. Neither *Dalehite* v. *United States*, 346 U. S. 15, *Indian Towing*, *supra*, nor *Berkovitz* v. *United States*, 486 U. S. 531, supports Gaubert's and the Court of Appeals' position that there is a dichotomy between discretionary functions and operational activities. Pp. 325–326.

3. The Court of Appeals erred in holding that some of the acts alleged in Gaubert's Amended Complaint were not discretionary acts within the meaning of § 2680(a). The challenged actions did not go beyond "normal regulatory activity." They were discretionary, since there were no formal regulations governing the conduct in question, and since the relevant statutory provisions left to the agency's judgment when to institute proceedings against a financial institution and which mechanism to use. Although the statutes provided only for formal proceedings, they did not prevent regulators from supervising IASA by informal means, a view held by the FHLBB, FHLBB Resolution No. 82–381. Gaubert's

argument that the actions fall outside the exception because they involved the mere application of technical skills and business expertise was rejected when the rationale of the Court of Appeals' decision was disapproved. The FHLBB's Resolution, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators undertook day-to-day operational decisions. Each of the regulators' actions was based on public policy considerations related either to the protection of the FSLIC's insurance fund or to federal oversight of the thrift industry. Although the regulators used the power of persuasion to accomplish their goals, neither the pervasiveness of their presence nor the forcefulness of their recommendations is sufficient to alter their actions' supervisory nature. Pp. 327–334.

885 F. 2d 1284, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 334.

Assistant Attorney General Gerson argued the cause for the United States. With him on the briefs were *Acting Solicitor General Roberts*, *Deputy Solicitor General Shapiro*, *Paul J. Larkin, Jr.*, *Anthony J. Steinmeyer*, and *John F. Daly*.

Abbe David Lowell argued the cause for respondent. With him on the brief were *Max Hathaway* and *Eugene Gressman*.*

JUSTICE WHITE delivered the opinion of the Court.

When the events in this case occurred, the Home Owners' Loan Act of 1933, 12 U. S. C. §§ 1461–1470,[1] provided for the

**Daniel J. Popeo* and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

[1] Subsequent to the events at issue here, and in response to the current crisis in the thrift industry, Congress enacted comprehensive changes to the statutory scheme concerning thrift regulation by means of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101–73, 103 Stat. 183. FIRREA abolished the FHLBB and the Federal Savings and Loan Insurance Corporation (FSLIC), two of the agencies at issue here, and repealed the statutory provisions governing

chartering and regulation of federal savings and loan associations (FSLA's). Section 1464(a) authorized the Federal Home Loan Bank Board (FHLBB) "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation" of FSLA's, and to issue charters, "giving primary consideration to the best practices of thrift institutions in the United States."[2] In this case the FHLBB and the Federal Home Loan Bank--Dallas (FHLB–D)[3] undertook to advise about and oversee certain aspects of the operation of a thrift institution. Their conduct in this respect was challenged by a suit against the United States under the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671 *et seq.* (FTCA),[4] asserting that the FHLBB and FHLB–D had been negligent in carrying out their supervisory activities. The question before us is whether certain actions taken by the FHLBB and

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those agencies' conduct. §§ 401, 407, 103 Stat. 354–357, 363. At the same time, it granted to the Federal Deposit Insurance Corporation (FDIC) and the newly established Office of Thrift Supervision discretionary enforcement authority similar to that enjoyed by the former agencies. §§ 201, 301, 103 Stat. 187–188, 277–343.

[2] Section 1464(a) stated in full:

"In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing."

[3] FHLB–D was one of the Federal Home Loan Banks (FHLB's) established by the FHLBB pursuant to 12 U. S. C. § 1423. The FHLBB was specifically empowered to authorize the performance by FHLB personnel of "any function" of the FHLBB, except for adjudications and the promulgation of rules and regulations. 12 U. S. C. § 1437(a).

[4] The FTCA, subject to various exceptions, waives sovereign immunity from suits for negligent or wrongful acts of Government employees.

FHLB–D are within the "discretionary function" exception to the liability of the United States under the FTCA. The Court of Appeals for the Fifth Circuit answered this question in the negative. We have the contrary view and reverse.

I

This FTCA suit arises from the supervision by federal regulators of the activities of Independent American Savings Association (IASA), a Texas-chartered and federally insured savings and loan. Respondent Thomas M. Gaubert was IASA's chairman of the board and largest shareholder. In 1984, officials at the FHLBB sought to have IASA merge with Investex Savings, a failing Texas thrift. Because the FHLBB and FHLB–D were concerned about Gaubert's other financial dealings, they requested that he sign a "neutralization agreement" which effectively removed him from IASA's management. They also asked him to post a $25 million interest in real property as security for his personal guarantee that IASA's net worth would exceed regulatory minimums. Gaubert agreed to both conditions. Federal officials then provided regulatory and financial advice to enable IASA to consummate the merger with Investex. Throughout this period, the regulators instituted no formal action against IASA. Instead, they relied on the likelihood that IASA and Gaubert would follow their suggestions and advice.

In the spring of 1986, the regulators threatened to close IASA unless its management and board of directors were replaced; all of the directors agreed to resign. The new officers and directors, including the chief executive officer who was a former FHLB–D employee, were recommended by FHLB–D. After the new management took over, FHLB–D officials became more involved in IASA's day-to-day business. They recommended the hiring of a certain consultant to advise IASA on operational and financial mat-

ters; they advised IASA concerning whether, when, and how its subsidiaries should be placed into bankruptcy; they mediated salary disputes; they reviewed the draft of a complaint to be used in litigation; they urged IASA to convert from state to federal charter; and they actively intervened when the Texas Savings and Loan Department attempted to install a supervisory agent at IASA. In each instance, FHLB–D's advice was followed.

Although IASA was thought to be financially sound while Gaubert managed the thrift, the new directors soon announced that IASA had a substantial negative net worth. On May 20, 1987, Gaubert filed an administrative tort claim with the FHLBB, FHLB–D, and FSLIC, seeking $75 million in damages for the lost value of his shares and $25 million for the property he had forfeited under his personal guarantee.[5] That same day, the FSLIC assumed the receivership of IASA. After Gaubert's administrative claim was denied six months later, he filed the instant FTCA suit in the United States District Court for the Northern District of Texas. His amended complaint sought $100 million in damages for the alleged negligence of federal officials in selecting the new officers and directors and in participating in the day-to-day management of IASA. The District Court granted the motion to dismiss filed by the United States, finding that all of the challenged actions of the regulators fell within the discretionary function exception to the FTCA, found in 28 U. S. C. § 2680(a).[6] No. CA 3–87–2989–T (Sept. 28, 1988), App. to Pet. for Cert. 21a.

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[5] Gaubert was required by statute to seek relief from the agencies prior to filing an FTCA suit. See 28 U. S. C. § 2675.

[6] Citing 12 U. S. C. § 1464, the court determined that the FHLBB had broad discretionary authority to regulate the savings and loan industry. Although acknowledging that most of Gaubert's allegations involved the regulators' activity prior to the date of receivership, the court stressed that had the regulators invoked their statutory authority to place IASA in receivership earlier, all of the challenged actions would have fallen within the exception. The court also pointed out that had IASA and Gaubert

The Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. 885 F. 2d 1284 (1989). Relying on this Court's decision in *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955), the court distinguished between "policy decisions," which fall within the exception, and "operational actions," which do not. 885 F. 2d, at 1287. After claiming further support for this distinction in this Court's decisions in *United States* v. *Varig Airlines*, 467 U. S. 797 (1984), and *Berkovitz* v. *United States*, 486 U. S. 531 (1988), the court explained:

> "The authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged. The FHLBB and FHLB-Dallas officials did not have regulations telling them, at every turn, how to accomplish their goals for IASA; this fact, however, does not automatically render their decisions discretionary and immune from FTCA suits. Only policy oriented decisions enjoy such immunity. Thus, the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." 885 F. 2d, at 1289 (citations and footnote omitted).

In the court's view, that line was crossed when the regulators "began to advise IASA management and participate in management decisions." *Id.*, at 1290. Consequently, the

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failed to cooperate with the regulators, receivership likely would have followed sooner. In the District Court's view, "[t]he fact that [Gaubert] cooperated when he could have refused will not give [him] a cause of action where he otherwise would have none." App. to Pet. for Cert. 24a–25a. Moreover, because the decision to place IASA in receivership involved the exercise of discretion, the decision *not* to do so at an earlier date was necessarily discretionary as well. The court viewed the decision to supervise IASA's activities first by informal means as an extension of the discretionary decision to postpone receivership.

Court of Appeals affirmed the District Court's dismissal of the claims which concerned the merger, neutralization agreement, personal guarantee, and replacement of IASA management, but reversed the dismissal of the claims which concerned the regulators' activities after they assumed a supervisory role in IASA's day-to-day affairs. We granted certiorari, 496 U. S. 935 (1990), and now reverse.

II

The liability of the United States under the FTCA is subject to the various exceptions contained in § 2680, including the "discretionary function" exception at issue here. That exception provides that the Government is not liable for

> "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U. S. C. § 2680(a).

The exception covers only acts that are discretionary in nature, acts that "involv[e] an element of judgment or choice," *Berkovitz*, *supra*, at 536; see also *Dalehite* v. *United States*, 346 U. S. 15, 34 (1953); and "it is the nature of the conduct, rather than the status of the actor" that governs whether the exception applies. *Varig Airlines*, *supra*, at 813. The requirement of judgment or choice is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because "the employee has no rightful option but to adhere to the directive." *Berkovitz*, 486 U. S., at 536.

Furthermore, even "assuming the challenged conduct involves an element of judgment," it remains to be decided "whether that judgment is of the kind that the discretionary

function exception was designed to shield." *Ibid.* See *Varig Airlines*, 467 U. S., at 813. Because the purpose of the exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," *id.*, at 814, when properly construed, the exception "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz*, *supra*, at 537.

Where Congress has delegated the authority to an independent agency or to the Executive Branch to implement the general provisions of a regulatory statute and to issue regulations to that end, there is no doubt that planning-level decisions establishing programs are protected by the discretionary function exception, as is the promulgation of regulations by which the agencies are to carry out the programs. In addition, the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected.

Thus, in *Dalehite*, the exception barred recovery for claims arising from a massive fertilizer explosion. The fertilizer had been manufactured, packaged, and prepared for export pursuant to detailed regulations as part of a comprehensive federal program aimed at increasing the food supply in occupied areas after World War II. 346 U. S., at 19–21. Not only was the cabinet-level decision to institute the fertilizer program discretionary, but so were the decisions concerning the specific requirements for manufacturing the fertilizer. *Id.*, at 37–38. Nearly 30 years later, in *Varig Airlines*, the Federal Aviation Administration's actions in formulating and implementing a "spot-check" plan for airplane inspection were protected by the discretionary function exception because of the agency's authority to establish safety standards for airplanes. 467 U. S., at 815. Actions taken in furtherance of the program were likewise protected, even if those particular actions were negligent. *Id.*, at 820. Most recently, in *Berkovitz*, we examined a comprehensive regula-

tory scheme governing the licensing of laboratories to produce polio vaccine and the release to the public of particular drugs. 486 U. S., at 533. We found that some of the claims fell outside the exception, because the agency employees had failed to follow the specific directions contained in the applicable regulations, *i. e.*, in those instances, there was no room for choice or judgment. *Id.*, at 542–543. We then remanded the case for an analysis of the remaining claims in light of the applicable regulations. *Id.*, at 544.

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. See *Dalehite*, *supra*, at 36. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Not all agencies issue comprehensive regulations, however. Some establish policy on a case-by-case basis, whether through adjudicatory proceedings or through administration of agency programs. Others promulgate regulations on some topics, but not on others. In addition, an agency may rely on internal guidelines rather than on published regulations. In any event, it will most often be true that the general aims and policies of the controlling statute will be evident from its text.

When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding

that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.[7]

III

In light of our cases and their interpretation of § 2680(a), it is clear that the Court of Appeals erred in holding that the exception does not reach decisions made at the operational or management level of the bank involved in this case. A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Varig Airlines*, *supra*, at 813.

In *Varig Airlines*, the Federal Aviation Administration had devised a system of "spot-checking" airplanes. We held that not only was this act discretionary but so too were the acts of agency employees in executing the program since they had a range of discretion to exercise in deciding how to carry out the spot-check activity. 467 U. S., at 820. Likewise in

[7] There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Berkovitz, although holding that some acts on the operational level were not discretionary and therefore were without the exception, we recognized that other acts, if held to be discretionary on remand, would be protected. 486 U. S., at 545.

The Court's first use of the term "operational" in connection with the discretionary function exception occurred in *Dalehite*, where the Court noted that "[t]he decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program." 346 U. S., at 42. Gaubert relies upon this statement as support for his argument that the Court of Appeals applied the appropriate analysis to the allegations of the amended complaint, but the distinction in *Dalehite* was merely description of the level at which the challenged conduct occurred. There was no suggestion that decisions made at an operational level could not also be based on policy.

Neither is the decision below supported by *Indian Towing*. There the Coast Guard had negligently failed to maintain a lighthouse by allowing the light to go out. The United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational "did not involve any permissible exercise of policy judgment." *Berkovitz*, 486 U. S., at 538, n. 3. Indeed, the Government did not even claim the benefit of the exception but unsuccessfully urged that maintaining the light was a governmental function for which it could not be liable. The Court of Appeals misinterpreted *Berkovitz*'s reference to *Indian Towing* as perpetuating a nonexistent dichotomy between discretionary functions and operational activities. 885 F. 2d, at 1289. Consequently, once the court determined that some of the actions challenged by Gaubert occurred at an operational level, it concluded, incorrectly, that those actions must necessarily have been outside the scope of the discretionary function exception.

IV

We now inquire whether the Court of Appeals was correct in holding that some of the acts alleged in Gaubert's amended complaint were not discretionary acts within the meaning of § 2680(a). The decision we review was entered on a motion to dismiss. We therefore "accept all of the factual allegations in [Gaubert's] complaint as true" and ask whether the allegations state a claim sufficient to survive a motion to dismiss. *Berkovitz*, *supra*, at 540.

The Court of Appeals dismissed several of the allegations in the amended complaint on the ground that the challenged activities fell within the discretionary function exception. These allegations concerned "the decision to merge IASA with Investex and seek a neutralization agreement from Gaubert," as well as "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision." 885 F. 2d, at 1290. Gaubert has not challenged this aspect of the court's ruling. Consequently, we review only those allegations in the amended complaint which the Court of Appeals viewed as surviving the Government's motion to dismiss.

These claims asserted that the regulators had achieved "a constant federal presence" at IASA. App. 14, ¶ 33. In describing this presence, the amended complaint alleged that the regulators "consult[ed] as to day-to-day affairs and operations of IASA," *id.*, at 14, ¶ 33a; "participated in management decisions" at IASA board meetings, *id.*, at 14, ¶ 33b; "became involved in giving advice, making recommendations, urging, or directing action or procedures at IASA," *id.*, at 14, ¶ 33c; and "advised their hand-picked directors and officers on a variety of subjects," *id.*, at 14, ¶ 34. Specifically, the complaint enumerated seven instances or kinds of objectionable official involvement. First, the regulators "arranged for the hiring for IASA of . . . consultants on operational and financial matters and asset management." *Id.*, at 14, ¶ 34a. Sec-

ond, the officials "urged or directed that IASA convert from a state-chartered savings and loan to a federally-chartered savings and loan in part so that it could become the exclusive government entity with power to control IASA." *Id.*, at 14, ¶34b. Third, the regulators "gave advice and made recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy." *Id.*, at 15, ¶34c. Fourth, the officials "mediated salary disputes between IASA and its senior officers." *Id.*, at 15, ¶34d. Fifth, the regulators "reviewed a draft complaint in litigation" that IASA's board contemplated filing and were "so actively involved in giving advice, making recommendations, and directing matters related to IASA's litigation policy that they were able successfully to stall the Board of Directors' ultimate decision to file the complaint until the Bank Board *in Washington* had reviewed, advised on, and commented on the draft." *Id.*, at 15, ¶34e (emphasis in original). Sixth, the regulators "actively intervened with the Texas Savings and Loan Department (IASA's principal regulator) when the State attempted to install a supervisory agent at IASA." *Id.*, at 15, ¶34f. Finally, the FHLB–D president wrote the IASA board of directors "affirming that his agency had placed that Board of Directors into office, and describing their mutual goal to protect the FSLIC insurance fund." *Id.*, at 15–16, ¶34g. According to Gaubert, the losses he suffered were caused by the regulators' "assumption of the duty to participate in, and to make, the day-to-day decisions at IASA and [the] negligent discharge of that assumed duty." *Id.*, at 17, ¶39. Moreover, he alleged that "[t]he involvement of the FHLB–Dallas in the affairs of IASA went beyond its normal regulatory activity, and the agency actually substituted its decisions for those of the directors and officers of the association." *Id.*, at 19, ¶55.

We first inquire whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations. *Berkovitz*, *supra*, at 536.

Although the FHLBB, which oversaw the other agencies at issue, had promulgated extensive regulations which were then in effect, see 12 CFR §§ 500–591 (1986), neither party has identified formal regulations governing the conduct in question. As already noted, 12 U. S. C. § 1464(a) authorizes the FHLBB to examine and regulate FSLA's, "giving primary consideration to the best practices of thrift institutions in the United States." Both the District Court and the Court of Appeals recognized that the agencies possessed broad statutory authority to supervise financial institutions.[8] The relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use. For example, the FSLIC had authority to terminate an institution's insured status, issue cease-and-desist orders, and suspend or remove an institution's officers, if "in the opinion of the Corporation" such action was warranted because the institution or its officers were engaging in an "unsafe or unsound practice" in connection with the business of the institution. 12 U. S. C. §§ 1730(b)(1), (e)(1), (g)(1). The FHLBB had parallel authority to issue cease-and-desist orders and suspend or remove an institution's officers. §§ 1464(d)(2)(A), (d)(4)(a). Although the statute enumerated specific grounds warranting an appointment by the FHLBB of a conservator or receiver, the determination of whether any of these grounds existed depended upon "the opinion of the Board." § 1464(d)(6)(A). The agencies here were not bound to act in a particular way; the exercise of their authority involved a great "element of judgment or choice." *Berkovitz*, *supra*, at 536.

We are unconvinced by Gaubert's assertion that because the agencies did not institute formal proceedings against IASA, they had no discretion to take informal actions as they

[8] As explained above, the agencies at issue here have since been abolished, although they have been replaced by agencies possessing similar discretionary authority. See n. 1, *supra*.

did. Although the statutes provided only for formal proceedings, there is nothing in the language or structure of the statutes that prevented the regulators from invoking less formal means of supervision of financial institutions. Not only was there no statutory or regulatory mandate which compelled the regulators to act in a particular way, but there was no prohibition against the use of supervisory mechanisms not specifically set forth in statute or regulation.

This is the view of the FHLBB; for in a resolution passed in 1982, the FHLBB adopted "a formal statement of policy regarding the Bank Board's use of supervisory actions," which provided in part:

> "In carrying out its supervisory responsibilities with respect to thrift institutions insured by the Federal Savings and Loan Insurance Corporation ('FSLIC'), . . . it is the policy of the Federal Home Loan Bank Board that violations of law or regulation, and unsafe or unsound practices will not be tolerated and will result in the initiation of strong supervisory and/or enforcement action by the Board. It is the Bank Board's goal to minimize, and where possible, to prevent losses occasioned by violations or unsafe and unsound practices by taking prompt and effective supervisory action. . . .
>
> "The Board recognizes that supervisory actions must be tailored to each case, and that such actions will vary according to the severity of the violation of law or regulation or the unsafe or unsound practice, as well as to the responsiveness and willingness of the association to take corrective action. The following guidance should be considered for all supervisory actions.
>
> "In each case, based upon an assessment of management's willingness to take appropriate corrective action and the potential harm to the institution if corrective action is not effected, the staff must weigh the appropriateness of available supervisory actions. If the potential harm is slight and there is a substantial prob-

> ability that management will correct the situation, informal supervisory guidance and oversight is appropriate. If some potential harm to the institution or its customers is likely, a supervisory agreement should be promptly negotiated and implemented. If substantial financial harm may occur to the institution, its customers, or the FSLIC and there is substantial doubt that corrections will be made promptly, a cease-and-desist order should be sought immediately through the Office of General Counsel." FHLBB Resolution No. 82–381 (May 26, 1982), reprinted in Brief for Respondent 4a–6a.

From this statement it is clear that the regulators had the discretion to supervise IASA through informal means, rather than invoke statutory sanctions.[9]

Gaubert also argues that the challenged actions fall outside the discretionary function exception because they involved the mere application of technical skills and business expertise. Brief for Respondent 33. But this is just another way of saying that the considerations involving the day-to-day management of a business concern such as IASA are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a), a notion that we have already rejected in disapproving the rationale of the Court of Appeals' decision. It may be that certain decisions resting on mathematical calculations, for example, involve no choice or judgment in carrying out the calculations, but the regulatory acts alleged here are not of that genre. Rather, it is plain to us that each of the challenged actions involved the exercise of choice and judgment.

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[9] We note that in a recent opinion by Judge Garza, who also wrote the opinion at issue here, the Court of Appeals for the Fifth Circuit refused to extend its decision in *Gaubert* to impose liability on the FDIC for failure to institute statutory receivership proceedings against a thrift. See *Federal Deposit Insurance Corp.* v. *Mmahat*, 907 F. 2d 546, 552 (1990).

We are also convinced that each of the regulatory actions in question involved the kind of policy judgment that the discretionary function exception was designed to shield. The FHLBB Resolution quoted above, coupled with the relevant statutory provisions, established governmental policy which is presumed to have been furthered when the regulators exercised their discretion to choose from various courses of action in supervising IASA. Although Gaubert contends that day-to-day decisions concerning IASA's affairs did not implicate social, economic, or political policies, even the Court of Appeals recognized that these day-to-day "operational" decisions were undertaken for policy reasons of primary concern to the regulatory agencies:

> "[T]he federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at IASA. First, they sought to protect the solvency of the savings and loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of IASA for the benefit of depositors and shareholders, of which Gaubert was one." 885 F. 2d, at 1290.

Consequently, Gaubert's assertion that the day-to-day involvement of the regulators with IASA is actionable because it went beyond "normal regulatory activity" is insupportable.

We find nothing in Gaubert's amended complaint effectively alleging that the discretionary acts performed by the regulators were not entitled to the exemption. By Gaubert's own admission, the regulators replaced IASA's management in order to protect the FSLIC's insurance fund; thus it cannot be disputed that this action was based on public policy considerations. The regulators' actions in urging IASA to convert to federal charter and in intervening with the state agency were directly related to public policy considerations regarding federal oversight of the thrift industry. So were advising the hiring of a financial consultant, advising when to place IASA subsidiaries into bankruptcy, intervening on IASA's

behalf with Texas officials, advising on litigation policy, and mediating salary disputes. There are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes.

There is no doubt that in advising IASA the regulators used the power of persuasion to accomplish their goals. Nevertheless, we long ago recognized that regulators have the authority to use such tactics in supervising financial institutions. In *United States* v. *Philadelphia Nat. Bank*, 374 U. S. 321 (1963), the Court considered the wide array of supervisory tools available to the Federal Deposit Insurance Corporation and the Federal Reserve System in overseeing banks. Noting the "frequent and intensive" nature of bank examinations and the "detailed periodic reports" banks were required to submit, the Court found that "the agencies maintain virtually a day-to-day surveillance of the American banking system." *Id.*, at 329. Moreover, the agencies' ability to terminate a bank's insured status and invoke other less drastic sanctions meant that "recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings." *Id.*, at 330. These statements apply with equal force to supervision by federal agencies of the savings and loan industry. More than 30 years ago, the Court of Appeals for the Fifth Circuit made similar observations in a case involving allegations that the FHLBB had improperly pressured a savings and loan's directors to resign. See *Miami Beach Federal Savings & Loan Association* v. *Callander*, 256 F. 2d 410 (1958). The court noted that "[w]hen a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace the management . . . , it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency." *Id.*, at 414–415. Consequently, neither the pervasiveness of the regulators' presence at IASA nor the forcefulness of their

recommendations is sufficient to alter the supervisory nature of the regulators' actions.

In the end, Gaubert's amended complaint alleges nothing more than negligence on the part of the regulators. Indeed, the two substantive counts seek relief for "negligent selection of directors and officers" and "negligent involvement in day-to-day operations." App. 17, 18. Gaubert asserts that the discretionary function exception protects only those acts of negligence which occur in the course of establishing broad policies, rather than individual acts of negligence which occur in the course of day-to-day activities. Brief for Respondent 39. But we have already disposed of that submission. See *supra*, at 325. If the routine or frequent nature of a decision were sufficient to remove an otherwise discretionary act from the scope of the exception, then countless policy-based decisions by regulators exercising day-to-day supervisory authority would be actionable. This is not the rule of our cases.

V

Because from the face of the amended complaint, it is apparent that all of the challenged actions of the federal regulators involved the exercise of discretion in furtherance of public policy goals, the Court of Appeals erred in failing to find the claims barred by the discretionary function exception of the FTCA. We therefore reverse the decision of the Court of Appeals for the Fifth Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

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

I concur in the judgment and in much of the opinion of the Court. I write separately because I do not think it necessary to analyze individually each of the particular actions challenged by Gaubert, nor do I think an individualized analysis necessarily leads to the results the Court obtains.

I

The so-called discretionary function exception to the Federal Tort Claims Act (FTCA) does not protect all governmental activities involving an element of choice. *Berkovitz* v. *United States*, 486 U. S. 531, 536–537 (1988). The choice must be "grounded in social, economic, [or] political policy," *United States* v. *Varig Airlines*, 467 U. S. 797, 814 (1984), or, more briefly, must represent a "policy judgment," *Berkovitz*, *supra*, at 537. Unfortunately, lower courts have had difficulty in applying this test.

The Court of Appeals in this case concluded that a choice involves policy judgment (in the relevant sense) if it is made at a planning rather than an operational level within the agency. 885 F. 2d 1284, 1287 (CA5 1989). I agree with the Court that this is wrong. I think, however, that the level at which the decision is made is often *relevant* to the discretionary function inquiry, since the answer to that inquiry turns on *both* the subject matter *and* the office of the decisionmaker. In my view a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

This test, by looking not only to the decision but also to the officer who made it, recognizes that there is something to the planning vs. operational dichotomy—though the "something" is not precisely what the Court of Appeals believed. Ordinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions. The dock foreman's decision to store bags of fertilizer in a highly compact fashion is not protected by this exception because, even if he carefully calculated considerations of cost to the Government vs. safety, it was not his responsibility to ponder such things; the Secretary of Agriculture's decision to the same

effect *is* protected, because weighing those considerations is his task. Cf. *Dalehite* v. *United States*, 346 U. S. 15 (1953). In *Indian Towing Co.* v. *United States*, 350 U. S. 61 (1955), the United States was held liable for, among other things, the failure of Coast Guard maintenance personnel adequately to inspect electrical equipment in a lighthouse; though there could conceivably be policy reasons for conducting only superficial inspections, the decisions had been made by the maintenance personnel, and it was assuredly not their responsibility to ponder such things. This same factor explains why it is universally acknowledged that the discretionary function exception never protects against liability for the negligence of a vehicle driver. See *ante*, at 325, n. 7. The need for expedition vs. the need for safety may well represent a policy choice, cf. *Dalehite*, *supra*, but the Government does not expect its drivers to make that choice on a case-by-case basis.

Moreover, not only is it necessary for application of the discretionary function exception that the decisionmaker be an official who possesses the relevant policy responsibility, but also the decisionmaker's close identification with policymaking can be strong evidence that the other half of the test is met—*i. e.*, that the subject matter of the decision is one that ought to be informed by policy considerations. I am much more inclined to believe, for example, that the manner of storing fertilizer raises economic policy concerns if the decision on that subject has been reserved to the Secretary of Agriculture himself. That it is proper to take the level of the decisionmaker into account is supported by the phrase of the FTCA immediately preceding the discretionary function exception, which excludes governmental liability for acts taken, "'exercising due care, in the execution of a . . . regulation, whether or not such . . . regulation be valid.'" *Dalehite*, 346 U. S., at 18. We have taken this to mean that regulations "[can]not be attacked by claimants under the Act." *Id.*, at 42. This immunity represents an absolute statutory pre-

sumption, so to speak, that all regulations involve policy judgments that must not be interfered with. I think there is a similar presumption, though not an absolute one, that decisions reserved to policymaking levels involve such judgments—and the higher the policymaking level, the stronger the presumption.

II

Turning to the facts of the present case, I find it difficult to say that the particular activities of which Gaubert complains are necessarily discretionary functions, so that a motion to dismiss could properly be granted on that ground. To take but one example, Gaubert alleges that the regulators acted negligently in selecting consultants to advise the bank. The Court argues that such a decision, even though taken in the course of "day-to-day" management, surely involves an element of choice. But that answers only the first half of the *Berkovitz* inquiry. It remains to be determined whether the choice is of a policymaking nature. Perhaps one can imagine a relatively high-level Government official, authorized generally to manage the bank in such fashion as to further applicable Government policies, who hires consultants and other employees with those policy objectives in mind. The discretionary function exception arguably *would* protect such a hiring choice. But one may also imagine a federal officer of relatively low level, authorized to hire a bank consultant by applying ordinary standards of business judgment, and not authorized to consider matters of Government policy in the process. That hiring decision would not be protected by the discretionary function exception, even though some element of choice is involved.

I do not think it advances the argument to observe, *ante*, at 333, that "[t]here are no allegations that the regulators gave anything other than the kind of advice that was within the purview of the policies behind the statutes." An official may act "within the purview" of the relevant policy without himself making policy decisions—in which case, if the action is

negligent (and was not specifically mandated by the relevant policy, see *Dalehite*, *supra*, at 36), the discretionary function exception does not bar United States liability. Contrariwise, action "outside the purview" of the relevant policy does not necessarily fail to qualify for the discretionary function defense. If the action involves policy discretion, and the officer is authorized to exercise that discretion, the defense applies even if the discretion has been exercised erroneously, so as to frustrate the relevant policy. See 28 U. S. C. § 2680(a) (discretionary function exception applies "whether or not the discretion involved be abused"). In other words, action "within the purview" of the relevant policy is neither a necessary nor a sufficient condition for invoking the discretionary function exception.

The present case comes to us on a motion to dismiss. Lacking any sort of factual record, we can do little more than speculate as to whether the officers here exercised policy-making responsibility with respect to the individual acts in question. Without more, the motion would have to be denied. I think, however, that the Court's conclusion to the contrary is properly reached under a slightly different approach. The alleged misdeeds complained of here were not actually committed by federal officers. Rather, federal officers "recommended" that such actions be taken, making it clear that if the recommendations were not followed the bank would be seized and operated directly by the regulators. In effect, the Federal Home Loan Bank Board (FHLBB) imposed the advice which Gaubert challenges as a condition of allowing the bank to remain independent. But surely the decision whether or not to take over a bank is a policy-based decision to which liability may not attach—a decision that ought to be influenced by considerations of "social, economic, [or] political policy," *Varig Airlines*, 467 U. S., at 814, and that in the nature of things can only be made by FHLBB officers responsible for weighing such considerations. I think a corollary is that setting the *conditions* under which the

FHLBB will or will not take over a bank is an exercise of policymaking discretion. By establishing such a list of conditions, as was done here, the Board in effect announces guidelines pursuant to which it will exercise its discretionary function of taking over the bank. Establishing guidelines for the exercise of a discretionary function is unquestionably a discretionary function. Thus, without resort to item-by-item analysis, I would find each of Gaubert's challenges barred by the discretionary function exception.

FEIST PUBLICATIONS, INC. *v.* RURAL TELEPHONE SERVICE CO., INC.

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

No. 89–1909. Argued January 9, 1991—Decided March 27, 1991

Respondent Rural Telephone Service Company, Inc., is a certified public utility providing telephone service to several communities in Kansas. Pursuant to state regulation, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. It obtains data for the directory from subscribers, who must provide their names and addresses to obtain telephone service. Petitioner Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories covering a much larger geographic range than directories such as Rural's. When Rural refused to license its white pages listings to Feist for a directory covering 11 different telephone service areas, Feist extracted the listings it needed from Rural's directory without Rural's consent. Although Feist altered many of Rural's listings, several were identical to listings in Rural's white pages. The District Court granted summary judgment to Rural in its copyright infringement suit, holding that telephone directories are copyrightable. The Court of Appeals affirmed.

Held: Rural's white pages are not entitled to copyright, and therefore Feist's use of them does not constitute infringement. Pp. 344–364.

(a) Article I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original and, thus, are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves. This fact/expression dichotomy severely limits the scope of protection in fact-based works. Pp. 344–351.

(b) The Copyright Act of 1976 and its predecessor, the Copyright Act of 1909, leave no doubt that originality is the touchstone of copyright protection in directories and other fact-based works. The 1976 Act explains that copyright extends to "original works of authorship," 17 U. S. C. § 102(a), and that there can be no copyright in facts, § 102(b).

A compilation is not copyrightable *per se*, but is copyrightable only if its facts have been "selected, coordinated, or arranged *in such a way* that the resulting work as a whole constitutes an original work of authorship." § 101 (emphasis added). Thus, the statute envisions that some ways of selecting, coordinating, and arranging data are not sufficiently original to trigger copyright protection. Even a compilation that is copyrightable receives only limited protection, for the copyright does not extend to facts contained in the compilation. § 103(b). Lower courts that adopted a "sweat of the brow" or "industrious collection" test—which extended a compilation's copyright protection beyond selection and arrangement to the facts themselves—misconstrued the 1909 Act and eschewed the fundamental axiom of copyright law that no one may copyright facts or ideas. Pp. 351–361.

(c) Rural's white pages do not meet the constitutional or statutory requirements for copyright protection. While Rural has a valid copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages, there is nothing original in Rural's white pages. The raw data are uncopyrightable facts, and the way in which Rural selected, coordinated, and arranged those facts is not original in any way. Rural's selection of listings—subscribers' names, towns, and telephone numbers—could not be more obvious and lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. In fact, it is plausible to conclude that Rural did not truly "select" to publish its subscribers' names and telephone numbers, since it was required to do so by state law. Moreover, there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. Pp. 361–364.

916 F. 2d 718, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., concurred in the judgment.

Kyler Knobbe argued the cause and filed briefs for petitioner.

James M. Caplinger, Jr., argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the Association of North American Directory Publishers et al. by *Theodore Case Whitehouse;* for the International Association of Cross Reference Directory Publishers

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to clarify the extent of copyright protection available to telephone directory white pages.

I

Rural Telephone Service Company, Inc., is a certified public utility that provides telephone service to several communities in northwest Kansas. It is subject to a state regulation that requires all telephone companies operating in Kansas to issue annually an updated telephone directory. Accordingly, as a condition of its monopoly franchise, Rural publishes a typical telephone directory, consisting of white pages and yellow pages. The white pages list in alphabetical order the names of Rural's subscribers, together with their towns and telephone numbers. The yellow pages list Rural's business subscribers alphabetically by category and feature classified advertisements of various sizes. Rural distributes its directory free of charge to its subscribers, but earns revenue by selling yellow pages advertisements.

Feist Publications, Inc., is a publishing company that specializes in area-wide telephone directories. Unlike a typical

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by *Richard D. Grauer* and *Kathleen McCree Lewis;* and for the Third-Class Mail Association by *Ian D. Volner.*

Briefs of *amici curiae* urging affirmance were filed for Ameritech et al. by *Michael K. Kellogg, Charles Rothfeld, Douglas J. Kirk, Thomas P. Hester,* and *Harlan Sherwat;* for the Association of American Publishers, Inc., by *Robert G. Sugarman* and *R. Bruce Rich;* for GTE Corp. by *Kirk K. Van Tine, Richard M. Cahill,* and *Edward R. Sublett;* for the National Telephone Cooperative Association by *L. Marie Guillory* and *David Cosson;* for the United States Telephone Association by *Richard J. Rappaport* and *Keith P. Schoeneberger;* and for West Publishing Co. by *Vance K. Opperman* and *James E. Schatz.*

Briefs of *amici curiae* were filed for Bellsouth Corp. by *Anthony B. Askew, Robert E. Richards, Walter H. Alford,* and *Vincent L. Sgrosso;* for the Direct Marketing Association, Inc., by *Robert L. Sherman;* for Haines and Co., Inc., by *Jeremiah D. McAuliffe, Bernard A. Barken,* and *Eugene Gressman;* and for the Information Industry Association et al. by *Steven J. Metalitz* and *Angela Burnett.*

directory, which covers only a particular calling area, Feist's area-wide directories cover a much larger geographical range, reducing the need to call directory assistance or consult multiple directories. The Feist directory that is the subject of this litigation covers 11 different telephone service areas in 15 counties and contains 46,878 white pages listings—compared to Rural's approximately 7,700 listings. Like Rural's directory, Feist's is distributed free of charge and includes both white pages and yellow pages. Feist and Rural compete vigorously for yellow pages advertising.

As the sole provider of telephone service in its service area, Rural obtains subscriber information quite easily. Persons desiring telephone service must apply to Rural and provide their names and addresses; Rural then assigns them a telephone number. Feist is not a telephone company, let alone one with monopoly status, and therefore lacks independent access to any subscriber information. To obtain white pages listings for its area-wide directory, Feist approached each of the 11 telephone companies operating in northwest Kansas and offered to pay for the right to use its white pages listings.

Of the 11 telephone companies, only Rural refused to license its listings to Feist. Rural's refusal created a problem for Feist, as omitting these listings would have left a gaping hole in its area-wide directory, rendering it less attractive to potential yellow pages advertisers. In a decision subsequent to that which we review here, the District Court determined that this was precisely the reason Rural refused to license its listings. The refusal was motivated by an unlawful purpose "to extend its monopoly in telephone service to a monopoly in yellow pages advertising." *Rural Telephone Service Co.* v. *Feist Publications, Inc.*, 737 F. Supp. 610, 622 (Kan. 1990).

Unable to license Rural's white pages listings, Feist used them without Rural's consent. Feist began by removing several thousand listings that fell outside the geographic range of its area-wide directory, then hired personnel to investigate the 4,935 that remained. These employees veri-

fied the data reported by Rural and sought to obtain additional information. As a result, a typical Feist listing includes the individual's street address; most of Rural's listings do not. Notwithstanding these additions, however, 1,309 of the 46,878 listings in Feist's 1983 directory were identical to listings in Rural's 1982–1983 white pages. App. 54 (¶ 15–16), 57. Four of these were fictitious listings that Rural had inserted into its directory to detect copying.

Rural sued for copyright infringement in the District Court for the District of Kansas taking the position that Feist, in compiling its own directory, could not use the information contained in Rural's white pages. Rural asserted that Feist's employees were obliged to travel door-to-door or conduct a telephone survey to discover the same information for themselves. Feist responded that such efforts were economically impractical and, in any event, unnecessary because the information copied was beyond the scope of copyright protection. The District Court granted summary judgment to Rural, explaining that "[c]ourts have consistently held that telephone directories are copyrightable" and citing a string of lower court decisions. 663 F. Supp. 214, 218 (1987). In an unpublished opinion, the Court of Appeals for the Tenth Circuit affirmed "for substantially the reasons given by the district court." App. to Pet. for Cert. 4a, judgt. order reported at 916 F. 2d 718 (1990). We granted certiorari, 498 U. S. 808 (1990), to determine whether the copyright in Rural's directory protects the names, towns, and telephone numbers copied by Feist.

II

A

This case concerns the interaction of two well-established propositions. The first is that facts are not copyrightable; the other, that compilations of facts generally are. Each of these propositions possesses an impeccable pedigree. That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that

"[n]o author may copyright his ideas or the facts he narrates." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 556 (1985). Rural wisely concedes this point, noting in its brief that "[f]acts and discoveries, of course, are not themselves subject to copyright protection." Brief for Respondent 24. At the same time, however, it is beyond dispute that compilations of facts are within the subject matter of copyright. Compilations were expressly mentioned in the Copyright Act of 1909, and again in the Copyright Act of 1976.

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data—*i. e.*, wholly factual information not accompanied by any original written expression. On what basis may one claim a copyright in such a work? Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. Yet copyright law seems to contemplate that compilations that consist exclusively of facts are potentially within its scope.

The key to resolving the tension lies in understanding why facts are not copyrightable. The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. See *Harper & Row*, *supra*, at 547–549. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990) (hereinafter Nimmer). To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, "no matter how crude, humble or obvious" it might be. *Id.*, § 1.08[C][1]. Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illus-

trate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable. See *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 81 F. 2d 49, 54 (CA2 1936).

Originality is a constitutional requirement. The source of Congress' power to enact copyright laws is Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to "secur[e] for limited Times to Authors . . . the exclusive Right to their respective Writings." In two decisions from the late 19th century—*The Trade-Mark Cases*, 100 U. S. 82 (1879); and *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53 (1884)—this Court defined the crucial terms "authors" and "writings." In so doing, the Court made it unmistakably clear that these terms presuppose a degree of originality.

In *The Trade-Mark Cases*, the Court addressed the constitutional scope of "writings." For a particular work to be classified "under the head of writings of authors," the Court determined, "originality is required." 100 U. S., at 94. The Court explained that originality requires independent creation plus a modicum of creativity: "[W]hile the word *writings* may be liberally construed, as it has been, to include original designs for engraving, prints, &c., it is only such as are *original*, and are founded in the creative powers of the mind. The writings which are to be protected are *the fruits of intellectual labor*, embodied in the form of books, prints, engravings, and the like." *Ibid.* (emphasis in original).

In *Burrow-Giles*, the Court distilled the same requirement from the Constitution's use of the word "authors." The Court defined "author," in a constitutional sense, to mean "he to whom anything owes its origin; originator; maker." 111 U. S., at 58 (internal quotation marks omitted). As in *The Trade-Mark Cases*, the Court emphasized the creative component of originality. It described copyright as being limited to "original intellectual conceptions of the author," 111 U. S., at 58, and stressed the importance of requiring an author who accuses another of infringement to prove "the exist-

ence of those facts of originality, of intellectual production, of thought, and conception." *Id.*, at 59–60.

The originality requirement articulated in *The Trade-Mark Cases* and *Burrow-Giles* remains the touchstone of copyright protection today. See *Goldstein* v. *California*, 412 U. S. 546, 561–562 (1973). It is the very "premise of copyright law." *Miller* v. *Universal City Studios, Inc.*, 650 F. 2d 1365, 1368 (CA5 1981). Leading scholars agree on this point. As one pair of commentators succinctly puts it: "The originality requirement is *constitutionally mandated* for all works." Patterson & Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L. Rev. 719, 763, n. 155 (1989) (emphasis in original) (hereinafter Patterson & Joyce). Accord, *id.*, at 759–760, and n. 140; Nimmer § 1.06[A] ("[O]riginality is a statutory as well as a constitutional requirement"); *id.*, § 1.08[C][1] ("[A] modicum of intellectual labor . . . clearly constitutes an essential constitutional element").

It is this bedrock principle of copyright that mandates the law's seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts." *Id.*, § 2.11[A], p. 2–157. This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from *Burrow-Giles*, one who discovers a fact is not its "maker" or "originator." 111 U. S., at 58. "The discoverer merely finds and records." Nimmer § 2.03[E]. Census takers, for example, do not "create" the population figures that emerge from their efforts; in a sense, they copy these figures from the world around them. Denicola, Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 Colum. L. Rev. 516, 525 (1981) (hereinafter Denicola). Census data therefore do not trigger copyright because these data are not "original" in the constitutional sense. Nimmer

§ 2.03[E]. The same is true of all facts—scientific, historical, biographical, and news of the day. "[T]hey may not be copyrighted and are part of the public domain available to every person." *Miller*, *supra*, at 1369.

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws. Nimmer §§ 2.11[D], 3.03; Denicola 523, n. 38. Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement. See *Harper & Row*, 471 U. S., at 547. Accord, Nimmer § 3.03.

This protection is subject to an important limitation. The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Patterson & Joyce 800–802; Ginsburg, Creation and Commercial Value: Copyright Protection of Works of Information, 90 Colum. L. Rev. 1865, 1868, and n. 12 (1990) (hereinafter Ginsburg). Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, see 471 U. S., at 556–557, but that he could prevent others from copying his "subjective descriptions and portraits of public figures."

Id., at 563. Where the compilation author adds no written expression but rather lets the facts speak for themselves, the expressive element is more elusive. The only conceivable expression is the manner in which the compiler has selected and arranged the facts. Thus, if the selection and arrangement are original, these elements of the work are eligible for copyright protection. See Patry, Copyright in Compilations of Facts (or Why the "White Pages" Are Not Copyrightable), 12 Com. & Law 37, 64 (Dec. 1990) (hereinafter Patry). No matter how original the format, however, the facts themselves do not become original through association. See Patterson & Joyce 776.

This inevitably means that the copyright in a factual compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas." Ginsburg 1868.

It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not "some unforeseen byproduct of a statutory scheme." *Harper & Row*, 471 U. S., at 589 (dissenting opinion). It is, rather, "the essence of copyright," *ibid.*, and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts." Art. I, § 8, cl. 8. Accord, *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151, 156 (1975). To this end, copyright assures authors the right to their orig-

inal expression, but encourages others to build freely upon the ideas and information conveyed by a work. *Harper & Row*, *supra*, at 556–557. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

This Court has long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works. More than a century ago, the Court observed: "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book." *Baker* v. *Selden*, 101 U. S. 99, 103 (1880). We reiterated this point in *Harper & Row:*

> "[N]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality.
>
> "[C]opyright does not prevent subsequent users from copying from a prior author's work those constituent elements that are not original—for example . . . facts, or materials in the public domain—as long as such use does not unfairly appropriate the author's original contributions." 471 U. S., at 547–548 (citation omitted).

This, then, resolves the doctrinal tension: Copyright treats facts and factual compilations in a wholly consistent manner. Facts, whether alone or as part of a compilation, are not original and therefore may not be copyrighted. A factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to

the particular selection or arrangement. In no event may copyright extend to the facts themselves.

B

As we have explained, originality is a constitutionally mandated prerequisite for copyright protection. The Court's decisions announcing this rule predate the Copyright Act of 1909, but ambiguous language in the 1909 Act caused some lower courts temporarily to lose sight of this requirement.

The 1909 Act embodied the originality requirement, but not as clearly as it might have. See Nimmer §2.01. The subject matter of copyright was set out in §§3 and 4 of the Act. Section 4 stated that copyright was available to "all the writings of an author." 35 Stat. 1076. By using the words "writings" and "author"—the same words used in Article I, §8, of the Constitution and defined by the Court in *The Trade-Mark Cases* and *Burrow-Giles*—the statute necessarily incorporated the originality requirement articulated in the Court's decisions. It did so implicitly, however, thereby leaving room for error.

Section 3 was similarly ambiguous. It stated that the copyright in a work protected only "the copyrightable component parts of the work." It thus stated an important copyright principle, but failed to identify the specific characteristic—originality—that determined which component parts of a work were copyrightable and which were not.

Most courts construed the 1909 Act correctly, notwithstanding the less-than-perfect statutory language. They understood from this Court's decisions that there could be no copyright without originality. See Patterson & Joyce 760–761. As explained in the Nimmer treatise: "The 1909 Act neither defined originality, nor even expressly required that a work be 'original' in order to command protection. However, the courts uniformly inferred the requirement from the fact that copyright protection may only be claimed by 'authors' . . . . It was reasoned that since an author is 'the . . .

creator, originator' it follows that a work is not the product of an author unless the work is original." Nimmer § 2.01 (footnotes omitted) (citing cases).

But some courts misunderstood the statute. See, *e. g.*, *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F. 2d 484 (CA9 1937); *Jeweler's Circular Publishing Co.* v. *Keystone Publishing Co.*, 281 F. 83 (CA2 1922). These courts ignored §§ 3 and 4, focusing their attention instead on § 5 of the Act. Section 5, however, was purely technical in nature: It provided that a person seeking to register a work should indicate on the application the type of work, and it listed 14 categories under which the work might fall. One of these categories was "[b]ooks, including composite and cyclopædic works, directories, gazetteers, and other compilations." § 5(a). Section 5 did not purport to say that all compilations were automatically copyrightable. Indeed, it expressly disclaimed any such function, pointing out that "the subject-matter of copyright [i]s defined in section four." Nevertheless, the fact that factual compilations were mentioned specifically in § 5 led some courts to infer erroneously that directories and the like were copyrightable *per se*, "without any further or precise showing of original—personal—authorship." Ginsburg 1895.

Making matters worse, these courts developed a new theory to justify the protection of factual compilations. Known alternatively as "sweat of the brow" or "industrious collection," the underlying notion was that copyright was a reward for the hard work that went into compiling facts. The classic formulation of the doctrine appeared in *Jeweler's Circular Publishing Co.*, 281 F., at 88:

> "The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill *or originality*, either in thought or in language, or anything more than industri-

> ous collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author" (emphasis added).

The "sweat of the brow" doctrine had numerous flaws, the most glaring being that it extended copyright protection in a compilation beyond selection and arrangement—the compiler's original contributions—to the facts themselves. Under the doctrine, the only defense to infringement was independent creation. A subsequent compiler was "not entitled to take one word of information previously published," but rather had to "independently wor[k] out the matter for himself, so as to arrive at the same result from the same common sources of information." *Id.*, at 88–89 (internal quotation marks omitted). "Sweat of the brow" courts thereby eschewed the most fundamental axiom of copyright law—that no one may copyright facts or ideas. See *Miller* v. *Universal City Studios, Inc.*, 650 F. 2d, at 1372 (criticizing "sweat of the brow" courts because "ensur[ing] that later writers obtain the facts independently . . . is precisely the scope of protection given . . . copyrighted matter, and the law is clear that facts are not entitled to such protection").

Decisions of this Court applying the 1909 Act make clear that the statute did not permit the "sweat of the brow" approach. The best example is *International News Service* v. *Associated Press*, 248 U. S. 215 (1918). In that decision, the Court stated unambiguously that the 1909 Act conferred copyright protection only on those elements of a work that were original to the author. International News Service had conceded taking news reported by Associated Press and publishing it in its own newspapers. Recognizing that § 5 of the Act specifically mentioned "'periodicals, including newspapers,'" § 5(b), the Court acknowledged that news articles were copyrightable. *Id.*, at 234. It flatly rejected, however, the notion that the copyright in an article extended to

the factual information it contained: "[T]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris;* it is the history of the day." *Ibid.**

Without a doubt, the "sweat of the brow" doctrine flouted basic copyright principles. Throughout history, copyright law has "recognize[d] a greater need to disseminate factual works than works of fiction or fantasy." *Harper & Row*, 471 U. S., at 563. Accord, Gorman, Fact or Fancy: The Implications for Copyright, 29 J. Copyright Soc. 560, 563 (1982). But "sweat of the brow" courts took a contrary view; they handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works. In truth, "[i]t is just such wasted effort that the proscription against the copyright of ideas and facts . . . [is] designed to prevent." *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 310 (CA2 1966), cert. denied, 385 U. S. 1009 (1967). "Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of 'writings' by 'authors.'" Nimmer § 3.04, p. 3–23 (footnote omitted).

C

"Sweat of the brow" decisions did not escape the attention of the Copyright Office. When Congress decided to overhaul the copyright statute and asked the Copyright Office to study existing problems, see *Mills Music, Inc.* v. *Snyder*, 469 U. S. 153, 159 (1985), the Copyright Office promptly rec-

*The Court ultimately rendered judgment for Associated Press on non-copyright grounds that are not relevant here. See 248 U. S., at 235, 241–242.

ommended that Congress clear up the confusion in the lower courts as to the basic standards of copyrightability. The Register of Copyrights explained in his first report to Congress that "originality" was a "basic requisit[e]" of copyright under the 1909 Act, but that "the absence of any reference to [originality] in the statute seems to have led to misconceptions as to what is copyrightable matter." Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., p. 9 (H. Judiciary Comm. Print 1961). The Register suggested making the originality requirement explicit. *Ibid.*

Congress took the Register's advice. In enacting the Copyright Act of 1976, Congress dropped the reference to "all the writings of an author" and replaced it with the phrase "original works of authorship." 17 U. S. C. § 102(a). In making explicit the originality requirement, Congress announced that it was merely clarifying existing law: "The two fundamental criteria of copyright protection [are] originality and fixation in tangible form . . . . The phrase 'original works of authorship,' which is purposely left undefined, is intended to incorporate without change *the standard of originality established by the courts under the present [1909] copyright statute.*" H. R. Rep. No. 94–1476, p. 51 (1976) (emphasis added) (hereinafter H. R. Rep.); S. Rep. No. 94–473, p. 50 (1975) (emphasis added) (hereinafter S. Rep.). This sentiment was echoed by the Copyright Office: "Our intention here is to maintain the *established standards* of originality . . . ." Supplementary Report of the Register of Copyrights on the General Revision of U. S. Copyright Law, 89th Cong., 1st Sess., pt. 6, p. 3 (H. Judiciary Comm. Print 1965) (emphasis added).

To ensure that the mistakes of the "sweat of the brow" courts would not be repeated, Congress took additional measures. For example, § 3 of the 1909 Act had stated that copyright protected only the "copyrightable component parts" of a work, but had not identified originality as the basis for distin-

guishing those component parts that were copyrightable from those that were not. The 1976 Act deleted this section and replaced it with § 102(b), which identifies specifically those elements of a work for which copyright is not available: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." Section 102(b) is universally understood to prohibit any copyright in facts. *Harper & Row*, *supra*, at 547, 556. Accord, Nimmer § 2.03[E] (equating facts with "discoveries"). As with § 102(a), Congress emphasized that § 102(b) did not change the law, but merely clarified it: "Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate . . . that the basic dichotomy between expression and idea remains unchanged." H. R. Rep., at 57; S. Rep., at 54.

Congress took another step to minimize confusion by deleting the specific mention of "directories . . . and other compilations" in § 5 of the 1909 Act. As mentioned, this section had led some courts to conclude that directories were copyrightable *per se* and that every element of a directory was protected. In its place, Congress enacted two new provisions. First, to make clear that compilations were not copyrightable *per se*, Congress provided a definition of the term "compilation." Second, to make clear that the copyright in a compilation did not extend to the facts themselves, Congress enacted § 103.

The definition of "compilation" is found in § 101 of the 1976 Act. It defines a "compilation" in the copyright sense as "a work formed by the collection and assembling of preexisting materials or of data *that* are selected, coordinated, or arranged *in such a way that* the resulting work as a whole constitutes an original work of authorship" (emphasis added).

The purpose of the statutory definition is to emphasize that collections of facts are not copyrightable *per se*. It conveys this message through its tripartite structure, as emphasized above by the italics. The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. "[T]his tripartite conjunctive structure is self-evident, and should be assumed to 'accurately express the legislative purpose.'" Patry 51, quoting *Mills Music*, 469 U. S., at 164.

At first glance, the first requirement does not seem to tell us much. It merely describes what one normally thinks of as a compilation—a collection of pre-existing material, facts, or data. What makes it significant is that it is not the *sole* requirement. It is not enough for copyright purposes that an author collects and assembles facts. To satisfy the statutory definition, the work must get over two additional hurdles. In this way, the plain language indicates that not every collection of facts receives copyright protection. Otherwise, there would be a period after "data."

The third requirement is also illuminating. It emphasizes that a compilation, like any other work, is copyrightable only if it satisfies the originality requirement ("an *original* work of authorship"). Although § 102 states plainly that the originality requirement applies to all works, the point was emphasized with regard to compilations to ensure that courts would not repeat the mistake of the "sweat of the brow" courts by concluding that fact-based works are treated differently and measured by some other standard. As Congress explained it, the goal was to "make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works . . . containing preexisting material." H. R. Rep., at 57; S. Rep., at 55.

The key to the statutory definition is the second requirement. It instructs courts that, in determining whether a fact-based work is an original work of authorship, they should focus on the manner in which the collected facts have been selected, coordinated, and arranged. This is a straightforward application of the originality requirement. Facts are never original, so the compilation author can claim originality, if at all, only in the way the facts are presented. To that end, the statute dictates that the principal focus should be on whether the selection, coordination, and arrangement are sufficiently original to merit protection.

Not every selection, coordination, or arrangement will pass muster. This is plain from the statute. It states that, to merit protection, the facts must be selected, coordinated, or arranged "in such a way" as to render the work as a whole original. This implies that some "ways" will trigger copyright, but that others will not. See Patry 57, and n. 76. Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. In accordance with "the established principle that a court should give effect, if possible, to every clause and word of a statute," *Moskal* v. *United States*, 498 U. S. 103, 109–110 (1990) (internal quotation marks omitted), we conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.

As discussed earlier, however, the originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (*i. e.*, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Pre-

sumably, the vast majority of compilations will pass this test, but not all will. There remains a narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent. See generally *Bleistein* v. *Donaldson Lithographing Co.*, 188 U. S. 239, 251 (1903) (referring to "the narrowest and most obvious limits"). Such works are incapable of sustaining a valid copyright. Nimmer § 2.01[B].

Even if a work qualifies as a copyrightable compilation, it receives only limited protection. This is the point of § 103 of the Act. Section 103 explains that "[t]he subject matter of copyright . . . includes compilations," § 103(a), but that copyright protects only the author's original contributions—not the facts or information conveyed:

> "The copyright in a compilation . . . extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." § 103(b).

As § 103 makes clear, copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected. "The most important point here is one that is commonly misunderstood today: copyright . . . has no effect one way or the other on the copyright or public domain status of the preexisting material." H. R. Rep., at 57; S. Rep., at 55. The 1909 Act did not require, as "sweat of the brow" courts mistakenly assumed, that each subsequent compiler must start from scratch and is precluded from relying on research undertaken by another. See, *e. g.*, *Jeweler's Circular Publishing Co.*, 281 F., at 88–89. Rather, the facts contained in existing works may be freely copied because copyright protects only the elements that owe their origin to the compiler—the selection, coordination, and arrangement of facts.

In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not "sweat of the brow," is the

touchstone of copyright protection in directories and other fact-based works. Nor is there any doubt that the same was true under the 1909 Act. The 1976 revisions were a direct response to the Copyright Office's concern that many lower courts had misconstrued this basic principle, and Congress emphasized repeatedly that the purpose of the revisions was to clarify, not change, existing law. The revisions explain with painstaking clarity that copyright requires originality, § 102(a); that facts are never original, § 102(b); that the copyright in a compilation does not extend to the facts it contains, § 103(b); and that a compilation is copyrightable only to the extent that it features an original selection, coordination, or arrangement, § 101.

The 1976 revisions have proven largely successful in steering courts in the right direction. A good example is *Miller* v. *Universal City Studios, Inc.*, 650 F. 2d, at 1369–1370: "A copyright in a directory . . . is properly viewed as resting on the originality of the selection and arrangement of the factual material, rather than on the industriousness of the efforts to develop the information. Copyright protection does not extend to the facts themselves, and the mere use of information contained in a directory without a substantial copying of the format does not constitute infringement" (citation omitted). Additionally, the Second Circuit, which almost 70 years ago issued the classic formulation of the "sweat of the brow" doctrine in *Jeweler's Circular Publishing Co.*, has now fully repudiated the reasoning of that decision. See, *e. g.*, *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, 808 F. 2d 204, 207 (CA2 1986), cert. denied, 484 U. S. 820 (1987); *Financial Information, Inc.* v. *Moody's Investors Service, Inc.*, 751 F. 2d 501, 510 (CA2 1984) (Newman, J., concurring); *Hoehling* v. *Universal City Studios, Inc.*, 618 F. 2d 972, 979 (CA2 1980). Even those scholars who believe that "industrious collection" should be rewarded seem to recognize that this is beyond the scope of existing copyright law. See Denicola 516 ("[T]he very vocabulary of copyright is ill

suited to analyzing property rights in works of nonfiction"); *id.*, at 520–521, 525; Ginsburg 1867, 1870.

III

There is no doubt that Feist took from the white pages of Rural's directory a substantial amount of factual information. At a minimum, Feist copied the names, towns, and telephone numbers of 1,309 of Rural's subscribers. Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. See *Harper & Row*, 471 U. S., at 548. The first element is not at issue here; Feist appears to concede that Rural's directory, considered as a whole, is subject to a valid copyright because it contains some foreword text, as well as original material in its yellow pages advertisements. See Brief for Petitioner 18; Pet. for Cert. 9.

The question is whether Rural has proved the second element. In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural? Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not "'ow[e] its origin'" to Rural. *Burrow-Giles*, 111 U. S., at 58. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory. The originality requirement "rule[s] out protecting . . . names, addresses, and telephone numbers of which the plaintiff by no stretch of the imagination could be called the author." Patterson & Joyce 776.

Rural essentially concedes the point by referring to the names, towns, and telephone numbers as "preexisting material." Brief for Respondent 17. Section 103(b) states ex-

plicitly that the copyright in a compilation does not extend to "the preexisting material employed in the work."

The question that remains is whether Rural selected, coordinated, or arranged these uncopyrightable facts in an original way. As mentioned, originality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. See Patterson & Joyce 760, n. 144 ("While this requirement is sometimes characterized as modest, or a low threshold, it is not without effect") (internal quotation marks omitted; citations omitted). As this Court has explained, the Constitution mandates some minimal degree of creativity, see *The Trade-Mark Cases*, 100 U. S., at 94; and an author who claims infringement must prove "the existence of . . . intellectual production, of thought, and conception." *Burrow-Giles*, *supra*, at 59–60.

The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity.

Rural's selection of listings could not be more obvious: It publishes the most basic information—name, town, and telephone number—about each person who applies to it for telephone service. This is "selection" of a sort, but it lacks the modicum of creativity necessary to transform mere selection into copyrightable expression. Rural expended sufficient ef-

fort to make the white pages directory useful, but insufficient creativity to make it original.

We note in passing that the selection featured in Rural's white pages may also fail the originality requirement for another reason. Feist points out that Rural did not truly "select" to publish the names and telephone numbers of its subscribers; rather, it was required to do so by the Kansas Corporation Commission as part of its monopoly franchise. See 737 F. Supp., at 612. Accordingly, one could plausibly conclude that this selection was dictated by state law, not by Rural.

Nor can Rural claim originality in its coordination and arrangement of facts. The white pages do nothing more than list Rural's subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. See Brief for Information Industry Association et al. as *Amici Curiae* 10 (alphabetical arrangement "is universally observed in directories published by local exchange telephone companies"). It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.

We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U. S. C. § 101 does not afford pro-

tection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

Because Rural's white pages lack the requisite originality, Feist's use of the listings cannot constitute infringement. This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort. As this Court noted more than a century ago, "'great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way.'" *Baker* v. *Selden*, 101 U. S., at 105.

The judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN concurs in the judgment.

Syllabus

CITY OF COLUMBIA ET AL. *v.* OMNI OUTDOOR ADVERTISING, INC.

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

No. 89–1671. Argued November 28, 1990—Decided April 1, 1991

After respondent Omni Outdoor Advertising, Inc., entered the billboard market in petitioner Columbia, South Carolina, petitioner Columbia Outdoor Advertising, Inc. (COA), which controlled more than 95% of the market and enjoyed close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. After such ordinances were passed, Omni filed suit against petitioners under §§ 1 and 2 of the Sherman Act and the State's Unfair Trade Practices Act, alleging, *inter alia*, that the ordinances were the result of an anticompetitive conspiracy that stripped petitioners of any immunity to which they might otherwise be entitled. After Omni obtained a jury verdict on all counts, the District Court granted petitioners' motions for judgment notwithstanding the verdict on the ground that their activities were outside the scope of the federal antitrust laws. The Court of Appeals reversed and reinstated the verdict.

Held:

1. The city's restriction of billboard construction is immune from federal antitrust liability under *Parker* v. *Brown*, 317 U. S. 341, 352—which held that principles of federalism and state sovereignty render the Sherman Act inapplicable to anticompetitive restraints imposed by the States "as an act of government"—and subsequent decisions according *Parker* immunity to municipal restriction of competition in implementation of state policy, see, *e. g.*, *Hallie* v. *Eau Claire*, 471 U. S. 34, 38. Pp. 370–379.

(a) The Court of Appeals correctly concluded that the city was prima facie entitled to *Parker* immunity for its billboard restrictions. Although *Parker* immunity does not apply directly to municipalities or other political subdivisions of the States, it does apply where a municipality's restriction of competition is an authorized implementation of state policy. South Carolina's zoning statutes unquestionably authorized the city to regulate the size, location, and spacing of billboards. The additional *Parker* requirement that the city possess clear delegated authority to suppress competition, see, *e. g.*, *Hallie*, *supra*, at 40–42, is also met here, since suppression of competition is at the very least a foreseeable result of zoning regulations. Pp. 370–373.

(b) The Court of Appeals erred, however, in applying a "conspiracy" exception to *Parker*, which is not supported by the language of that case. Such an exception would swallow up the *Parker* rule if "conspiracy" means nothing more than agreement to impose the regulation in question, since it is both inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them. It would be similarly impractical to limit "conspiracy" to instances of governmental "corruption," or governmental acts "not in the public interest"; virtually all anticompetitive regulation is open to such charges and the risk of unfavorable *ex post facto* judicial assessment would impair the States' ability to regulate their domestic commerce. Nor is it appropriate to limit "conspiracy" to instances in which bribery or some other violation of state or federal law has been established, since the exception would then be unrelated to the purposes of the Sherman Act, which condemns trade restraints, not political activity. With the possible exception of the situation in which the State is acting as a market participant, *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws. Pp. 374–379.

2. COA is immune from liability for its activities relating to enactment of the ordinances under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 141, which states a corollary to *Parker:* The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. The Court of Appeals erred in applying the "sham" exception to the *Noerr* doctrine. This exception encompasses situations in which persons use the governmental process itself—as opposed to the *outcome* of that process—as an anticompetitive weapon. That is not the situation here. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 512, distinguished. Omni's suggestion that this Court adopt a "conspiracy" exception to *Noerr* immunity is rejected for largely the same reasons that prompt the Court to reject such an exception to *Parker*. Pp. 379–384.

3. The Court of Appeals on remand must determine (if the theory has been properly preserved) whether the evidence was sufficient to sustain a verdict for Omni based solely on its assertions that COA engaged in *private* anticompetitive actions, and whether COA can be held liable to Omni on its state-law claim. P. 384.

891 F. 2d 1127, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post*, p. 385.

Joel I. Klein argued the cause for petitioners. With him on the briefs were *Paul M. Smith, Roy D. Bates, James S. Meggs, David W. Robinson II,* and *Heyward E. McDonald.*

A. Camden Lewis argued the cause for respondent. With him on the brief was *Randall M. Chastain.**

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to clarify the application of the Sherman Act to municipal governments and to the citizens who seek action from them.

I

Petitioner Columbia Outdoor Advertising, Inc. (COA), a South Carolina corporation, entered the billboard business in the city of Columbia, South Carolina (also a petitioner here), in the 1940's. By 1981 it controlled more than 95% of what has been conceded to be the relevant market. COA was a local business owned by a family with deep roots in the community, and enjoyed close relations with the city's political leaders. The mayor and other members of the city council were personal friends of COA's majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns. According to respondent Omni Outdoor Advertising, Inc., these beneficences were part of a "longstanding" "secret anticompetitive agreement" whereby "the City and COA would each use their *[sic]* respective power and resources to protect . . . COA's monopoly position," in return for which "City Council members received advantages made possible by COA's monopoly." Brief for Respondent 12, 16.

**Charles Rothfeld, Benna Ruth Solomon,* and *Peter J. Kalis* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

Steven C. McCracken, Maurice Baskin, and *John R. Crews* filed a brief for Associated Builders and Contractors, Inc., as *amicus curiae* urging affirmance.

Eric M. Rubin and *Walter E. Diercks* filed a brief for the Outdoor Advertising Association of America, Inc., as *amicus curiae.*

In 1981, Omni, a Georgia corporation, began erecting billboards in and around the city. COA responded to this competition in several ways. First, it redoubled its own billboard construction efforts and modernized its existing stock. Second—according to Omni—it took a number of anticompetitive private actions, such as offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts. Finally (and this is what gives rise to the issue we address today), COA executives met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. COA was not alone in urging this course; concerned about the city's recent explosion of billboards, a number of citizens, including writers of articles and editorials in local newspapers, advocated restrictions.

In the spring of 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in downtown Columbia. This was later amended to impose a 180-day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council. A state court invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions. The city then requested the State's regional planning authority to conduct a comprehensive analysis of the local billboard situation as a basis for developing a final, constitutionally valid, ordinance. In September 1982, after a series of public hearings and numerous meetings involving city officials, Omni, and COA (in all of which, according to Omni, positions contrary to COA's were not genuinely considered), the city council passed a new ordinance restricting the size, location, and spacing of billboards. These restrictions, particularly those on spacing, obviously benefited COA, which already had its billboards in place; they severely hindered Omni's ability to compete.

In November 1982, Omni filed suit against COA and the city in Federal District Court, charging that they had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2,[1] as well as South Carolina's Unfair Trade Practices Act, S. C. Code Ann. § 39–5–140 (1976). Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws. In January 1986, after more than two weeks of trial, a jury returned general verdicts against the city and COA on both the federal and state claims. It awarded damages, before trebling, of $600,000 on the § 1 Sherman Act claim, and $400,000 on the § 2 claim.[2] The jury also answered two special interrogatories, finding specifically that the city and COA had conspired both to restrain trade and to monopolize the market. Petitioners moved for judgment notwithstanding the verdict, contending among other

[1] Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

Section 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U. S. C. § 2.

[2] The monetary damages in this case were assessed entirely against COA, the District Court having ruled that the city was immunized by the Local Government Antitrust Act of 1984, 98 Stat. 2750, as amended, 15 U. S. C. §§ 34–36, which exempts local governments from paying damages for violations of the federal antitrust laws. Although enacted in 1984, after the events at issue in this case, the Act specifically provides that it may be applied retroactively if "the defendant establishes and the court determines, in light of all the circumstances . . . that it would be inequitable not to apply this subsection to a pending case." 15 U. S. C. § 35(b). The District Court determined that it would be, and the Court of Appeals refused to disturb that judgment. Respondent has not challenged that determination in this Court, and we express no view on the matter.

things that their activities were outside the scope of the federal antitrust laws. In November 1988, the District Court granted the motion.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and reinstated the jury verdict on all counts. 891 F. 2d 1127 (1989). We granted certiorari, 496 U. S. 935 (1990).

II

In the landmark case of *Parker* v. *Brown*, 317 U. S. 341 (1943), we rejected the contention that a program restricting the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act, violated the Sherman Act. Relying on principles of federalism and state sovereignty, we held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.*, at 352.

Since *Parker* emphasized the role of sovereign *States* in a federal system, it was initially unclear whether the governmental actions of political subdivisions enjoyed similar protection. In recent years, we have held that *Parker* immunity does not apply directly to local governments, see *Hallie* v. *Eau Claire*, 471 U. S. 34, 38 (1985); *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 50–51 (1982); *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 412–413 (1978) (plurality opinion). We have recognized, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy, and have accorded *Parker* immunity where that is the case.

The South Carolina statutes under which the city acted in the present case authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.[3] It is undisputed that, as a matter

[3] S. C. Code Ann. § 5–23–10 (1976) ("Building and zoning regulations authorized") provides that "[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cit-

of state law, these statutes authorize the city to regulate the size, location, and spacing of billboards. It could be argued, however, that a municipality acts beyond its delegated authority, for *Parker* purposes, whenever the nature of its regulation is substantively or even procedurally defective. On such an analysis it could be contended, for example, that the city's regulation in the present case was not "authorized" by S. C. Code Ann. § 5–23–10 (1976), see n. 3, *supra*, if it was not, as that statute requires, adopted "for the purpose of promoting health, safety, morals or the general welfare of the community." As scholarly commentary has noted, such an expansive interpretation of the *Parker*-defense authorization requirement would have unacceptable consequences.

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to

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ies and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures."

Section 5–23–20 ("Division of municipality into districts") provides that "[f]or any or all of such purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."

Section 6–7–710 ("Grant of power for zoning") provides that "[f]or the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures. . . . The regulations shall . . . be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements."

> reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not lightly assume that *Lafayette*'s authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, Antitrust Law ¶212.3b, p. 145 (Supp. 1989).

We agree with that assessment, and believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. We have adopted an approach that is similar in principle, though not necessarily in precise application, elsewhere. See *Stump* v. *Sparkman*, 435 U. S. 349 (1978). It suffices for the present to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition—more specifically, "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality in connection with its regulation. *Hallie*, 471 U. S., at 40 (internal quotation omitted). We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, see *id.*, at 41–42.

It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes, *id.*, at 42. That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.[4]

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[4] The dissent contends that, in order successfully to delegate its *Parker* immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," *post*, at 388, (2) of a specific industry, *post*, at 391. These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.

If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), as discussed in text. Seemingly, however, the dissent means only that the state authorization must specify that sort of regulation whereunder "decisions about prices and output are made not by individual firms, but rather by a public body." *Post*, at 387. But why is not the restriction of billboards in a city a restriction on the "output" of the local billboard industry? It assuredly *is*—and that is indeed the very gravamen of Omni's complaint. It seems to us that the dissent's concession that "it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare," *post*, at 393, is a gross understatement. Loose talk about a "regulated industry" may suffice for what the dissent calls "antitrust parlance," *post*, at 387, but it is not a definition upon which the criminal liability of public officials ought to depend.

Under the dissent's second requirement for a valid delegation of *Parker* immunity—that the authorization to regulate pertain to a specific industry—the problem with the South Carolina statute is that it used the generic term "structures," instead of conferring its regulatory authority industry-by-industry (presumably "billboards," "movie houses," "mobile homes," "TV antennas," and every other conceivable object of zoning regulation that can be the subject of a relevant "market" for purposes of antitrust analysis). To describe this is to refute it. Our precedents not only fail to suggest, but positively reject, such an approach. "[T]he municipal-

The Court of Appeals was therefore correct in its conclusion that the city's restriction of billboard construction was prima facie entitled to *Parker* immunity. The Court of Appeals upheld the jury verdict, however, by invoking a "conspiracy" exception to *Parker* that has been recognized by several Courts of Appeals. See, *e. g.*, *Whitworth* v. *Perkins*, 559 F. 2d 378 (CA5 1977), vacated, 435 U. S. 992, aff'd on rehearing, 576 F. 2d 696 (1978), cert. denied, 440 U. S. 911 (1979). That exception is thought to be supported by two of our statements in *Parker:* "[W]e have no question of the state or its municipality becoming a *participant in a private agreement* or combination by others for restraint of trade, cf. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450." *Parker*, 317 U. S., at 351–352 (emphasis added). "The state in adopting and enforcing the prorate program made no contract or agreement *and entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.*, at 352 (emphasis added). *Parker* does not apply, according to the Fourth Circuit, "where politicians or political entities are involved as conspirators" with private actors in the restraint of trade. 891 F. 2d, at 1134.

There is no such conspiracy exception. The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. The sentences from the opinion quoted above simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commer-

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ity need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit." *Hallie*, *supra*, at 39 (quoting *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978)).

cial participant in a given market. That is evident from the citation of *Union Pacific R. Co.* v. *United States*, 313 U. S. 450 (1941), which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities. These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties. The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge. See Areeda & Hovenkamp, *supra*, ¶203.3b, at 34, and n. 1; Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 704–705 (1991).[5]

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[5] The dissent is confident that a jury composed of citizens of the vicinage will be able to tell the difference between "independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." *Post*, at 395–396. No doubt. But those are merely the polar extremes, which like the geographic poles will rarely be seen by jurors of the vicinage. Ordinarily the allegation will merely be (and the dissent says this is enough) that the municipal action was not prompted "*exclusively* by a concern for the general public interest," *post*, at 387 (emphasis added). Thus, the real question is whether a jury can tell the difference—whether *Solomon* can tell the difference—between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently. "*Independent* municipal action" is unobjectionable, "action taken for the *sole* purpose of carrying out

Omni suggests, however, that "conspiracy" might be limited to instances of governmental "corruption," defined variously as "abandonment of public responsibilities to private interests," Brief for Respondent 42, "corrupt or bad faith decisions," *id.*, at 44, and "selfish or corrupt motives," *ibid.* Ultimately, Omni asks us not to define "corruption" at all, but simply to leave that task to the jury: "[a]t bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." *Id.*, at 43. Omni's *amicus* eschews this emphasis on "corruption," instead urging us to define the conspiracy exception as encompassing any governmental act "not in the public interest." Brief for Associated Builders and Contractors, Inc., as *Amicus Curiae* 5.

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an anticompetitive agreement for the private party" is unlawful, and everything else (that is, the known world between the two poles) is unaddressed.

The dissent contends, moreover, that "[t]he instructions in this case, fairly read, told the jury that the plaintiff should not prevail *unless* the ordinance was enacted for the sole purpose of interfering with access to the market." *Post*, at 396, n. 9 (emphasis added). That is not so. The sum and substance of the jury's instructions here were that anticompetitive municipal action is not lawful when taken as part of a conspiracy, and that a conspiracy is "an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." App. 79. Although the District Court explained that "[i]t is perfectly lawful for any and all persons to petition their government," the court immediately added, "but they may not do so as a part or as the object of a conspiracy." *Ibid.* These instructions, then, are entirely circular: An anticompetitive agreement becomes unlawful if it is part of a conspiracy, and a conspiracy is an agreement to do something unlawful. The District Court's observation, upon which the dissent places so much weight, that "if by the evidence you find that [COA] procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of [Omni] to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws," *id.*, at 81, see *post*, at 387, n. 2, is in no way tantamount to an instruction that this was the *only* theory upon which the jury could find an immunity-destroying "conspiracy."

A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interest of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries. If the city of Columbia's decision to regulate what one local newspaper called "billboard jungles," Columbia Record, May 21, 1982, p. 14–A, col. 1; App. in No. 88–1388 (CA4), p. 3743, is made subject to *ex post facto* judicial assessment of "the public interest," with personal liability of city officials a possible consequence, we will have gone far to "compromise the States' ability to regulate their domestic commerce," *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48, 56 (1985). The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid.[6] "[W]here the action complained

[6] We have proceeded otherwise only in the "very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry." *United States* v. *O'Brien*, 391 U. S. 367, 383, n. 30 (1968) (bill of attainder). See also *Arlington Heights* v. *Metro-*

of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Hoover* v. *Ronwin*, 466 U. S. 558, 579–580 (1984). See also *Llewellyn* v. *Crothers*, 765 F. 2d 769, 774 (CA9 1985) (Kennedy, J.).

The foregoing approach to establishing a "conspiracy" exception at least seeks (however impractically) to draw the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker:* prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest. Another approach is possible, which has the virtue of practicality but the vice of being unrelated to those purposes. That is the approach which would consider *Parker* inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law has been established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid. (That is frequently the defense asserted to a criminal bribery charge—and though it is never valid in law, see, *e. g.*, *United States* v. *Jannotti*, 673 F. 2d 578, 601 (CA3) (en banc), cert. denied, 457 U. S. 1106 (1982), it is often plausible in fact.) When, moreover, the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law (by bribing a minority of the decisionmakers) establishes that the regulation has no valid public purpose. Cf. *Fletcher* v. *Peck*, 6 Cranch 87, 130 (1810). To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed

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politan Housing Development Corp., 429 U. S. 252, 268, n. 18 (1977) (race-based motivation).

at combating corruption in state and local governments. See, *e. g.*, 18 U. S. C. § 1951 (Hobbs Act). "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, 140 (1961).

For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," *Hoover*, 466 U. S., at 580. We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is "*ipso facto* . . . exempt from the operation of the antitrust laws," *id.*, at 568. This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U. S., at 351 (citing *Northern Securities Co.* v. *United States*, 193 U. S. 197, 332, 344–347 (1904)). See also *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

III

While *Parker* recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U. S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*, we have developed a corollary to *Parker:* The federal antitrust laws also do not regulate the conduct of private individuals in seeking

anticompetitive action from the government. This doctrine, like *Parker*, rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *Noerr*, *supra*, at 141. That a private party's political motives are selfish is irrelevant: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Mine Workers* v. *Pennington*, 381 U. S. 657, 670 (1965).

Noerr recognized, however, what has come to be known as the "sham" exception to its rule: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U. S., at 144. The Court of Appeals concluded that the jury in this case could have found that COA's activities on behalf of the restrictive billboard ordinances fell within this exception. In our view that was error.

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 496, 500, n. 4 (1988), not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*,'" *id.*, at 508, n. 10 (quoting *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 827 F. 2d 458, 465, n. 5 (CA9 1987)).

Neither of the Court of Appeals' theories for application of the "sham" exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA's interaction with city officials "'was actually nothing more than an attempt to interfere directly with the business relations *[sic]* of a competitor.'" 891 F. 2d, at 1139 (quoting *Noerr*, *supra*, at 144). This analysis relies upon language from *Noerr*, but ignores the import of the critical word "directly." Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals' second theory was that the jury could have found "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora." 891 F. 2d, at 1139. But the purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham," unless (as no evidence suggested was true here) the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. "If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of the government action sought . . . does not foreclose protection." Sullivan, Developments in the Noerr Doctrine, 56 Antitrust L. J. 361, 362 (1987). As for "deny[ing] . . . meaningful access to the appropriate city administrative and legislative fora," that may render the manner of lobbying improper or even unlawful, but does not necessarily render it a "sham." We did hold in *California Motor Transport*, *supra*, that a conspiracy among private parties to monopolize trade by excluding a competitor from participation in the regulatory process did not enjoy *Noerr* protection. But *California Motor Transport* involved a context in which the conspirators' participation in the governmental process was itself claimed to be a

"sham," employed as a means of imposing cost and delay. ("It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" 404 U. S., at 512.) The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked genuinely, and not in a "sham" fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.

Omni urges that if, as we have concluded, the "sham" exception is inapplicable, we should use this case to recognize another exception to *Noerr* immunity—a "conspiracy" exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition. We have left open the possibility of such an exception, see, *e. g.*, *Allied Tube*, *supra*, at 502, n. 7, as have a number of Courts of Appeals. See, *e. g.*, *Oberndorf* v. *Denver*, 900 F. 2d 1434, 1440 (CA10 1990); *First American Title Co. of South Dakota* v. *South Dakota Land Title Assn.*, 714 F. 2d 1439, 1446, n. 6 (CA8 1983), cert. denied, 464 U. S. 1042 (1984). At least one Court of Appeals has affirmed the existence of such an exception in dicta, see *Duke & Co.* v. *Foerster*, 521 F. 2d 1277, 1282 (CA3 1975), and

the Fifth Circuit has adopted it as holding, see *Affiliated Capital Corp.* v. *Houston*, 735 F. 2d 1555, 1566–1568 (1984) (en banc).

Giving full consideration to this matter for the first time, we conclude that a "conspiracy" exception to *Noerr* must be rejected. We need not describe our reasons at length, since they are largely the same as those set forth in Part II above for rejecting a "conspiracy" exception to *Parker*. As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members of the legislative body became . . . 'co-conspirators'" in *some* sense with the private party urging such action, *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F. 2d 220, 230 (CA7 1975). And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that

"deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U. S., at 145.

IV

Under *Parker* and *Noerr*, therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U. S. 19, 29–30 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

There also remains to be considered the effect of our judgment upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act. The District Court granted judgment notwithstanding the verdict on this claim as well as the Sherman Act claims; the Court of Appeals reversed on the ground that "a finding of conspiracy to restrain competition is tantamount to a finding" that the South Carolina law had been violated, 891 F. 2d, at 1143. Given our reversal of the "conspiracy" holding, that reasoning is no longer applicable.

We leave these remaining questions for determination by the Court of Appeals on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Section 1 of the Sherman Act provides in part: "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1 (emphasis added). Although we have previously recognized that a completely literal interpretation of the word "every" cannot have been intended by Congress,[1] the Court today carries this recognition to an extreme by deciding that agreements between municipalities, or their officials, and private parties to use the zoning power to confer exclusive privileges in a particular line of commerce are beyond the reach of § 1. History, tradition, and the facts of this case all demonstrate that the Court's attempt to create a "better" and less inclusive Sherman Act, cf. *West Virginia*

[1] Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited.

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. . . . [The Rule of Reason] focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 687–688 (1978) (footnotes omitted).

We have also confined the Sherman Act's mandate by holding that the independent actions of the sovereign States and their officials are not covered by the language of the Act. *Parker* v. *Brown*, 317 U. S. 341 (1943).

University Hospitals, Inc. v. *Casey*, 499 U. S. 83, 101 (1991), is ill advised.

I

As a preface to a consideration of the "state action" and so-called *"Noerr-Pennington"* exemptions to the Sherman Act, it is appropriate to remind the Court that one of the classic common-law examples of a prohibited contract in restraint of trade involved an agreement between a public official and a private party. The public official—the Queen of England—had granted one of her subjects a monopoly in the making, importation, and sale of playing cards in order to generate revenues for the crown. A competitor challenged the grant in *The Case of Monopolies*, 11 Co. Rep. 84, 77 Eng. Rep. 1260 (Q. B. 1602), and prevailed. Chief Justice Popham explained on behalf of the bench:

> "The Queen was . . . deceived in her grant; for the Queen . . . intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore . . . this grant is void *jure Regio*." *Id.*, at 87a; 77 Eng. Rep., at 1264.

In the case before us today, respondent alleges that the city of Columbia, S. C., has entered into a comparable agreement to give the private petitioner a monopoly in the sale of billboard advertising. After a 3-week trial, a jury composed of citizens of the vicinage found that, despite the city fathers' denials, there was indeed such an agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship—and in any case, not

exclusively by a concern for the general public interest.[2] Today the Court acknowledges the anticompetitive consequences of this and similar agreements but decides that they should be exempted from the coverage of the Sherman Act because it fears that enunciating a rule that allows the motivations of public officials to be probed may mean that innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster the evils the Sherman Act was designed to eradicate.

II

There is a distinction between economic regulation, on the one hand, and regulation designed to protect the public health, safety, and environment. In antitrust parlance a "regulated industry" is one in which decisions about prices and output are made not by individual firms, but rather by a public body or a collective process subject to governmental approval. Economic regulation of the motor carrier and airline industries was imposed by the Federal Government in the 1930's; the "deregulation" of those industries did not eliminate all the other types of regulation that continue to protect our safety and environmental concerns.

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[2] The jury returned its verdict pursuant to the following instructions given by the District Court:

"So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

"So once again an entity may engage in . . . legitimate lobbying . . . to procure legislati[on] even if the motive behind the lobbying is anticompetitive.

"If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue." App. 81.

The antitrust laws reflect a basic national policy favoring free markets over regulated markets.[3] In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions. Moreover, the so-called "state-action" exemption from the Sherman Act reflects the Court's understanding that Congress did not intend the statute to pre-empt a State's economic regulation of commerce within its own borders.

The contours of the state-action exemption are relatively well defined in our cases. Ever since our decision in *Olsen* v. *Smith*, 195 U. S. 332 (1904), which upheld a Texas statute fixing the rates charged by pilots operating in the Port of Galveston, it has been clear that a State's decision to displace competition with economic regulation is not prohibited by the Sherman Act. *Parker* v. *Brown*, 317 U. S. 341 (1943), the case most frequently identified with the state-action exemption, involved a decision by California to substitute sales quotas and price control—the purest form of economic regulation—for competition in the market for California raisins.

In *Olsen*, the State itself had made the relevant pricing decision. In *Parker*, the regulation of the marketing of Cali-

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[3] "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co.* v. *FTC*, 340 U. S. 231, 248 [(1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *National Society of Professional Engineers*, 435 U. S., at 695.

fornia's 1940 crop of raisins was administered by state officials. Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable. *Hoover* v. *Ronwin*, 466 U. S. 558, 568–569 (1984); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 360 (1977).

Underlying the Court's recognition of this state-action exemption has been respect for the fundamental principle of federalism. As we stated in *Parker*, 317 U. S., at 351: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, this Court recognized long ago that the deference due States within our federal system does not extend fully to conduct undertaken by municipalities. Rather, all sovereign authority "within the geographical limits of the United States" resides with "the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States* v. *Kagama*, 118 U. S. 375, 379 (1886).

Unlike States, municipalities do not constitute bedrocks within our system of federalism. And also unlike States, municipalities are more apt to promote their narrow parochial interests "without regard to extraterritorial impact and regional efficiency." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 404 (1978); see also The Federalist No. 10 (J. Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good). "If municipalities were free to make economic choices counseled solely by their own parochial inter-

ests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S., at 408. Indeed, "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Id.*, at 412–413.[4]

Nevertheless, insofar as municipalities may serve to implement state policies, we have held that economic regulation administered by a municipality may also be exempt from Sherman Act coverage if it is enacted pursuant to a clearly articulated and affirmatively expressed state directive "to replace competition with regulation." *Hoover*, 466 U. S., at 569. However, the mere fact that a municipality acts within its delegated authority is not sufficient to exclude its anticompetitive behavior from the reach of the Sherman Act.

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[4] In *Owen* v. *City of Independence*, 445 U. S. 622 (1980), this Court recognized that "notwithstanding [42 U. S. C.] § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967)." *Id.*, at 637. Nevertheless, the Court refused to find a firmly established immunity enjoyed by municipal corporations at common law for the torts of their agents. "Where the immunity claimed by the defendant was well established at common law at the time [42 U. S. C.] § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify" according them such immunity. *Id.*, at 638. See also *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 70 (1989) ("States are protected by the Eleventh Amendment while municipalities are not . . .").

"Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 56 (1982).

Accordingly, we have held that the critical decision to substitute economic regulation for competition is one that must be made by the State. That decision must be articulated with sufficient clarity to identify the industry in which the State intends that economic regulation shall replace competition. The terse statement of the reason why the municipality's actions in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985), was exempt from the Sherman Act illustrates the point: "They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation." *Id.*, at 47.[5]

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[5] Contrary to the Court's reading of *Hallie*, our opinion in that case emphasized the industry-specific character of the Wisconsin legislation in explaining why the delegation satisfied the "clear articulation" requirement. At issue in *Hallie* was the town's independent decision to refuse to provide sewage treatment services to nearby towns—a decision that had been expressly authorized by the Wisconsin legislation. 471 U. S., at 41. We wrote:

"Applying the analysis of *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389 (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.*, at 42.

"Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder*, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the 'clear

III

Today the Court adopts a significant enlargement of the state-action exemption. The South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce or in any specific industry. As the Court notes, the state statutes were expressly adopted to promote the "'health, safety, morals or the general welfare of the community,'" see *ante*, at 370, n. 3. Like Colorado's grant of "home rule" powers to the city of Boulder, they are simply neutral on the question whether the municipality should displace competition with economic regulation in any industry. There is not even an arguable basis for concluding that the State authorized the city of Columbia to enter into exclusive agreements with any person, or to use the zoning power to protect favored citizens from competition.[6] Nevertheless, under the guise of acting

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articulation' component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." *Id.*, at 43.

We rejected the argument that the delegation was insufficient because it did not expressly mention the foreseeable anticompetitive consequences of the city of Eau Claire's conduct, but we surely did not hold that the mere fact that incidental anticompetitive consequences are foreseeable is sufficient to immunize otherwise unauthorized restrictive agreements between cities and private parties.

[6] The authority to regulate the "'location, height, bulk, number of stories and size of buildings and other structures,'" see *ante*, at 371, n. 3 (citation omitted), may of course have an indirect effect on the total output in the billboard industry, see *ante*, at 373–374, n. 4, as well as on a number of other industries, but the Court surely misreads our cases when it implies that a general grant of zoning power represents a clearly articulated deci-

pursuant to a state legislative grant to regulate health, safety, and welfare, the city of Columbia in this case enacted an ordinance that amounted to economic regulation of the billboard market; as the Court recognizes, the ordinance "obviously benefited COA, which already had its billboards in place . . . [and] severely hindered Omni's ability to compete." *Ante*, at 368.

Concededly, it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare. "Social and safety regulation have economic impacts, and economic regulation has social and safety effects." D. Hjelmfelt, Antitrust and Regulated Industries 3 (1985). It is nevertheless important to determine when purported general welfare regulation in fact constitutes economic regulation by its purpose and effect of displacing competition. "An example of economic regulation which is disguised by another stated purpose is the limitation of advertising by lawyers for the stated purpose of protecting the public from incompetent lawyers. Also, economic regulation posing as safety regulation is often encountered in the health care industry." *Id.*, at 3–4.

In this case, the jury found that the city's ordinance—ostensibly one promoting health, safety, and welfare—was in fact enacted pursuant to an agreement between city officials and a private party to restrict competition. In my opinion such a finding necessarily leads to the conclusion that the city's ordinance was fundamentally a form of economic regulation of the billboard market rather than a general welfare regulation having incidental anticompetitive effects. Because I believe our cases have wisely held that the decision to embark upon economic regulation is a nondelegable one that must expressly be made by the State in the context of a specific industry in order to qualify for state-action immunity, see, *e. g.*, *Olsen* v. *Smith*, 195 U. S. 332 (1904) (Texas pilot-

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sion to authorize municipalities to enter into agreements to displace competition in every industry that is affected by zoning regulation.

age statutes expressly regulated both entry and rates in the Port of Galveston); *Parker* v. *Brown*, 317 U. S. 341 (1943) (California statute expressly authorized the raisin market regulatory program), I would hold that the city of Columbia's economic regulation of the billboard market pursuant to a general state grant of zoning power is not exempt from antitrust scrutiny.[7]

Underlying the Court's reluctance to find the city of Columbia's enactment of the billboard ordinance pursuant to a private agreement to constitute unauthorized economic regulation is the Court's fear that subjecting the motivations and effects of municipal action to antitrust scrutiny will result in public decisions being "made subject to *ex post facto* judicial assessment of 'the public interest.'" *Ante*, at 377. That fear, in turn, rests on the assumption that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Ante*, at 375.

The Court's assumption that an agreement between private parties and public officials is an "inevitable" precondition for official action, however, is simply wrong.[8] Indeed, I am

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[7] A number of Courts of Appeals have held that a municipality which exercises its zoning power to further a private agreement to restrain trade is not entitled to state-action immunity. See, *e. g.*, *Westborough Mall, Inc.* v. *Cape Girardeau*, 693 F. 2d 733, 746 (CA8 1982) ("Even if zoning in general can be characterized as 'state action,' . . . a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy"); *Whitworth* v. *Perkins*, 559 F. 2d 378, 379 (CA5 1977) ("The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade").

[8] No such agreement was involved in *Hallie* v. *Eau Claire*, 471 U. S. 34 (1985). In that case the plaintiffs challenged independent action—the determination of the service area of the city's sewage system—that had been expressly authorized by Wisconsin legislation. The absence of any such agreement provided the basis for our decision in *Fisher* v. *Berkeley*,

persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored. The mere fact that an official body adopts a position that is advocated by a private lobbyist is plainly not sufficient to establish an agreement to do so. See *Fisher* v. *Berkeley*, 475 U. S. 260, 266–267 (1986); cf. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U. S. 537, 541 (1954). Nevertheless, in many circumstances, it would seem reasonable to infer—as the jury did in this case—that the official action is the product of an agreement intended to elevate particular private interests over the general good.

In this case, the city took two separate actions that protected the local monopolist from threatened competition. It first declared a moratorium on any new billboard construction, despite the city attorney's advice that the city had no power to do so. When the moratorium was invalidated in state-court litigation, it was replaced with an apparently valid ordinance that clearly had the effect of creating formidable barriers to entry in the billboard market. Throughout the city's decisionmaking process in enacting the various ordinances, undisputed evidence demonstrated that Columbia Outdoor Advertising, Inc., had met with city officials privately as well as publicly. As the Court of Appeals noted: "Implicit in the jury verdict was a finding that the city was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." 891 F. 2d 1127, 1133 (CA4 1989).

Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out an

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475 U. S. 260, 266–267 (1986) ("The distinction between unilateral and concerted action is critical here. . . . Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1").

anticompetitive agreement for the private party.[9] See, *e. g.*, *In re Japanese Electronic Products Antitrust Litigation*, 631 F. 2d 1069, 1079 (CA3 1980) ("The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules"). Indeed, the problems inherent in determining whether the actions of municipal officials are the product of an illegal agreement are substantially the same as those arising in cases in which the actions of business executives are subjected to antitrust scrutiny.[10]

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[9] The instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market. See n. 2, *supra*. Thus, this case is an example of one of the "polar extremes," see *ante*, at 375, n. 5, that juries—as well as Solomon—can readily identify. The mixed motive cases that concern the Court should present no problem if juries are given instructions comparable to those given below. When the Court describes my position as assuming that municipal action that was not prompted "exclusively by a concern for the general public interest" is enough to create antitrust liability, *ibid.*, it simply ignores the requirement that the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties. Contrary to our square holding in *Fisher* v. *Berkeley*, 475 U. S. 260 (1986), today the Court seems to assume that municipal action which is not entirely immune from antitrust scrutiny will automatically violate the antitrust laws.

[10] "There are many obstacles to discovering conspiracies, but the most frequent difficulties are three. First, price-fixers and similar miscreants seldom admit their conspiracy or agree in the open. Often, we can infer the agreement only from their behavior. Second, behavior can sometimes be coordinated without any communication or other observable and reprehensible behavior. Third, the causal connection between an observable, controllable act—such as a solicitation or meeting—and subsequent parallel action may be obscure." 6 P. Areeda, Antitrust Law ¶ 1400, at 3–4 (1986). See also Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962)

The difficulty of proving whether an agreement motivated a course of conduct should not in itself intimidate this Court into exempting those illegal agreements that are proved by convincing evidence. Rather, the Court should, if it must, attempt to deal with these problems of proof as it has in the past—through heightened evidentiary standards rather than through judicial expansion of exemptions from the Sherman Act. See, *e. g.*, *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574 (1986) (allowing summary judgment where a predatory pricing conspiracy in violation of the Sherman Act was founded largely upon circumstantial evidence); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 768 (1984) (holding that a plaintiff in a vertical price-fixing case must produce evidence which "tends to exclude the possibility of independent action").

Unfortunately, the Court's decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalist system into a lawful exercise of public decision-making. Although the Court correctly applies principles of federalism in refusing to find a "conspiracy exception" to the *Parker* state-action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state-action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare. Unlike the previous limitations this Court has imposed on Congress' sweeping mandate in § 1, which found support in our common-law traditions or our system of federalism, see n. 1, *supra*, the Court's wholesale exemption of municipal action from antitrust scrutiny amounts to little more than a bold and disturbing act of judicial legislation

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(discussing difficulties of condemning parallel anticompetitive action absent explicit agreement among the parties).

which dramatically curtails the statutory prohibition against "every" contract in restraint of trade.[11]

IV

Just as I am convinced that municipal "lawmaking that has been infected by selfishly motivated agreement with private interests," *ante*, at 383, is not authorized by a grant of zoning authority, and therefore not within the state-action exemption, so am I persuaded that a private party's agreement with selfishly motivated public officials is sufficient to remove the antitrust immunity that protects private lobbying under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965). Although I agree that the "sham" exception to the *Noerr-Pennington* rule exempting lobbying activities from the antitrust laws does not apply to the private petitioner's conduct in this case for the reasons stated by the Court in Part III of its opinion, I am satisfied that the evidence in the record is sufficient to support the jury's finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope of *Noerr-Pennington* antitrust immunity. Accordingly, I would af-

[11] As the Court previously has noted:

"In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services, while the remaining 38,552 represented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 407–408 (1978) (footnotes omitted).

firm the judgment of the Court of Appeals as to both the city of Columbia and Columbia Outdoor Advertising, Inc.

I respectfully dissent.

POWERS *v.* OHIO

CERTIORARI TO THE COURT OF APPEALS OF OHIO, FRANKLIN COUNTY

No. 89–5011. Argued October 9, 1990—Decided April 1, 1991

During jury selection at his state-court trial for aggravated murder and related offenses, petitioner Powers, a white man, objected to the State's use of peremptory challenges to remove seven black venirepersons from the jury. Powers' objections, which were based on *Batson* v. *Kentucky*, 476 U. S. 79, were overruled, the empaneled jury convicted him on several counts, and he was sentenced to prison. On appeal, he contended that the State's discriminatory use of peremptories violated, *inter alia*, the Fourteenth Amendment's Equal Protection Clause, and that his own race was irrelevant to the right to object to the peremptories. The Ohio Court of Appeals affirmed his conviction.

Held: Under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded jurors share the same race. Pp. 404–416.

(a) The Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race. See, *e. g.*, *Batson*, *supra*, at 84; *Holland* v. *Illinois*, 493 U. S. 474, 479. Contrary to Ohio's contention, racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a *Batson* challenge, and would, in fact, contravene the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law. Although *Batson* did involve such an identity, it recognized that the State's discriminatory use of peremptories harms the excluded jurors by depriving them of a significant opportunity to participate in civil life. 476 U. S., at 87. Moreover, the discriminatory selection of jurors has been the subject of a federal criminal prohibition since Congress enacted the Civil Rights Act of 1875. Thus, although an individual juror does not have the right to sit on any particular petit jury, he or she does possess the right not to be excluded from one on account of race. This Court rejects, as contrary to accepted equal protection principles, the arguments that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine a juror's objectivity or qualifications, see *Batson*, *supra*, at 87, and that race-based

peremptory challenges are permissible when visited upon members of all races in equal degree, see *Loving* v. *Virginia*, 388 U. S. 1. Pp. 404–410.

(b) A criminal defendant has standing to raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. Cf., *e. g.*, *Singleton* v. *Wulff*, 428 U. S. 106, 112–116. First, the discriminatory use of peremptory challenges causes the defendant cognizable injury, and he or she has a concrete interest in challenging the practice, because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and the excluded jurors is such that he or she is fully as effective a proponent of their rights as they themselves would be, since both have a common interest in eliminating racial discrimination from the courtroom, and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a discriminatorily constituted jury may lead to the reversal of the conviction under *Batson*, *supra*, at 100. Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his or her own rights. Thus, the fact that Powers' race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use of peremptories. Pp. 410–416.

Reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 417.

Robert L. Lane, by appointment of the Court, 494 U. S. 1054, argued the cause for petitioner. With him on the brief were *Randall M. Dana*, *Gregory L. Ayers*, and *Jill E. Stone*.

Alan Craig Travis argued the cause for respondent. With him on the brief was *Michael Miller*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Barbara D. Underwood*, *Steven R. Shapiro*, *Julius LeVonne Chambers*, and *Charles Stephen Ralston;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Harry R. Reinhart and *Kathleen S. Aynes* filed a brief for the Ohio Association of Criminal Defense Lawyers as *amicus curiae*.

JUSTICE KENNEDY delivered the opinion of the Court.

Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life. Congress recognized this over a century ago in the Civil Rights Act of 1875, which made it a criminal offense to exclude persons from jury service on account of their race. See 18 U. S. C. §243. In a trilogy of cases decided soon after enactment of this prohibition, our Court confirmed the validity of the statute, as well as the broader constitutional imperative of race neutrality in jury selection. See *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Virginia* v. *Rives*, 100 U. S. 313 (1880); *Ex parte Virginia*, 100 U. S. 339 (1880). In the many times we have confronted the issue since those cases, we have not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts. Despite the clarity of these commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist. In this case, petitioner alleges race discrimination in the prosecution's use of peremptory challenges. Invoking the Equal Protection Clause and federal statutory law, and relying upon well-established principles of standing, we hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

I

Petitioner Larry Joe Powers, a white man, was indicted in Franklin County, Ohio, on two counts of aggravated murder and one count of attempted aggravated murder. Each count also included a separate allegation that petitioner had a firearm while committing the offense. Powers pleaded not guilty and invoked his right to a jury trial.

In the jury selection process, Powers objected when the prosecutor exercised his first peremptory challenge to remove a black venireperson. Powers requested the trial court to compel the prosecutor to explain, on the record, his reasons for excluding a black person. The trial court denied the request and excused the juror. The State proceeded to use nine more peremptory challenges, six of which removed black venirepersons from the jury. Each time the prosecution challenged a black prospective juror, Powers renewed his objections, citing our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). His objections were overruled. The record does not indicate that race was somehow implicated in the crime or the trial; nor does it reveal whether any black persons sat on petitioner's petit jury or if any of the nine jurors petitioner excused by peremptory challenges were black persons.

The empaneled jury convicted Powers on counts of murder, aggravated murder, and attempted aggravated murder, each with the firearm specifications, and the trial court sentenced him to a term of imprisonment of 53 years to life. Powers appealed his conviction to the Ohio Court of Appeals, contending that the prosecutor's discriminatory use of peremptories violated the Sixth Amendment's guarantee of a fair cross section in his petit jury, the Fourteenth Amendment's Equal Protection Clause, and Article I, §§ 10 and 16, of the Ohio Constitution. Powers contended that his own race was irrelevant to the right to object to the prosecution's peremptory challenges. The Court of Appeals affirmed the conviction, and the Supreme Court of Ohio dismissed Powers' appeal on the ground that it presented no substantial constitutional question.

Petitioner sought review before us, renewing his Sixth Amendment fair cross section and Fourteenth Amendment equal protection claims. While the petition for certiorari was pending, we decided *Holland* v. *Illinois*, 493 U. S. 474 (1990). In *Holland* it was alleged the prosecution had used its peremptory challenges to exclude from the jury members

of a race other than the defendant's. We held the Sixth Amendment did not restrict the exclusion of a racial group at the peremptory challenge stage. Five members of the Court there said a defendant might be able to make the objection on equal protection grounds. See *id.*, at 488 (KENNEDY, J., concurring); *id.*, at 490 (MARSHALL, J., joined by Brennan and BLACKMUN, JJ., dissenting); *id.*, at 504 (STEVENS, J., dissenting). After our decision in *Holland*, we granted Powers' petition for certiorari limited to the question whether, based on the Equal Protection Clause, a white defendant may object to the prosecution's peremptory challenges of black venirepersons. 493 U. S. 1068 (1990). We now reverse and remand.

II

For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, *Strauder*, [100 U. S.,] at 305, or on the false assumption that members of his race as a group are not qualified to serve as jurors, see *Norris* v. *Alabama*, 294 U. S. 587, 599 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881)." *Batson*, *supra*, at 86 (footnote omitted). Although a defendant has no right to a "petit jury composed in whole or in part of persons of [the defendant's] own race," *Strauder*, 100 U. S., at 305, he or she does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria.

We confronted the use of peremptory challenges as a device to exclude jurors because of their race for the first time in *Swain* v. *Alabama*, 380 U. S. 202 (1965). *Swain* involved a challenge to the so-called struck jury system, a procedure designed to allow both the prosecution and the defense a maximum number of peremptory challenges. The venire in

noncapital cases started with about 35 potential jurors, from which the defense and the prosecution alternated with strikes until a petit panel of 12 jurors remained. The defendant in *Swain*, who was himself black, alleged that the prosecutor had used the struck jury system and its numerous peremptory challenges for the purpose of excluding black persons from his petit jury. In finding that no constitutional harm was alleged, the Court in *Swain* sought to reconcile the command of racial neutrality in jury selection with the utility, and the tradition, of peremptory challenges. The Court declined to permit an equal protection claim premised on a pattern of jury strikes in a particular case, but acknowledged that proof of systematic exclusion of black persons through the use of peremptories over a period of time might establish an equal protection violation. *Id.*, at 222–228.

We returned to the problem of a prosecutor's discriminatory use of peremptory challenges in *Batson* v. *Kentucky*. There, we considered a situation similar to the one before us today, but with one exception: Batson, the defendant who complained that black persons were being excluded from his petit jury, was himself black. During the *voir dire* examination of the venire for Batson's trial, the prosecutor used his peremptory challenges to strike all four black persons on the venire, resulting in a petit jury composed only of white persons. Batson's counsel moved without success to discharge the jury before it was empaneled on the ground that the prosecutor's removal of black venirepersons violated his rights under the Sixth and Fourteenth Amendments. Relying upon the Equal Protection Clause alone, we overruled *Swain* to the extent it foreclosed objections to the discriminatory use of peremptories in the course of a specific trial. 476 U. S., at 90–93. In *Batson* we held that a defendant can raise an equal protection challenge to the use of peremptories at his own trial by showing that the prosecutor used them for the purpose of excluding members of the defendant's race. *Id.*, at 96.

The State contends that our holding in the case now before us must be limited to the circumstances prevailing in *Batson* and that in equal protection analysis the race of the objecting defendant constitutes a relevant precondition for a *Batson* challenge. Because Powers is white, the State argues, he cannot object to the exclusion of black prospective jurors. This limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.

In *Batson*, we spoke of the harm caused when a defendant is tried by a tribunal from which members of his own race have been excluded. But we did not limit our discussion in *Batson* to that one aspect of the harm caused by the violation. *Batson* "was designed 'to serve multiple ends,'" only one of which was to protect individual defendants from discrimination in the selection of jurors. *Allen* v. *Hardy*, 478 U. S. 255, 259 (1986) *(per curiam)* (quoting *Brown* v. *Louisiana*, 447 U. S. 323, 329 (1980)). *Batson* recognized that a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large. 476 U. S., at 87.

The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system. See *Duncan* v. *Louisiana*, 391 U. S. 145, 147–158 (1968). In *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), Chief Justice Taft wrote for the Court:

> "The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse." *Id.*, at 310.

And, over 150 years ago, Alexis de Tocqueville remarked:

> "[T]he institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society.
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> . . . . . .
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> ". . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
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> . . . . . .
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> "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ." 1 Democracy in America 334–337 (Schocken 1st ed. 1961).

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people. See *Green* v. *United States*, 356 U. S. 165, 215 (1958) (Black, J., dissenting). It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law." *Duncan*, *supra*, at 187 (Harlan, J., dissenting). Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

While States may prescribe relevant qualifications for their jurors, see *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320, 332 (1970), a member of the community may not be excluded from jury service on account of his or her race. See *Batson*, *supra*, at 84; *Swain*, 380 U. S., at 203–204; *Carter*, *supra*, at 329–330; *Thiel* v. *Southern Pacific Co.*, 328 U. S.

217, 220–221 (1946); *Neal* v. *Delaware*, 103 U. S. 370, 386 (1881); *Strauder*, 100 U. S., at 308. "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." *Carter*, *supra*, at 330. Over a century ago, we recognized that:

> "The very fact that [members of a particular race] are singled out and expressly denied . . . all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Strauder*, *supra*, at 308.

Discrimination in the jury selection process is the subject of a federal criminal prohibition, and has been since Congress enacted the Civil Rights Act of 1875. The prohibition has been codified at 18 U. S. C. § 243, which provides:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

In *Peters* v. *Kiff*, 407 U. S. 493 (1972), JUSTICE WHITE spoke of "the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment." *Id.*, at 507 (opinion concurring in judgment). The Court permitted a white defendant to challenge the systematic exclusion of

black persons from grand and petit juries. While *Peters* did not produce a single majority opinion, six of the Justices agreed that racial discrimination in the jury selection process cannot be tolerated and that the race of the defendant has no relevance to his or her standing to raise the claim. See *id.*, at 504–505 (opinion of MARSHALL, J.); *id.*, at 506–507 (WHITE, J., concurring in judgment).

Racial discrimination in the selection of jurors in the context of an individual trial violates these same prohibitions. A State "may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process.'" *Batson*, 476 U. S., at 88 (quoting *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953)). We so held in *Batson*, and reaffirmed that holding in *Holland*. See 493 U. S., at 479. In *Holland*, the Court held that a defendant could not rely on the Sixth Amendment to object to the exclusion of members of any distinctive group at the peremptory challenge stage. We noted that the peremptory challenge procedure has acceptance in our legal tradition. See *id.*, at 481. On this reasoning we declined to permit an objection to the peremptory challenge of a juror on racial grounds as a Sixth Amendment matter. As the *Holland* Court made explicit, however, racial exclusion of prospective jurors violates the overriding command of the Equal Protection Clause, and "race-based exclusion is no more permissible at the individual petit jury stage than at the venire stage." *Id.*, at 479.

We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence. "A person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, *supra*, at 87 (quoting *Thiel* v. *Southern Pacific Co.*, *supra*, at 227 (Frankfurter, J., dissenting)). We may not accept as a defense to racial discrimination the very stereotype the law condemns.

We reject as well the view that race-based peremptory challenges survive equal protection scrutiny because members of all races are subject to like treatment, which is to say that white jurors are subject to the same risk of peremptory challenges based on race as are all other jurors. The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). This idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving* v. *Virginia*, 388 U. S. 1 (1967).

III

We must consider whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of these principles. In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. *Department of Labor* v. *Triplett*, 494 U. S. 715, 720 (1990); *Singleton* v. *Wulff*, 428 U. S. 106 (1976). This fundamental restriction on our authority admits of certain, limited exceptions. We have recognized the right of litigants to bring actions on behalf of

third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *id.*, at 112; the litigant must have a close relation to the third party, *id.*, at 113–114; and there must exist some hindrance to the third party's ability to protect his or her own interests. *Id.*, at 115–116. See also *Craig* v. *Boren*, 429 U. S. 190 (1976). These criteria have been satisfied in cases where we have permitted criminal defendants to challenge their convictions by raising the rights of third parties. See, *e. g.*, *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); see also *McGowan* v. *Maryland*, 366 U. S. 420 (1961). By similar reasoning, we have permitted litigants to raise third-party rights in order to prevent possible future prosecution. See, *e. g.*, *Doe* v. *Bolton*, 410 U. S. 179 (1973).

The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. See *Allen* v. *Hardy*, 478 U. S., at 259 (recognizing a defendant's interest in "neutral jury selection procedures"). This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," *Rose* v. *Mitchell*, 443 U. S. 545, 556 (1979), and places the fairness of a criminal proceeding in doubt.

The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. *Batson*, 476 U. S., at 86. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, *Rosales-Lopez* v. *United States*, 451 U. S. 182, 188 (1981);

Ham v. *South Carolina*, 409 U. S. 524 (1973); *Dennis* v. *United States*, 339 U. S. 162 (1950), or predisposition about the defendant's culpability, *Irvin* v. *Dowd*, 366 U. S. 717 (1961)." *Gomez* v. *United States*, 490 U. S. 858, 873 (1989). Active discrimination by a prosecutor during this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. The cynicism may be aggravated if race is implicated in the trial, either in a direct way as with an alleged racial motivation of the defendant or a victim, or in some more subtle manner as by casting doubt upon the credibility or dignity of a witness, or even upon the standing or due regard of an attorney who appears in the cause.

Unlike the instances where a defendant seeks to object to the introduction of evidence obtained illegally from a third party, see, *e. g.*, *United States* v. *Payner*, 447 U. S. 727 (1980), here petitioner alleges that the primary constitutional violation occurred during the trial itself. A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the "jurors' first introduction to the substantive factual and legal issues in a case." *Gomez*, *supra*, at 874. The influence of the *voir dire* process may persist through the whole course of the trial proceedings. *Ibid.* If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means. The composition of the

trier of fact itself is called in question, and the irregularity may pervade all the proceedings that follow.

The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

We noted in *Singleton* that in certain circumstances "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." 428 U. S., at 115. Here, the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases. See, *e. g.*, *Griswold* v. *Connecticut*, *supra* (Planned Parenthood official and a licensed physician can raise the constitutional rights of contraceptive users with whom they had professional relationships); *Craig*, *supra* (licensed beer vendor has standing to raise the equal protection claim of a male customer challenging a statutory scheme prohibiting the sale of beer to males under the age of 21 and to females under the age of 18); *Department of Labor* v. *Triplett*, 494 U. S. 715 (1990) (attorney may challenge an attorney's fees restriction by asserting the due process rights of the client). *Voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to the sentencing as well.

Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom. A venireperson excluded from jury service because of race suffers a profound personal humiliation height-

ened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights. Petitioner has much at stake in proving that his jury was improperly constituted due to an equal protection violation, for we have recognized that discrimination in the jury selection process may lead to the reversal of a conviction. See *Batson*, 476 U. S., at 100; *Vasquez* v. *Hillery*, 474 U. S. 254, 264 (1986); *Rose* v. *Mitchell*, 443 U. S., at 551; *Cassell* v. *Texas*, 339 U. S. 282 (1950). Thus, "'there seems little loss in terms of effective advocacy from allowing [the assertion of this claim] by' the present *jus tertii* champion." *Craig*, 429 U. S., at 194 (quoting *Singleton*, *supra*, at 118).

The final inquiry in our third-party standing analysis involves the likelihood and ability of the third parties, the excluded venirepersons, to assert their own rights. See *Singleton*, *supra*, at 115–116. We have held that individual jurors subjected to racial exclusion have the legal right to bring suit on their own behalf. *Carter*, 396 U. S., at 329–330. As a practical matter, however, these challenges are rare. See Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 193–195 (1989). Indeed, it took nearly a century after the Fourteenth Amendment and the Civil Rights Act of 1875 came into being for the first such case to reach this Court. See *Carter*, *supra*, at 320.

The barriers to a suit by an excluded juror are daunting. Potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges.

Unlike a challenge to systematic practices of the jury clerk and commissioners such as we considered in *Carter*, it would be difficult for an individual juror to show a likelihood that discrimination against him at the *voir dire* stage will recur. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 105–110 (1983). And, there exist considerable practical barriers to suit by the excluded juror because of the small financial stake involved and the economic burdens of litigation. See *Vasquez*, *supra*, at 262, n. 5; *Rose* v. *Mitchell*, *supra*, at 558. The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights. See *Barrows* v. *Jackson*, 346 U. S. 249, 257 (1953).

We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race. In so doing, we once again decline "to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice." *Cassell* v. *Texas*, *supra*, at 290 (Frankfurter, J., concurring in judgment). To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service. In *Holland* and *Batson*, we spoke of the significant role peremptory challenges play in our trial procedures, but we noted also that the utility of the peremptory challenge system must be accommodated to the command of racial neutrality. *Holland*, 493 U. S., at 486–487; *Batson*, *supra*, at 98–99.

The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. *Rose* v. *Mitchell*, *supra*, at 555. We have held, for example, that prosecutorial discretion cannot be exercised on the basis of race, *Wayte* v. *United States*, 470 U. S. 598, 608 (1985), and that, where racial bias is likely to influence a jury, an inquiry must be made into such bias. *Ristaino* v. *Ross*, 424 U. S.

589, 596 (1976); see also *Turner* v. *Murray*, 476 U. S. 28 (1986). The statutory prohibition on discrimination in the selection of jurors, 18 U. S. C. § 243, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition. See *Peters* v. *Kiff*, 407 U. S., at 507 (WHITE, J., concurring in judgment); see also *id.*, at 505 (opinion of MARSHALL, J.).

The emphasis in *Batson* on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges. Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. But to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms.

It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice. In this case, the State concedes that, if we find the petitioner has standing to object to the prosecution's use of the peremptory challenges, the case should be remanded. We find that petitioner does have standing. The judgment is reversed, and the case is remanded for further proceedings not inconsistent with our opinion.

It is so ordered.

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

Since in my view today's decision contradicts well-established law in the area of equal protection and of standing, I respectfully dissent.

I

The Court portrays its holding as merely the logical application of our prior jurisprudence concerning equal protection challenges to criminal convictions. It is far from that.

Over a century ago, in *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), we held that a statute barring blacks from service on grand or petit juries denied equal protection of the laws to a black man convicted of murder by an all-white jury. Interpreting the recently enacted Fourteenth Amendment, we concluded that the statute violated the black defendant's equal protection right for the following reason:

> "It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?" *Id.*, at 309.

It was not suggested in *Strauder*, and I am sure it was quite unthinkable, that a *white* defendant could have had his conviction reversed on the basis of the same statute. The statute did not exclude members of *his* race, and thus did not deprive *him* of the equal protection of the laws.

Since *Strauder*, we have repeatedly invalidated criminal convictions on equal protection grounds where state laws or practices excluded potential jurors from service on the basis of race. See *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Castaneda* v. *Partida*, 430 U. S. 482 (1977); *Alexander* v. *Louisiana*, 405 U. S. 625 (1972); *Sims* v. *Georgia*, 389 U. S. 404 (1967) *(per curiam)*; *Jones* v. *Georgia*, 389 U. S. 24 (1967) *(per curiam)*; *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964) *(per curiam)*; *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Williams* v. *Georgia*, 349 U. S. 375 (1955); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Hale* v. *Kentucky*, 303 U. S. 613 (1938) *(per curiam)*; *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935) *(per curiam)*; *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Bush* v. *Kentucky*, 107 U. S. 110 (1883); *Neal* v. *Delaware*, 103 U. S. 370 (1881). In *all* these cases, the basis for our decision was that the State had violated the *defendant*'s right to equal protection, because it had excluded jurors of *his* race. As we said in *Carter* v. *Texas:* "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied *to him*, contrary to the Fourteenth Amendment of the Constitution of the United States." 177 U. S., at 447 (emphasis added).

Twenty-six years ago, in *Swain* v. *Alabama*, 380 U. S. 202 (1965), we first considered an equal protection claim against peremptory challenges by the prosecution. In that case, a

black man had been convicted and sentenced to death by an all-white jury, the prosecutor having peremptorily struck six prospective black jurors from the venire. We rejected the defendant's equal protection claim. Our opinion set forth at length the "very old credentials" of the peremptory challenge, *id.*, at 212, see *id.*, at 212–219, discussed the reasons for the "long and widely held belief" that it is "a necessary part of trial by jury," *id.*, at 219, see *id.*, at 219–221, and observed that it is "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty," *id.*, at 220. To accept petitioner's equal protection claim, we said, "would establish a rule wholly at odds with the peremptory challenge system as we know it," *id.*, at 222, a system in which "Negro and white, Protestant and Catholic, are alike subject to being challenged without cause," *id.*, at 221. But while permitting race-based challenges for the traditional purpose of eliminating "irrational . . . suspicions and antagonisms," *id.*, at 224, "related to the case [the prosecutor] is trying, the particular defendant involved and the particular crime charged," *id.*, at 223, we strongly suggested that it would violate the Equal Protection Clause to use race-based challenges as a surrogate for segregated jury lists, employing them "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim," *ibid.*, in order to "deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population," *id.*, at 224.

Five years ago we revisited the issue, and overruled *Swain*. In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), we held that "a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*," *id.*, at 95 (emphasis in original), whereupon the prosecution would be required to justify its strikes on race-neutral

grounds. *Batson*, however, like all our other cases upholding an equal protection challenge to the composition of criminal juries, referred to—indeed, it *emphasized*—the necessity of racial identity between the defendant and the excluded jurors. "[T]he defendant," we said, "first must show that *he is a member of a cognizable racial group*, and that the prosecutor has exercised peremptory challenges to remove from the venire *members of the defendant's race*." *Id.*, at 96 (emphasis added; citation omitted). This requirement was repeated several times. "The defendant initially must show that *he* is a member of a racial group capable of being singled out for differential treatment." *Id.*, at 94 (emphasis added). "The Equal Protection Clause guarantees the defendant that the State will not exclude members of *his race* from the jury venire on account of race." *Id.*, at 86 (emphasis added). JUSTICE WHITE, concurring, concluded that the abandonment of *Swain* was justified because "[i]t appears . . . that the practice of peremptorily eliminating blacks from petit juries *in cases with black defendants* remains widespread, so much so that I agree that an opportunity to inquire should be afforded when this occurs." *Id.*, at 101 (emphasis added). Today's opinion for the Court is correct in noting that *Batson* asserted that "a prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large," *ante*, at 406. But there is no contradiction, and *Batson* obviously saw none, between that proposition and the longstanding and reiterated principle that no defendant except one *of the same race as the excluded juror* is deprived of equal protection of the laws.

On only two occasions in the past have we considered claims by a criminal defendant of one race that the prosecution had discriminated against prospective jurors of another race. Last Term, in *Holland* v. *Illinois*, 493 U. S. 474 (1990), we held that the prosecution's use of peremptory strikes against black jurors did not deprive a white defendant of his Sixth Amendment right to an impartial jury. No

equal protection claim was made in that case. Such a claim was made, however, in *Peters* v. *Kiff*, 407 U. S. 493 (1972). There the petitioner, a white man, contended that the State, through its use of segregated jury lists, had excluded blacks from his grand and petit juries, thus denying him due process and equal protection. The case produced no majority opinion, but it is significant that *no Justice* relied upon the petitioner's equal protection argument. JUSTICE MARSHALL, joined by Justice Douglas and Justice Stewart, asserted that a defendant has a due process right not to be subjected "to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner." *Id.*, at 502. JUSTICE WHITE, joined by Justice Brennan and Justice Powell, concluded that "the strong statutory policy" contained in the 1875 criminal statute prohibiting disqualification from jury service on racial grounds, 18 U. S. C. § 243, entitled the petitioner to challenge the exclusion of blacks from the grand jury that indicted him. 407 U. S., at 507. Chief Justice Burger, joined by JUSTICE BLACKMUN and then-JUSTICE REHNQUIST, contended that there was no basis for assuming that the petitioner had been injured in any way by the alleged discrimination, and noted that "the Court has never intimated that a defendant is the victim of unconstitutional discrimination if he does not claim that members of his own race have been excluded." *Id.*, at 509.

Alexander v. *Louisiana*, 405 U. S. 625 (1972), involved precisely the sort of claim made here, in the context of an alleged denial of equal protection on the basis of sex. In that case, a black male defendant contended that the State's manner of composing its jury lists had excluded blacks and women from his grand jury, thereby denying him equal protection of the laws. We ultimately found it unnecessary to reach his claim regarding the exclusion of women, but only after saying the following:

> "This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong

> constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. . . . [T]here is nothing in past adjudications suggesting that petitioner *himself* has been denied equal protection by the alleged exclusion of women from grand jury service." *Id.*, at 633 (emphasis added).

Similarly, in *Castaneda* v. *Partida*, 430 U. S. 482 (1977), in holding that the respondent had successfully established a prima facie case of discrimination against Mexican-Americans in the selection of grand jurors, we said that "in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of *his race or of the identifiable group to which he belongs*." *Id.*, at 494 (emphasis added).

Thus, both before and after *Batson*, and right down to the release of today's opinion, our jurisprudence contained neither a case holding, nor even a dictum suggesting, that a defendant could raise an equal protection challenge based upon the exclusion of a juror of another race; and our opinions contained a vast body of clear statement to the contrary. We had reaffirmed the point just last Term in *Holland*, *supra*. After quoting the language from *Batson* requiring the defendant to show that he is a member of the racial group alleged to have been removed from the jury, we contrasted the requirements for standing under the Fourteenth Amendment's Equal Protection Clause and the Sixth Amendment: "We have never suggested, however, that such a *requirement of correlation* between the group identification of the defendant and the group identification of excluded venire members is necessary for Sixth Amendment standing. *To the contrary*, our cases hold that the Sixth Amendment entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether

or not the systematically excluded groups are groups to which he himself belongs." 493 U. S., at 477 (emphasis added).

Thus, today's holding cannot be considered in accordance with our prior law. It is a clear departure.

II

In an apparent attempt to portray the question before us as a novel one, the Court devotes a large portion of its opinion to third-party standing—as though that obvious avenue of rendering the Equal Protection Clause applicable had not occurred to us in the many cases discussed above. Granted, the argument goes, that this white defendant has not *himself* been denied equal protection, but he has third-party standing to challenge the denial of equal protection to the stricken black jurors. The Court's discussion of third-party standing is no more faithful to our precedent than its description of our earlier equal protection cases. Before reaching that point, however, there is a prior one: The *first-party* right upon which the Court seeks to *base* third-party standing has not hitherto been held to exist.

All citizens have the equal protection right not to be excluded from *jury service* (*i. e.*, not to be excluded from grand- and petit-jury lists) on the basis of irrelevant factors such as race, *Carter* v. *Jury Comm'n of Greene County*, 396 U. S. 320 (1970), or employment status, cf. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946). As *Swain* suggested, this principle would also prohibit the systematic exclusion of a particular race or occupation from all jury service through peremptory challenges. When a particular group has been singled out in this fashion, its members have been treated *differently*, and have suffered the deprivation of a right and responsibility of citizenship. But when that group, *like all others*, has been made subject to peremptory challenge on the basis of its group characteristic, its members have been treated not differently but the same. In fact, it would con-

stitute discrimination to *exempt* them from the peremptory-strike exposure to which all others are subject. If, for example, men were permitted to be struck but not women, or fundamentalists but not atheists, or blacks but not whites, members of the former groups would plainly be the object of discrimination.

In reply to this, it could be argued that discrimination is not legitimated by being applied, so to speak, indiscriminately; that the unlawfulness of treating one person differently on irrelevant grounds is not erased by subjecting everyone else to the same unlawfulness. The response to this is that the stricken juror has *not* been "treated differently" in the only pertinent sense—that is, in the sense of being deprived of any benefit or subjected to any slight or obloquy. The strike does not deprecate his group, and thereby "stigmatize" his own personality. Unlike the categorical exclusion of a group from jury service, which implies that all its members are incompetent or untrustworthy, a peremptory strike on the basis of group membership implies nothing more than the undeniable reality (upon which the peremptory strike system is largely based) that all groups tend to have particular sympathies and hostilities—most notably, sympathies towards their own group members. Since that reality is acknowledged as to *all* groups, and forms the basis for peremptory strikes as to *all* of them, there is no implied criticism or dishonor to a strike. Nor is the juror who is struck because of his group membership deprived of any benefit. It is obvious, as *Strauder* acknowledged, that a defendant belonging to an identifiable group is benefited by having members of that group on his jury, but it is impossible to understand how a juror is benefited by sitting in judgment of a member of his own group, rather than of another. All qualified citizens have a civic right, of course, to serve as jurors, but none has the right to serve as a juror in a particular case. Otherwise, we would have to permit stricken jurors to complain not only of peremptory challenges that supposedly deny

them equal protection, but also of erroneously allowed challenges for cause.

To affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge. As discussed in *Swain*, "irrelevant" personal characteristics are by definition the basis for using that device; *relevant* characteristics would produce recusal *for cause*. And as *Swain* also pointed out, the irrelevant characteristics relied upon are frequently those that would promptly trigger invalidation in other contexts—not only race, but religion, sex, age, political views, economic status. Not only is it implausible that such a permanent and universal feature of our jury-trial system is unconstitutional, but it is unlikely that its elimination would be desirable. The peremptory challenge system has endured so long because it has unquestionable advantages. As we described in *Holland*, 493 U. S., at 484, it is a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible. In a criminal-law system in which a single biased juror can prevent a deserved conviction or a deserved acquittal, the importance of this device should not be minimized.

Until *Batson*, our jurisprudence affirmed the categorical validity of peremptory strikes so long as they were not used as a substitute for segregated jury lists. *Batson* made an exception, but one that was narrow in principle and hence limited in effect. It announced an equal protection right, not of prospective jurors to be seated without regard to their race, but *of defendants* not to be tried by juries from which members of *their* race have been intentionally excluded. While the opinion refers to "[t]he harm" that "discriminatory jury selection" inflicts upon "the excluded juror," 476 U. S., at 87, that is not a clear recognition, even in dictum, that the excluded juror has his own cause of action—any more than its accompanying reference to the harm inflicted upon "the entire community," *ibid.*, suggests that the entire community

has a cause of action. To the contrary, an independent cause of action on the juror's part is quite incompatible with the opinion's repeated insistence that the stricken juror must be *of the same race* as the defendant. It would be absurd to suppose that a black juror has a right not to be discriminated against, through peremptory strike, in the trial of a black defendant, but not in the trial of a white defendant.

In sum, we have *never* held, or even said, that a juror has an equal protection right not to be excluded from a particular case through peremptory challenge; and the existence of such a right would call into question the continuing existence of a centuries-old system that has important beneficial effects. Thus, even if the Court's discussion of Powers' third-party standing to raise the rights of stricken jurors were correct, it would merely replace the mystery of why *he* has a cause of action with the mystery of why *they* do.

III

In any event, the Court's third-party standing analysis is not correct. The Court fails to establish what we have described as the very first element of third-party standing: the requirement of "injury in fact." See, *e. g.*, *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 623, n. 3 (1989); *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 954–955 (1984). The Court's attempt at constructing an injury in fact to petitioner goes as follows: When the prosecution takes race into account in exercising its peremptory challenges, it "casts doubt on the integrity of the judicial process," and "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law," *ante*, at 411, 412 (internal quotations omitted), as a result of which "[t]he verdict will not be accepted or understood [as fair]," *ante*, at 413. The Court must, of course, speak in terms of the *perception* of fairness rather than its reality, since only last Term we held categorically that the exclusion of members of a particular race from a jury does *not* produce

an unfair jury, and suggested that in some circumstances it may increase fairness. See *Holland*, *supra*, at 480–481. But in any event, how do these alleged perceptions of unfairness, these "castings of doubt" and "invitations to cynicism," establish that the defendant has been injured *in fact?* They plainly do not. Every criminal defendant objecting to the introduction of some piece of evidence or to some trial procedure on the ground that it violates the rights of a third party can claim a similar "perception of unfairness," but we deny standing. "Injury in perception" would seem to be the very *antithesis* of "injury in fact." As the very words suggest, the latter sort of injury must be "distinct *and palpable*," *Warth* v. *Seldin*, 422 U. S. 490, 501 (1975) (emphasis added), "particular *[and] concrete*," *United States* v. *Richardson*, 418 U. S. 166, 177 (1974) (emphasis added), "specific *[and] objective*," *Laird* v. *Tatum*, 408 U. S. 1, 14 (1972) (emphasis added). Today's opinion makes a mockery of that requirement. It does not even pretend that the peremptory challenges here have caused this defendant tangible injury and concrete harm—but rather (with careful selection of both adjectives and nouns) only a "*cognizable* injury," producing a "concrete *interest* in challenging the practice." *Ante*, at 411 (emphasis added). I have no doubt he now has a cognizable injury; the Court has made it true by saying so. And I have no doubt he has a concrete interest in challenging the practice at issue here; he would have a concrete interest in challenging a mispronunciation of one of the jurors' names, if that would overturn his conviction. But none of this has anything to do with injury in fact.

In response, however, it could be asserted that the requirement of injury in fact—and, more specifically, that element of the requirement which demands that the cause-and-effect relationship between the illegality and the alleged harm be *more than speculative*, see *Allen* v. *Wright*, 468 U. S. 737, 750–752 (1984); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 40–46 (1976)—has

never been applied to a litigant's claim of illegality relating to an aspect of criminal or civil procedure. The available concrete injury in such cases, of course, is the conviction or judgment—or more precisely, the punishment that attends the conviction and the economic or other loss that attends the judgment. But courts have never required that injury to be connected with the alleged procedure-related illegality by anything more than speculation. If, for example, one of the elements of criminal due process has been denied, or one of the constitutionally specified attributes of a prosecution has been omitted, we do not require the defendant to establish, by more than speculation, that he would not otherwise have been convicted. To the contrary, standing is accorded, and relief will be granted unless the government can establish beyond a reasonable doubt that the error was harmless. See, *e. g.*, *Rose* v. *Clark*, 478 U. S. 570 (1986).

We do not, however, extend this special treatment of injury in fact in the litigation context to third-party standing. Indeed, we do not even *recognize* third-party standing in the litigation context—that is, permit a civil or criminal litigant to upset an adverse judgment because the process by which it was obtained involved the violation of someone else's rights—even when the *normal* injury-in-fact standard is amply met. If, for example, the *only* evidence supporting a conviction (so that the causality is not remotely speculative) consists of the fruit of a search and seizure that violated a third party's Fourth Amendment rights, we will not permit those rights to be asserted by the defendant. See, *e. g.*, *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *United States* v. *Payner*, 447 U. S. 727 (1980); *Rakas* v. *Illinois*, 439 U. S. 128 (1978). We would reach the same result with respect to reliable evidence obtained in violation of another person's Fifth Amendment right against self-incrimination, cf. *id.*, at 140, n. 8. Likewise (assuming we follow the common law) with respect to evidence introduced in violation of someone else's confidentiality privilege. See, *e. g.*, *Commonwealth* v. *McKenna*,

206 Pa. 317, 322, 213 A. 2d 223, 226 (1965); *Butz* v. *State*, 221 Md. 68, 73, 156 A. 2d 423, 426 (1959); see generally Annot., 2 A. L. R. 2d 645 (1948). These cases can, to be sure, be explained on the basis that the rights in question are "personal," rather than on the basis of lack of third-party standing, but the result comes to the same. It is difficult to accept the proposition that, even though introduction of the fruits of a third party's illegally obtained confession, which unquestionably produces the defendant's conviction, is not a ground for reversal, racial discrimination against a prospective juror, which only speculatively produces the conviction, is. There is, in short, no sound basis for abandoning the normal injury-in-fact requirements applicable to third-party standing, and supplanting them with an "interest in challenging the practice" standard, simply because a trial-related violation is at issue. If anything, that consideration should lead to the conclusion that there is no third-party standing at all.

IV

Last Term, in *Holland*, we noted that "[t]he tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, . . . was recognized in an opinion by Justice Story to be part of the common law of the United States, . . . and has endured through two centuries in all the States. . . ." 493 U. S., at 481. We concluded from this that "[a]ny theory of the Sixth Amendment leading to [the] result" that "each side may not . . . use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side" is "implausible." *Ibid.* What is true with respect to the Sixth Amendment is true with respect to the Equal Protection Clause as well.

Batson was, as noted earlier, a clear departure from our jurisprudence, and the precise scope of the exception it has

created remains to be determined. It is unclear, for example, whether it applies to government peremptories in civil cases; whether it applies to peremptories by parties other than the government; and whether it applies to peremptories based on the defendant's sex, religion, age, economic status and *any other* personal characteristic unrelated to the capacity for responsible jury service. All these extensions are arguably within the logic of the decision. This case, however, involves not a clarification of *Batson*, but the creation of an additional, *ultra-Batson* departure from established law. Petitioner seeks not some further elaboration of the right to have his racial identity disregarded in the selection of his jury, but rather the announcement of a new right to have his jury immune from the exclusion of people of *any* race; or the announcement of a new power to assert a new right of jurors never to be excluded from any jury on the basis of their race. Not only does this exceed the rationale of *Batson*, but it exceeds *Batson*'s emotional and symbolic justification as well. Notwithstanding history, precedent, and the significant benefits of the peremptory-challenge system, it is intolerably offensive for the State to imprison a person on the basis of a conviction rendered by a jury from which members of that person's minority race were carefully excluded. I am unmoved, however, and I think most Americans would be, by this white defendant's complaint that he was sought to be tried by an all-white jury, or that he should be permitted to press black jurors' unlodged complaint that they were not allowed to sit in judgment of him.

The Court's decision today is unprecedented in law, but not in approach. It is a reprise, so to speak, of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), in that the Court uses its key to the jailhouse door not to free the arguably innocent, but to threaten release upon the society of the unquestionably guilty unless law enforcement officers take certain steps that the Court newly announces to be required by law. It goes beyond *Miranda*, however, in that there, at least, the man-

dated steps related to the defendant's own rights, if not to his guilt. Here they relate to neither. The sum and substance of the Court's lengthy analysis is that, since a denial of equal protection to other people occurred at the defendant's trial, though it did not affect the fairness of that trial, the defendant must go free. Even if I agreed that the exercise of peremptory strikes constitutes unlawful discrimination (which I do not), I would not understand why the release of a convicted murderer who has not been harmed by those strikes is an appropriate remedy.

Judging from the Court's opinion, we can expect further, wide-ranging use of the jailhouse key to combat discrimination. Convictions are to be overturned, apparently, *whenever* "race is implicated in the trial"—"by casting doubt upon the credibility or dignity of a witness, or . . . upon the standing or due regard of an attorney who appears in the cause," or even by suggesting "an alleged racial motivation of the defendant or a victim." *Ante*, at 412. To me this makes no sense. Lofty aims do not justify every step intended to achieve them. Today's supposed blow against racism, while enormously self-satisfying, is unmeasured and misdirected. If for any reason the State is unable to reconvict Powers for the double murder at issue here, later victims may pay the price for our extravagance. Even if such a tragedy, in this or any case, never occurs, the prosecutorial efforts devoted to retrials will necessarily be withheld from other endeavors, as will the prosecutorial efforts devoted to meeting the innumerable *Powers* claims that defendants of all races can be relied upon to present—again with the result that crime goes unpunished and criminals go free.

I respectfully dissent.

KAY *v.* EHRLER ET AL.

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

No. 90–79. Argued February 25, 1991—Decided April 16, 1991

After respondent Kentucky Board of Elections denied petitioner Kay's request to have his name placed on a primary ballot for President of the United States, Kay, an attorney licensed to practice in Florida, filed a civil rights action on his own behalf in the District Court, challenging the constitutionality of the state statute on which the Board relied. Although he prevailed on the merits, the court denied his request for attorney's fees under 42 U. S. C. § 1988, and the Court of Appeals affirmed.

Held: A *pro se* litigant who is also a lawyer may not be awarded attorney's fees under § 1988. Neither § 1988's text nor its legislative history provides a clear answer to the question whether a lawyer who represents himself should be treated like a client who has an independent attorney or like other *pro se* litigants, who, the Courts of Appeals have correctly decided, are not entitled to attorney's fees. However, § 1988's overriding concern is with obtaining independent counsel for victims of civil rights violations in order to ensure the effective prosecution of meritorious claims. That policy is best served by a rule that creates an incentive to retain counsel in every case rather than a disincentive to employ counsel whenever a plaintiff considers himself competent to litigate on his own behalf. Even a skilled lawyer who represents himself is at a disadvantage in contested litigation because ethical considerations may make it inappropriate for him to appear as a witness, and because he is deprived of the judgment of an independent third party during the litigation. Pp. 435–438.

900 F. 2d 967, affirmed.

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

Timothy B. Dyk argued the cause for petitioner. With him on the briefs were *Robert H. Klonoff* and *Richard B. Kay, pro se.*

Ann M. Sheadel, Assistant Attorney General of Kentucky, argued the cause for respondents. With her on the brief was *Frederic J. Cowan,* Attorney General.

Robert A. Long, Jr., argued the cause for the United States as *amicus curiae* urging affirmance. With him on

the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Leonard Schaitman*, and *Marc Richman*.*

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney who represents himself in a successful civil rights action may be awarded "a reasonable attorney's fee as part of the costs" under 42 U. S. C. § 1988.[1]

Petitioner is licensed to practice law in Florida. In 1980, he requested the Kentucky Board of Elections (Board) to place his name on the Democratic Party's primary ballot for the office of President of the United States. Because the members of the Board concluded that he was not a candidate who was "generally advocated and nationally recognized" within the meaning of the controlling Kentucky statute, Ky.

**Brian Wolfman* and *Alan B. Morrison* filed a brief for Public Citizen as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Hawaii et al. by *Warren Price III*, Attorney General of Hawaii, and *Girard D. Lau* and *Steven S. Michaels*, Deputy Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Charles E. Cole*, Attorney General of Alaska, *Ron Fields*, Attorney General of Arkansas, and *Mary B. Stallcup*, First Assistant Attorney General, *Charles M. Oberly III*, Attorney General of Delaware, *Bob Butterworth*, Attorney General of Florida, *James T. Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Thomas J. Miller*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Frank J. Kelley*, Attorney General of Michigan, *William L. Webster*, Attorney General of Missouri, *Robert J. Del Tufo*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Ernest Preate*, Attorney General of Pennsylvania, *Travis Medlock*, Attorney General of South Carolina, *R. Paul Van Dam*, Attorney General of Utah, *Jeffrey L. Amestoy*, Attorney General of Vermont, *Mary Sue Terry*, Attorney General of Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming.

[1] The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, as amended, 42 U. S. C. § 1988.

Rev. Stat. Ann. § 118.580 (Michie 1982) (repealed in 1982), the Board refused his request.

Petitioner filed a successful action on his own behalf in the District Court, challenging the constitutionality of the Kentucky statute. *Kay* v. *Mills*, 490 F. Supp. 844, 852–853 (ED Ky. 1980). The District Court held that the statute was invalid and entered an injunction requiring that petitioner's name appear on the ballot. *Id.*, at 855. Two years later, the Kentucky General Assembly repealed the statute. In 1986, however, it enacted an identically worded statute, Ky. Rev. Stat. Ann. § 118.581 (Michie 1982 and Supp. 1988). In 1987, petitioner again requested that his name appear on the primary ballot, and when the Board initially refused his request, petitioner again brought suit in the District Court, and prevailed.[2] This time, however, he requested a fee award under 42 U. S. C. § 1988.[3]

The District Court denied petitioner's request for attorney's fees under § 1988 based on *Falcone* v. *IRS*, 714 F. 2d 646 (CA6 1983), cert. denied, 466 U. S. 908 (1984).[4] App.

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[2] When the Board determined that petitioner was the same person who had successfully challenged Kentucky's primary election law in 1980, the Board added petitioner's name to the ballot. The Magistrate found that the case was not moot at that point because "[t]he laws in question remain on the books and the problem posed for voters and future candidates, including the [petitioner], remains unsolved without action." App. to Pet. for Cert. 20a–21a (citation omitted).

[3] Petitioner requested both costs and an attorney's fee and was awarded the former, but not the latter. Only the attorney's fee is at issue before us.

[4] In *Falcone*, the Court of Appeals declined to award attorney's fees to a *pro se* attorney in a successful action under the Freedom of Information Act (FOIA), 5 U. S. C. § 552. The Court of Appeals reasoned that attorney's fees in FOIA actions were inappropriate because the award was intended "to relieve plaintiffs with legitimate claims of the burden of legal costs" and "to encourage potential claimants to seek legal advice before commencing litigation." 714 F. 2d, at 647. The court relied on the fact that "[a]n attorney who represents himself in litigation may have the necessary legal expertise but is unlikely to have the 'detached and objective

to Pet. for Cert. 14a. The United States Court of Appeals for the Sixth Circuit affirmed. 900 F. 2d 967 (1990). The majority read the language of the statute as assuming the existence of "a paying relationship between an attorney and a client." *Id.*, at 971. Moreover, it concluded that the purpose of the statute was best served when a plaintiff hired an objective attorney—rather than serving as both claimant and advocate—to provide a "filtering of meritless claims." *Ibid.* The dissenting judge emphasized the statutory goals of promoting lawsuits that protect civil rights and relieving the prevailing party of the burdens of litigation. *Id.*, at 972–973.

We granted certiorari, 498 U. S. 807 (1990), to resolve the conflict among the Circuits on the question whether a *pro se* litigant who is also a lawyer may be awarded attorney's fees under § 1988. The Circuits are in agreement, however, on the proposition that a *pro se* litigant who is *not* a lawyer is *not* entitled to attorney's fees.[5] Petitioner does not disagree with these cases, see Brief for Petitioner 9, n. 4, and we are also satisfied that they were correctly decided. The question then is whether a lawyer who represents himself should be treated like other *pro se* litigants or like a client who has had the benefit of the advice and advocacy of an independent attorney.

We do not think either the text of the statute or its legislative history provides a clear answer. On the one hand, petitioner is an "attorney," and has obviously handled his professional responsibilities in this case in a competent manner. On the other hand, the word "attorney" assumes an agency

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perspective' necessary to fulfill the aims of the Act." *Ibid.* (citation omitted).

[5] See, *e. g.*, *Gonzalez* v. *Kangas*, 814 F. 2d 1411 (CA9 1987); *Smith* v. *DeBartoli*, 769 F. 2d 451, 453 (CA7 1985), cert. denied, 475 U. S. 1067 (1986); *Turman* v. *Tuttle*, 711 F. 2d 148 (CA10 1983) *(per curiam)*; *Owens-El* v. *Robinson*, 694 F. 2d 941 (CA3 1982); *Wright* v. *Crowell*, 674 F. 2d 521 (CA6 1982) *(per curiam)*; *Cofield* v. *Atlanta*, 648 F. 2d 986, 987–988 (CA5 1981); *Lovell* v. *Snow*, 637 F. 2d 170 (CA1 1981); *Davis* v. *Parratt*, 608 F. 2d 717 (CA8 1979) *(per curiam)*.

relationship,[6] and it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988.[7] Although this section was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in vindicating their rights.[8]

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[6] The definition of the word "attorney" in Webster's Dictionary reads as follows:

"[O]ne who is legally appointed by another to transact business for him; *specif:* a legal agent qualified to act for suitors and defendants in legal proceedings." Webster's New Collegiate Dictionary 73 (1975).

Other dictionaries, both popular and specialized, also emphasize the agency relationship between an attorney and his client in their definitions of "attorney." See, *e. g.*, American Heritage Dictionary 140 (Second College ed. 1982) ("A person legally appointed to act for another, esp. an attorney at law"); Black's Law Dictionary 128 (6th ed. 1990) ("[A]n agent or substitute, or one who is appointed and authorized to act in the place or stead of another. An agent, or one acting on behalf of another"); 1 Compact Edition of the Oxford English Dictionary 553 (1981 ed.) ("One appointed or ordained to act for another; an agent, deputy, commissioner").

[7] Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship.

[8] Both the Senate and House Reports explain that the attorney's fee provision was intended to give citizens access to legal assistance so that they could enforce their civil rights:

"In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94–1011, p. 2 (1976).

The House Report, accompanying a bill that was similar in wording to the enacted Senate bill, expressed the same concern:

"Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In

In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Even a skilled lawyer who represents himself is at a disadvantage in contested litigation. Ethical considerations may make it inappropriate for him to appear as a witness.[9] He is deprived of the judgment of an independent third party in framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining hostile witnesses, formulating legal arguments, and in making sure that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. The

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authorizing an award of reasonable attorney's fees, [this bill] is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law." H. R. Rep. No. 94–1558, p. 1 (1976).

In their hearings, both Senate and House Subcommittees focused on the need of average citizens to be able to afford lawyers so that they could protect their rights in court. See, *e. g.*, Legal Fees, Hearings before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., pp. 1–2, 3–4, 273 (1973) (addressing question whether coal miners were receiving adequate legal coverage); *id.*, at 466, 470–471, 505–509, 515 (addressing question whether veterans were denied legal assistance by $10 contingent fee); *id.*, at 789, 808–810 (Indians' access to lawyers); *id.*, at 1127, 1253–1254 (average citizen cannot afford attorney); Awarding of Attorneys' Fees, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., pp. 60, 189, 192, 254–256, 292, 328 (1975) (private citizens needed fee-shifting provisions to be made whole again).

[9] The ABA Model Code of Professional Responsibility (1977) describes the potential conflict:

"The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively." EC 5–9.

adage that "a lawyer who represents himself has a fool for a client" is the product of years of experience by seasoned litigators.

A rule that authorizes awards of counsel fees to *pro se* litigants—even if limited to those who are members of the bar—would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Syllabus

LEATHERS, COMMISSIONER OF REVENUES OF ARKANSAS *v.* MEDLOCK ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 90–29. Argued January 9, 1991—Decided April 16, 1991*

Arkansas' Gross Receipts Act imposes a tax on receipts from the sale of all tangible personal property and specified services, but expressly exempts, *inter alia*, certain receipts from newspaper and magazine sales. In 1987, Act 188 amended the Gross Receipts Act to impose the tax on cable television. Petitioners in No. 90–38, a cable television subscriber, a cable operator, and a cable trade organization (cable petitioners), brought this class action in the State Chancery Court, contending that their expressive rights under the First Amendment and their rights under the Equal Protection Clause of the Fourteenth Amendment were violated by the extension of the tax to cable services, the exemption from the tax of newspapers and magazines, and the exclusion from the list of services subject to the tax of scrambled satellite broadcast television services to home dish-antennae owners. In 1989, shortly after the Chancery Court upheld the constitutionality of Act 188, Arkansas adopted Act 769, which extended the tax to, among other things, all television services to paying customers. On appeal, the State Supreme Court held that the tax was not invalid after the passage of Act 769 because the Constitution does not prohibit the differential taxation of different media. However, believing that the First Amendment does prohibit discriminatory taxation among members of the same medium, and that cable and scrambled satellite television services were "substantially the same," the Supreme Court held that the tax was unconstitutional for the period during which it applied to cable but not satellite broadcast services.

Held:

1. Arkansas' extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment. Pp. 444–453.

(a) Although cable television, which provides news, information, and entertainment to its subscribers, is engaged in "speech" and is part of the "press" in much of its operation, the fact that it is taxed differently from other media does not by itself raise First Amendment concerns.

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*Together with No. 90–38, *Medlock et al.* v. *Leathers, Commissioner of Revenues of Arkansas, et al.*, also on certiorari to the same court.

The Arkansas tax presents none of the First Amendment difficulties that have led this Court to strike down differential taxation of speakers. See, *e. g.*, *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221. It is a tax of general applicability covering all tangible personal property and a broad range of services and, thus, does not single out the press and thereby threaten to hinder it as a watchdog of government activity. Furthermore, there is no indication that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities, nor is the tax structured so as to raise suspicion that it was intended to do so. Arkansas has not selected a small group of speakers to bear fully the burden of the tax, since, even if the State Supreme Court's finding that cable and satellite television are the same medium is accepted, Act 188 extended the tax uniformly to the approximately 100 cable systems then operating in the State. Finally, the tax is not content based, since there is nothing in the statute's language that refers to the content of mass media communications, and since the record contains no evidence that the variety of programming cable television offers subscribers differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines. Pp. 444–449.

(b) Thus, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated their First Amendment rights. See *Arkansas Writers'*, *supra*, at 233. This Court's decisions do not support their argument that such a basis exists here because the tax discriminates among media and discriminated for a time within a medium. Taken together, cases such as *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. Nothing about Arkansas' choice to exclude or exempt certain media from its tax has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in the record indicate that this broad-based, content-neutral tax is likely to stifle the free exchange of ideas. Pp. 449–453.

2. The question whether Arkansas' temporary tax distinction between cable and satellite services violated the Equal Protection Clause must be addressed by the State Supreme Court on remand. P. 453.

301 Ark. 483, 785 S. W. 2d 202, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 454.

William E. Keadle argued the cause for petitioner in No. 90–29 and respondents in No. 90–38. With him on the briefs was *Larry D. Vaught*.

Eugene G. Sayre argued the cause and filed briefs for petitioners in No. 90–38 and respondents in No. 90–29.†

JUSTICE O'CONNOR delivered the opinion of the Court.

These consolidated cases require us to consider the constitutionality of a state sales tax that excludes or exempts certain segments of the media but not others.

I

Arkansas' Gross Receipts Act imposes a 4% tax on receipts from the sale of all tangible personal property and specified services. Ark. Code Ann. §§ 26–52–301, 26–52–302 (1987 and Supp. 1989). The Act exempts from the tax certain sales of goods and services. § 26–52–401 (Supp. 1989). Counties

†Briefs of *amici curiae* urging reversal were filed for Dow Jones & Co., Inc., by *Richard J. Tofel* and *Robert D. Sack;* for the Indiana Cable Television Association Inc. by *D. Craig Martin;* and for the National Cable Television Association, Inc., by *H. Bartow Farr III, Richard G. Taranto, Brenda L. Fox*, and *Michael S. Schooler*.

Briefs of *amici curiae* urging affirmance were filed for the City of Los Angeles, California, et al., by *Larrine S. Holbrooke, William R. Malone, Edward J. Perez*, and *Barry A. Lindahl;* and for the City of New York et al. by *Robert Alan Garrett*.

Briefs of *amici curiae* were filed for Cablevision Industries Corp. et al. by *Brent N. Rushforth;* for the California Cable Television Association by *Frank W. Lloyd III, Diane B. Burstein*, and *Alan J. Gardner;* for Century Communications Corp. et al. by *John P. Cole, Jr.*, and *Wesley R. Heppler;* for the Competitive Cable Association et al. by *Harold R. Farrow, Sol Schildhause*, and *Robert M. Bramson;* for Greater Media Cablevision, Inc., by *Robert H. Louis* and *Salvatore M. DeBunda;* and for the National Association of Broadcasters et al. by *Jack N. Goodman* and *James J. Popham*.

within Arkansas impose a 1% tax on all goods and services subject to taxation under the Gross Receipts Act, §§ 26–74–307, 26–74–222 (1987 and Supp. 1989), and cities may impose a further ½% or 1% tax on these items, § 26–75–307 (1987).

The Gross Receipts Act expressly exempts receipts from subscription and over-the-counter newspaper sales and subscription magazine sales. See §§ 26–52–401(4), (14) (Supp. 1989); Revenue Policy Statement 1988–1 (Mar. 10, 1988), reprinted in CCH Ark. Tax Rep. ¶ 69–415. Before 1987, the Act did not list among those services subject to the sales tax either cable television[1] or scrambled satellite broadcast television services to home dish-antennae owners.[2] See § 26–52–301 (1987). In 1987, Arkansas adopted Act 188, which amended the Gross Receipts Act to impose the sales tax on cable television. 1987 Ark. Gen. Acts, No. 188, § 1.

Daniel L. Medlock, a cable television subscriber, Community Communications Co., a cable television operator, and the Arkansas Cable Television Association, Inc., a trade organization composed of approximately 80 cable operators with systems throughout the State (cable petitioners), brought this class action in the Arkansas Chancery Court to challenge the extension of the sales tax to cable television services. Cable petitioners contended that their expressive activities are protected by the First Amendment and are comparable to those of newspapers, magazines, and scrambled satellite broadcast television. They argued that Arkansas' sales tax-

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[1] Cable systems receive television, radio, or other signals through antennae located at their so-called "headends." Information gathered in this way, as well as any other material that the system operator wishes to transmit, is then conducted through cables strung over utility poles and through underground conduits to subscribers. See generally D. Brenner, M. Price, & M. Meyerson, Cable Television and Other Nonbroadcast Video: Law and Policy § 1.03 (1989).

[2] Satellite television broadcast services transmit over-the-air "scrambled" signals directly to the satellite dishes of subscribers, who must pay for the right to view the signals. See generally A. Easton & S. Easton, The Complete Sourcebook of Home Satellite TV 57–66 (1988).

ation of cable services, and exemption or exclusion from the tax of newspapers, magazines, and satellite broadcast services, violated their constitutional rights under the First Amendment and under the Equal Protection Clause of the Fourteenth Amendment.

The Chancery Court granted cable petitioners' motion for a preliminary injunction, requiring Arkansas to place in escrow the challenged sales taxes and to keep records identifying collections of the taxes. Both sides introduced extensive testimony and documentary evidence at the hearing on this motion and at the subsequent trial. Following the trial, the Chancery Court concluded that cable television's necessary use of public rights-of-way distinguishes it for constitutional purposes from other media. It therefore upheld the constitutionality of Act 188, dissolved its preliminary injunction, and ordered all funds collected in escrow released.

In 1989, shortly after the Chancery Court issued its decision, Arkansas adopted Act 769, which extended the sales tax to "all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users." 1989 Ark. Gen. Acts, No. 769, § 1. On appeal to the Arkansas Supreme Court, cable petitioners again challenged the State's sales tax on the ground that, notwithstanding Act 769, it continued unconstitutionally to discriminate against cable television. The Supreme Court rejected the claim that the tax was invalid after the passage of Act 769, holding that the Constitution does not prohibit the differential taxation of different media. *Medlock* v. *Pledger*, 301 Ark. 483, 487, 785 S. W. 2d 202, 204 (1990). The court believed, however, that the First Amendment prohibits discriminatory taxation among members of the same medium. On the record before it, the court found that cable television services and satellite broadcast services to home dish-antennae owners were "substantially the same." *Ibid.* The State Supreme Court rejected the Chancery Court's conclusion that cable television's use of public

rights-of-way justified its differential sales tax treatment, explaining that cable operators already paid franchise fees for that right. *Id.*, at 485, 785 S. W. 2d, at 203. It therefore held that Arkansas' sales tax was unconstitutional under the First Amendment for the period during which cable television, but not satellite broadcast services, were subject to the tax. *Id.*, at 487; 785 S. W. 2d, at 204.

Both cable petitioners and the Arkansas Commissioner of Revenues petitioned this Court for certiorari. We consolidated these petitions and granted certiorari, *Pledger* v. *Medlock*, 498 U. S. 809 (1990), in order to resolve the question, left open in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 233 (1987), whether the First Amendment prevents a State from imposing its sales tax on only selected segments of the media.

II

Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment, and is, in much of its operation, part of the "press." See *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986). That it is taxed differently from other media does not by itself, however, raise First Amendment concerns. Our cases have held that a tax that discriminates among speakers is constitutionally suspect only in certain circumstances.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936), the Court considered a First Amendment challenge to a Louisiana law that singled out publications with weekly circulations above 20,000 for a 2% tax on gross receipts from advertising. The tax fell exclusively on 13 newspapers. Four other daily newspapers and 120 weekly newspapers with weekly circulations of less than 20,000 were not taxed. The Court discussed at length the pre-First Amendment English and American tradition of taxes imposed exclusively on the press. This invidious form of censorship was intended to curtail the circulation of newspapers and thereby prevent the

people from acquiring knowledge of government activities. *Id.*, at 246–251. The Court held that the tax at issue in *Grosjean* was of this type and was therefore unconstitutional. *Id.*, at 250.

In *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983), we noted that it was unclear whether the result in *Grosjean* depended on our perception in that case that the State had imposed the tax with the intent to penalize a selected group of newspapers or whether the structure of the tax was sufficient to invalidate it. See 460 U. S., at 580 (citing cases and commentary). *Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds: "Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Id.*, at 592.

At issue in *Minneapolis Star* was a Minnesota special use tax on the cost of paper and ink consumed in the production of publications. The tax exempted the first $100,000 worth of paper and ink consumed annually. Eleven publishers, producing only 14 of the State's 388 paid circulation newspapers, incurred liability under the tax in its first year of operation. The Minneapolis Star & Tribune Co. (Star Tribune) was responsible for roughly two-thirds of the total revenue raised by the tax. The following year, 13 publishers, producing only 16 of the State's 374 paid circulation papers, paid the tax. Again, the Star Tribune bore roughly two-thirds of the tax's burden. We found no evidence of impermissible legislative motive in the case apart from the structure of the tax itself.

We nevertheless held the Minnesota tax unconstitutional for two reasons. First, the tax singled out the press for special treatment. We noted that the general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from this po-

litical constraint. See *id.*, at 585. Given "the basic assumption of our political system that the press will often serve as an important restraint on government," we feared that the threat of exclusive taxation of the press could operate "as effectively as a censor to check critical comment." *Ibid.* "Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment," that it is presumptively unconstitutional. *Ibid.*

Beyond singling out the press, the Minnesota tax targeted a small group of newspapers—those so large that they remained subject to the tax despite its exemption for the first $100,000 of ink and paper consumed annually. The tax thus resembled a penalty for certain newspapers. Once again, the scheme appeared to have such potential for abuse that we concluded that it violated the First Amendment: "[W]hen the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises." *Id.*, at 592.

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U. S. 221 (1987), reaffirmed the rule that selective taxation of the press through the narrow targeting of individual members offends the First Amendment. In that case, Arkansas Writers' Project sought a refund of state taxes it had paid on sales of the Arkansas Times, a general interest magazine, under Arkansas' Gross Receipts Act of 1941. Exempt from the sales tax were receipts from sales of religious, professional, trade and sports magazines. See *id.*, at 224–226. We held that Arkansas' magazine exemption, which meant that only "a few Arkansas magazines pay any sales tax," operated in much the same way as did the $100,000 exemption in *Minneapolis Star* and therefore suffered from the same type of discrimination identified in that case. *Id.*, at 229. Moreover, the basis on which the tax differentiated among magazines depended entirely on their content. *Ibid.*

These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. See *Grosjean*, 297 U. S., at 244–249; *Minneapolis Star*, 460 U. S., at 585. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion. A tax is also suspect if it targets a small group of speakers. See *id.*, at 575; *Arkansas Writers'*, 481 U. S., at 229. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech. See *id.*, at 229–231.

The Arkansas tax at issue here presents none of these types of discrimination. The Arkansas sales tax is a tax of general applicability. It applies to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions. Among the services on which the tax is imposed are natural gas, electricity, water, ice, and steam utility services; telephone, telecommunications, and telegraph service; the furnishing of rooms by hotels, apartment hotels, lodging houses, and tourist camps; alteration, addition, cleaning, refinishing, replacement, and repair services; printing of all kinds; tickets for admission to places of amusement or athletic, entertainment, or recreational events; and fees for the privilege of having access to, or use of, amusement, entertainment, athletic, or recreational facilities. See Ark. Code Ann. § 26–52–301 (Supp. 1989). The tax does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity. Cf. *Minneapolis Star*, *supra*, at 585. We have said repeatedly that a State may impose on the press a generally applicable tax. See *Jimmy Swaggart Min-*

istries v. *Board of Equalization of Cal.*, 493 U. S. 378, 387–388 (1990); *Arkansas Writers'*, *supra*, at 229; *Minneapolis Star*, *supra*, at 586, and n. 9.

Furthermore, there is no indication in these cases that Arkansas has targeted cable television in a purposeful attempt to interfere with its First Amendment activities. Nor is the tax one that is structured so as to raise suspicion that it was intended to do so. Unlike the taxes involved in *Grosjean* and *Minneapolis Star*, the Arkansas tax has not selected a narrow group to bear fully the burden of the tax.

The tax is also structurally dissimilar to the tax involved in *Arkansas Writers'*. In that case, only "a few" Arkansas magazines paid the State's sales tax. See *Arkansas Writers'*, 481 U. S., at 229, and n. 4. Arkansas Writers' Project maintained before the Court that the Arkansas Times was the only Arkansas publication that paid sales tax. The Commissioner contended that two additional periodicals also paid the tax. We responded that, "[w]hether there are three Arkansas magazines paying tax or only one, the burden of the tax clearly falls on a limited group of publishers." *Id.*, at 229, n. 4. In contrast, Act 188 extended Arkansas' sales tax uniformly to the approximately 100 cable systems then operating in the State. See App. to Pet. for Cert. in No. 90–38, p. 12a. While none of the seven scrambled satellite broadcast services then available in Arkansas, Tr. 12 (Aug. 19, 1987), was taxed until Act 769 became effective, Arkansas' extension of its sales tax to cable television hardly resembles a "penalty for a few." See *Minneapolis Star*, *supra*, at 592; *Arkansas Writers'*, *supra*, at 229, and n. 4.

The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas. "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion,

putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California*, 403 U. S. 15, 24 (1971). There is no comparable danger from a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State. That the Arkansas Supreme Court found cable and satellite television to be the same medium does not change this conclusion. Even if we accept this finding, the fact remains that the tax affected approximately 100 suppliers of cable television services. This is not a tax structure that resembles a penalty for particular speakers or particular ideas.

Finally, Arkansas' sales tax is not content based. There is nothing in the language of the statute that refers to the content of mass media communications. Moreover, the record establishes that cable television offers subscribers a variety of programming that presents a mixture of news, information, and entertainment. It contains no evidence, nor is it contended, that this material differs systematically in its message from that communicated by satellite broadcast programming, newspapers, or magazines.

Because the Arkansas sales tax presents none of the First Amendment difficulties that have led us to strike down differential taxation in the past, cable petitioners can prevail only if the Arkansas tax scheme presents "an additional basis" for concluding that the State has violated petitioners' First Amendment rights. See *Arkansas Writers'*, *supra*, at 233. Petitioners argue that such a basis exists here: Arkansas' tax discriminates among media and, if the Arkansas Supreme Court's conclusion regarding cable and satellite television is accepted, discriminated for a time within a medium. Petitioners argue that such intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particu-

lar ideas, violates the First Amendment. Our cases do not support such a rule.

Regan v. *Taxation with Representation of Wash.*, 461 U. S. 540 (1983), stands for the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. In that case, we considered provisions of the Internal Revenue Code that discriminated between contributions to lobbying organizations. One section of the Code conferred tax-exempt status on certain nonprofit organizations that did not engage in lobbying activities. Contributions to those organizations were deductible. Another section of the Code conferred tax-exempt status on certain other nonprofit organizations that did lobby, but contributions to them were not deductible. Taxpayers contributing to veterans' organizations were, however, permitted to deduct their contributions regardless of those organizations' lobbying activities.

The tax distinction between these lobbying organizations did not trigger heightened scrutiny under the First Amendment. *Id.*, at 546–551. We explained that a legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction.[3] *Id.*, at 546. For this proposition, we relied on *Cammarano* v. *United States*, 358 U. S. 498 (1959). In *Cammarano*, the Court considered an Internal Revenue regulation that denied a tax deduction for money spent by businesses on publicity programs directed at pending state legislation. The Court held that the regulation did not violate the First Amendment because it did not discriminate on the basis of who was spending the money on

[3] Certain *amici* in support of cable petitioners argue that *Regan* is distinguishable from these cases because the petitioners in *Regan* were complaining that their contributions to lobbying organizations should be tax *deductible*, while cable petitioners complain that sales of their services should be tax *exempt*. This is a distinction without a difference. As we explained in *Regan*, "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." 461 U. S., at 544.

publicity or what the person or business was advocating. The regulation was therefore "plainly not '"aimed at the suppression of dangerous ideas."'" *Id.*, at 513, quoting *Speiser* v. *Randall*, 357 U. S. 513, 519 (1958).

Regan, while similar to *Cammarano*, presented the additional fact that Congress had chosen to exempt from taxes contributions to veterans' organizations, while not exempting other contributions. This did not change the analysis. Inherent in the power to tax is the power to discriminate in taxation. "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan*, *supra*, at 547. See also *Madden* v. *Kentucky*, 309 U. S. 83, 87–88 (1940); *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 294 (1898).

Cammarano established that the government need not exempt speech from a generally applicable tax. *Regan* established that a tax scheme does not become suspect simply because it exempts only some speech. *Regan* reiterated in the First Amendment context the strong presumption in favor of duly enacted taxation schemes. In so doing, the Court quoted the rule announced more than 40 years earlier in *Madden*, an equal protection case:

> "'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court can-

not have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.'" *Madden*, *supra*, at 87–88 (footnotes omitted), quoted in *Regan*, 461 U. S., at 547–548.

On the record in *Regan*, there appeared no such "hostile and oppressive discrimination." We explained that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Id.*, at 548 (internal quotation marks omitted). But that was not the case. The exemption for contributions to veterans' organizations applied without reference to the content of the speech involved; it was not intended to suppress any ideas; and there was no demonstration that it had that effect. *Ibid.* Under these circumstances, the selection of the veterans' organizations for a tax preference was "obviously a matter of policy and discretion." *Id.*, at 549 (internal quotation marks omitted).

That a differential burden on speakers is insufficient by itself to raise First Amendment concerns is evident as well from *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946), and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946). Those cases do not involve taxation, but they do involve government action that places differential burdens on members of the press. The Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, applies generally to newspapers as to other businesses, but it exempts from its requirements certain small papers. § 213(a)(8). Publishers of larger daily newspapers argued that the differential burden thereby placed on them violates the First Amendment. The Court upheld the exemption because there was no indication that the government had singled out the press for special treatment, *Walling*, *supra*, at 194, or that the exemption was a "'deliberate and

calculated device'" to penalize a certain group of newspapers, *Mabee*, *supra*, at 184, quoting *Grosjean*, 297 U. S., at 250.

Taken together, *Regan*, *Mabee*, and *Oklahoma Press* establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas. That was the case in *Grosjean*, *Minneapolis Star*, and *Arkansas Writers'*, but it is not the case here. The Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas' broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the First Amendment.

Before the Arkansas Chancery Court, cable petitioners contended that the State's tax distinction between cable and other media violated the Equal Protection Clause of the Fourteenth Amendment as well as the First Amendment. App. to Pet. for Cert. in No. 90–38, p. 21a. The Chancery Court rejected both claims, and cable petitioners challenged these holdings before the Arkansas Supreme Court. That court did not reach the equal protection question as to the State's temporary tax distinction between cable and satellite services because it disallowed that distinction on First Amendment grounds. We leave it to the Arkansas Supreme Court to address this question on remand.

For the foregoing reasons, the judgment of the Arkansas Supreme Court is affirmed in part and reversed in part, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, dissenting.

This Court has long recognized that the freedom of the press prohibits government from using the tax power to discriminate against individual members of the media or against the media as a whole. See *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987). The Framers of the First Amendment, we have explained, specifically intended to prevent government from using disparate tax burdens to impair the untrammeled dissemination of information. We granted certiorari in this case to consider whether the obligation not to discriminate against individual members of the press prohibits the State from taxing one information medium—cable television—more heavily than others. The majority's answer to this question—that the State is free to discriminate between otherwise like-situated media so long as the more heavily taxed medium is not too "small" in number—is no answer at all, for it fails to explain which media actors are entitled to equal tax treatment. Indeed, the majority so adamantly proclaims the irrelevance of this problem that its analysis calls into question whether any general obligation to treat media actors even-handedly survives today's decision. Because I believe the majority has unwisely cut back on the principles that inform our selective-taxation precedents, and because I believe that the First Amendment prohibits the State from singling out a particular information medium for heavier tax burdens than are borne by like-situated media, I dissent.

I

A

Our decisions on selective taxation establish a nondiscrimination principle for like-situated members of the press. Under this principle, "differential treatment, unless justified

by some special characteristic of the press, . . . is presumptively unconstitutional," and must be struck down "unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star*, *supra*, at 585.

The nondiscrimination principle is an instance of government's general First Amendment obligation not to interfere with the press as an institution. As the Court explained in *Grosjean*, the purpose of the Free Press Clause "was to preserve an untrammeled press as a vital source of public information." 297 U. S., at 250. Reviewing both the historical abuses associated with England's infamous "'taxes on knowledge'" and the debates surrounding ratification of the Constitution, see *id.*, at 246–250; *Minneapolis Star*, 460 U. S., at 583–586, and nn. 6–7, our decisions have recognized that the Framers viewed selective taxation as a distinctively potent "means of abridging the freedom of the press," *id.*, at 586, n. 7.

We previously have applied the nondiscrimination principle in two contexts. First, we have held that this principle prohibits the State from imposing on the media tax burdens not borne by like-situated nonmedia enterprises. Thus, in *Minneapolis Star*, we struck down a use tax that applied to the ink and paper used in newspaper production but not to any other item used as a component of a good to be sold at retail. See *id.*, at 578, 581–582. Second, we have held that the nondiscrimination principle prohibits the State from taxing *individual* members of the press unequally. Thus, as an alternative ground in *Minneapolis Star*, we concluded that the State's use tax violated the First Amendment because it exempted the first $100,000 worth of ink and paper consumed and thus effectively singled out large publishers for a disproportionate tax burden. See *id.*, at 591–592. Similarly, in *Arkansas Writers' Project*, we concluded that selective exemptions for certain periodicals rendered unconstitutional the application of a general sales tax to the remaining

periodicals "because [the tax] [was] not evenly applied to *all* magazines." See 481 U. S., at 229 (emphasis added); see also *Grosjean* v. *American Press Co.*, *supra* (tax applied only to newspapers that meet circulation threshold unconstitutionally discriminates against more widely circulated newspapers).

Before today, however, we had not addressed whether the nondiscrimination principle prohibits the State from singling out a particular information medium for tax burdens not borne by other media. *Grosjean* and *Minneapolis Star* both invalidated tax schemes that discriminated between different members of a single medium, namely, newspapers. Similarly, *Arkansas Writers' Project* invalidated a general sales tax because it "treat[ed] some magazines less favorably than others," 481 U. S., at 229, leaving open the question whether less favorable tax treatment of magazines than of newspapers furnished an additional ground for invalidating the scheme, see *id.*, at 233. This case squarely presents the question whether the State may discriminate between distinct information media, for under Arkansas' general sales tax scheme, cable operators pay a sales tax on their subscription fees that is not paid by newspaper or magazine companies on their subscription fees or by television or radio broadcasters on their advertising revenues.[1] In my view, the principles

[1] Subject to various exemptions, Arkansas law imposes a 4% tax on the receipts from sales of all tangible personal property and of specified services. Ark. Code Ann. §§ 26–52–301, 26–52–302, 26–52–401 (1987 and Supp. 1989). Cable television service is expressly included in the tax. See § 26–52–301(3)(D)(i) (Supp. 1989). Proceeds from the sale of newspapers, § 26–52–401(4) (Supp. 1989), and from the sale of magazines by subscription, § 26–52–401(14) (Supp. 1989); Revenue Policy Statement 1988–1 (Mar. 10, 1988), reprinted in CCH Ark. Tax Rep. ¶ 69–415, are expressly exempted, as are the proceeds from the sale of advertising in newspapers and other publications, § 26–52–401(13) (Supp. 1989). Proceeds from the

that animate our selective-taxation cases clearly condemn this form of discrimination.

B

Although cable television transmits information by distinctive means, the *information service* provided by cable does not differ significantly from the information services provided by Arkansas' newspapers, magazines, television broadcasters, and radio stations. This Court has recognized that cable operators exercise the same core press function of "communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers," *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 494 (1986), and that "[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include," *FCC* v. *Midwest Video Corp.*, 440 U. S. 689, 707 (1979). See also *ante*, at 444 (acknowledging that cable television is "part of the 'press'"). In addition, the cable-service providers in this case put on extensive and unrebutted proof at trial designed to show that consumers regard the news, sports, and entertainment features provided by cable as largely interchangeable with the services provided by other members of the

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sale of advertising for broadcast radio and television services are not included in the tax.

Insofar as the Arkansas Supreme Court found that cable and scrambled satellite television are a *single* medium, 301 Ark. 483, 487, 785 S. W. 2d 202, 204–205 (1990), this case also involves a straightforward application of *Arkansas Writers' Project* and *Minneapolis Star* in resolving the cable operators' constitutional challenge to the taxes that they paid prior to 1989, the year in which Arkansas amended its sales tax to include the subscription fees collected by scrambled-satellite television. I would affirm on that basis the Arkansas Supreme Court's conclusion that the pre-1989 version of the Arkansas sales tax violated the First Amendment by imposing on cable a tax burden not borne by its scrambled-satellite television.

print and electronic media. See App. 81–85, 100–101, 108, 115, 133–137, 165–170. See generally *Competition, Rate Deregulation and the Commission's Policies Relating to Provision of Cable Television Service*, 5 FCC Record 4962, 4967 (1990) (discussing competition between cable and other forms of television).

Because cable competes with members of the print and electronic media in the larger information market, the power to discriminate between these media triggers the central concern underlying the nondiscrimination principle: the risk of covert censorship. The nondiscrimination principle protects the press from censorship prophylactically, condemning any selective-taxation scheme that presents the "*potential* for abuse" by the State, *Minneapolis Star*, 460 U. S., at 592 (emphasis added), independent of any actual "evidence of an improper censorial motive," *Arkansas Writers' Project*, *supra*, at 228; see *Minneapolis Star*, *supra*, at 592 ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment"). The power to discriminate among like-situated media presents such a risk. By imposing tax burdens that disadvantage one information medium relative to another, the State can favor those media that it likes and punish those that it dislikes.

Inflicting a competitive disadvantage on a disfavored medium violates the First Amendment "command that the government . . . shall not impede the free flow of ideas." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945). We have previously recognized that differential taxation *within* an information medium distorts the marketplace of ideas by imposing on some speakers costs not borne by their competitors. See *Grosjean*, 297 U. S., at 241, 244–245 (noting competitive disadvantage arising from differential tax based on newspaper circulation). Differential taxation *across* different media likewise "limit[s] the circulation of information to which the public is entitled," *id.*, at 250, where, as here, the

relevant media compete in the same information market. By taxing cable television more heavily relative to its social cost than newspapers, magazines, broadcast television and radio, Arkansas distorts consumer preferences for particular information formats, and thereby impairs "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, *supra*, at 20.

Because the power selectively to tax cable operators triggers the concerns that underlie the nondiscrimination principle, the State bears the burden of demonstrating that "differential treatment" of cable television is justified by some "special characteristic" of that particular information medium or by some other "counterbalancing interest of compelling importance that [the State] cannot achieve without differential taxation." *Minneapolis Star*, *supra*, at 585 (footnote omitted). The State has failed to make such a showing in this case. As the Arkansas Supreme Court found, the amount collected from the cable operators pursuant to the state sales tax does not correspond to any social cost peculiar to cable-television service, see 301 Ark. 483, 485, 785 S. W. 2d 202, 203 (1990); indeed, cable operators in Arkansas must pay a franchise fee expressly designed to defray the cost associated with cable's unique exploitation of public rights of way. See *ibid.* The only justification that the State asserts for taxing cable operators more heavily than newspapers, magazines, television broadcasters and radio stations is its interest in raising revenue. See Brief for Respondents in No. 90–38, p. 9. This interest is not sufficiently compelling to overcome the presumption of unconstitutionality under the nondiscrimination principle. See *Arkansas Writers' Project*, 481 U. S., at 231–232; *Minneapolis Star*, *supra*, at 586.[2]

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[2] I need not consider what, if any, state interests might justify selective taxation of cable television, since the State has advanced no interest other than revenue enhancement. I also do not dispute that the unique characteristics of cable may justify special regulatory treatment of that medium. See *Los Angeles* v. *Preferred Communications, Inc.*, 476 U. S. 488, 496

II

The majority is undisturbed by Arkansas' discriminatory tax regime. According to the majority, the power to single out cable for heavier tax burdens presents no realistic threat of governmental abuse. The majority also dismisses the notion that the State has any general obligation to treat members of the press evenhandedly. Neither of these conclusions is supportable.

A

The majority dismisses the risk of governmental abuse under the Arkansas tax scheme on the ground that the number of media actors exposed to the tax is "large." *Ante*, at 449. According to the majority, where a tax is generally applicable to nonmedia enterprises, the selective application of that tax to different segments of the media offends the First Amendment only if the tax is limited to "a small number of speakers," *ante*, at 448, for it is only under those circumstances that selective taxation "resembles a penalty for particular speakers or particular ideas," *ante*, at 449. The selective sales tax at issue in *Arkansas Writers' Project*, the majority points out, applied to no more than three magazines. See *ante*, at 448. The tax at issue here, "[i]n contrast," applies "uniformly to the approximately *100* cable systems" in operation in Arkansas. *Ibid.* (emphasis added). In my view, this analysis is overly simplistic and is unresponsive to the concerns that inform our selective-taxation precedents.

To start, the majority's approach provides no meaningful guidance on the intermedia scope of the nondiscrimination principle. From the majority's discussion, we can infer that three is a sufficiently "small" number of affected actors to

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(1986) (BLACKMUN, J., concurring); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 386–401 (1969). I conclude only that the State is not free to burden cable with a selective tax absent a clear nexus between the tax and a "special characteristic" of cable television service or a "counterbalancing interest of compelling importance." *Minneapolis Star*, 460 U. S., at 585.

trigger First Amendment problems and that one hundred is too "large" to do so. But the majority fails to pinpoint the magic number *between* three and one hundred actors above which discriminatory taxation can be accomplished with impunity. Would the result in this case be different if Arkansas had only 50 cable-service providers? Or 25? The suggestion that the First Amendment prohibits selective taxation that "resembles a penalty" is no more helpful. A test that turns on whether a selective tax "penalizes" a particular medium presupposes some baseline establishing that medium's entitlement to equality of treatment with other media. The majority never develops any theory of the State's obligation to treat like-situated media equally, except to say that the State must avoid discriminating against too "small" a number of media actors.

In addition, the majority's focus on absolute numbers fails to reflect the concerns that inform the nondiscrimination principle. The theory underlying the majority's "small versus large" test is that "a tax on the services provided by a large number of cable operators offering a wide variety of programming throughout the State," *ante*, at 449, poses no "risk of affecting only a limited range of views," *ante*, at 448. This assumption is unfounded. The record in this case furnishes ample support for the conclusion that the State's cable operators make unique contributions to the information market. See, *e. g.*, App. 82 (testimony of cable operator that he offers "certain religious programming" that "people demand . . . because they otherwise could not have access to it"); *id.*, at 138 (cable offers Spanish-language information network); *id.*, at 150 (cable broadcast of local city council meetings). The majority offers no reason to believe that programs like these are duplicated by other media. Thus, to the extent that selective taxation makes it harder for Arkansas' 100 cable operators to compete with Arkansas' 500 newspapers, magazines, and broadcast television and radio stations, see 1 Gale Directory of Publications and Broadcast Media 67–68

(123d ed. 1991), Arkansas' discriminatory tax *does* "risk . . . affecting only a limited range of views," and may well "distort the market for ideas" in a manner akin to direct "content-based regulation." *Ante*, at 448.[3]

The majority also mistakenly assesses the impact of Arkansas' discriminatory tax as if the State's 100 cable operators comprised 100 additional actors in a *statewide* information market. In fact, most communities are serviced by only a single cable operator. See generally 1 Gale Directory, *supra*, at 69–91. Thus, in any given locale, Arkansas' discriminatory tax may disadvantage a *single* actor, a "small" number even under the majority's calculus.

Even more important, the majority's focus on absolute numbers ignores the potential for abuse inherent in the State's power to discriminate based on *medium identity*. So long as the disproportionately taxed medium is sufficiently "large," nothing in the majority's test prevents the State from singling out a particular medium for higher taxes, either because the State does not like the character of the services that the medium provides or because the State simply wishes to confer an advantage upon the medium's competitors.

Indeed, the facts of this case highlight the potential for governmental abuse inherent in the power to discriminate among like-situated media based on their identities. Before this litigation began, most receipts generated by the media—including newspaper sales, certain magazine subscription fees, print and electronic media advertising revenues, and cable television and scrambled-satellite television subscription fees—were either expressly exempted from, or not expressly included in, the Arkansas sales tax. See Ark. Code

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[3] Even if it did happen to apply neutrally across the range of viewpoints expressed in the Arkansas information market, Arkansas' discriminatory tax would still raise First Amendment problems. "It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him." *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 553 (1983) (BLACKMUN, J., concurring).

Ann. §§ 84–1903, 84–1904(f), (j), (1947 and Supp. 1985); see also *Arkansas Writers' Project*, 481 U. S., at 224–225. Effective July 1, 1987, however, the legislature expanded the tax base to include cable television subscription fees. See App. to Pet. for Cert. in No. 90–38, p. 16a. Cable operators then filed this suit, protesting the discriminatory treatment in general and the absence of any tax on scrambled-satellite television—cable's closest rival—in particular. While the case was pending on appeal to the Arkansas Supreme Court, the Arkansas legislature again amended the sales tax, this time extending the tax to the subscription fees paid for scrambled-satellite television. 301 Ark., at 484, 785 S. W. 2d, at 203. Of course, for all we know, the legislature's initial decision selectively to tax cable may have been prompted by a similar plea from traditional broadcast media to curtail competition from the emerging cable industry. If the legislature did indeed respond to such importunings, the tax would implicate government censorship as surely as if the government itself disapproved of the new competitors.

As I have noted, however, our precedents do not require "evidence of an improper censorial motive," *Arkansas Writers' Project*, *supra*, at 228, before we may find that a discriminatory tax violates the Free Press Clause; it is enough that the application of a tax offers the "*potential* for abuse," *Minneapolis Star*, 460 U. S., at 592 (emphasis added). That potential is surely present when the legislature may, at will, include or exclude various media sectors from a general tax.

B

The majority, however, does not flinch at the prospect of intermedia discrimination. Purporting to draw on *Regan* v. *Taxation With Representation of Washington*, 461 U. S. 540 (1983)—a decision dealing with the tax-deductibility of lobbying expenditures—the majority embraces "the proposition that a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates *on*

the basis of ideas." *Ante*, at 450 (emphasis added). "[T]he power to discriminate in taxation," the majority insists, is "[i]nherent in the power to tax." *Ante*, at 451.

Read for all they are worth, these propositions would essentially annihilate the nondiscrimination principle, at least as it applies to tax differentials between individual members of the press. If *Minneapolis Star*, *Arkansas Writers' Project*, and *Grosjean* stand for anything, it is that the "power to tax" does *not* include "the power to discriminate" when the press is involved. Nor is it the case under these decisions that a tax regime that singles out individual members of the press implicates the First Amendment *only* when it is "directed at, or presents the danger of suppressing, *particular* ideas." *Ante*, at 453 (emphasis added). Even when structured in a manner that is content neutral, a scheme that imposes differential burdens on like-situated members of the press violates the First Amendment because it poses *the risk* that the State might abuse this power. See *Minneapolis Star*, *supra*, at 592.

At a minimum, the majority incorrectly conflates our cases on selective taxation of the press and our cases on the selective taxation (or subsidization) of speech generally. *Regan* holds that the government does not invariably violate the Free Speech Clause when it selectively subsidizes one group of speakers according to content-neutral criteria. This power, when exercised with appropriate restraint, inheres in government's legitimate authority to tap the energy of expressive activity to promote the public welfare. See *Buckley* v. *Valeo*, 424 U. S. 1, 90–97 (1976).

But our cases on the selective taxation of the *press* strike a different posture. Although the Free Press Clause does not guarantee the press a preferred position over other speakers, the Free Press Clause does "protec[t] [members of press] from invidious discrimination." L. Tribe, American Constitutional Law § 12–20, p. 963 (2d ed. 1988). Selective taxation is precisely that. In light of the Framers' specific in-

tent "to preserve an untrammeled press as a vital source of public information," *Grosjean*, 297 U. S., at 250; see *Minneapolis Star*, *supra*, at 585, n. 7, our precedents recognize that the Free Press Clause imposes a special obligation on government to avoid disrupting the integrity of the information market. As Justice Stewart explained:

> "[T]he Free Press guarantee is, in essence, a *structural* provision of the Constitution. Most of the other provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution." Stewart, "Or of the Press," 26 Hastings L. J. 631, 633 (1975) (emphasis in original).

Because they distort the competitive forces that animate this institution, tax differentials that fail to correspond to the social cost associated with different information media, and that are justified by nothing more than the State's desire for revenue, violate government's obligation of evenhandedness. Clearly, this is true of disproportionate taxation of cable television. Under the First Amendment, government simply has no business interfering with the process by which citizens' preferences for information formats evolve.[4]

[4] The majority's reliance on *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946), and *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), is also misplaced. At issue in those cases was a provision that exempted small newspapers with primarily local distribution from the Fair Labor Standards Act of 1938 (FLSA). In upholding the provision, the Court noted that the exemption promoted a legitimate interest in placing the exempted papers "on a parity with other small town enterprises" that also were not subject to regulation under the FLSA. *Mabee*, *supra*, at 184; see also *Oklahoma Press*, *supra*, at 194. In *Minneapolis Star*, we distinguished these cases on the ground that, unlike the FLSA exemption, Minnesota's discrimination between large and small newspapers did not derive from, or correspond to, any *general* state policy to benefit small businesses. See 460 U. S., at 592, and n. 16. Similarly, Arkansas' dis-

Today's decision unwisely discards these teachings. I dissent.

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crimination against cable operators derives not from any general, legitimate state policy unrelated to speech but rather from the simple decision of state officials to treat one information medium differently from all others. Thus, like the schemes in *Arkansas Writers' Project* and *Minneapolis Star*, but unlike the scheme at issue in *Mabee* and *Oklahoma Press*, the Arkansas tax scheme must be supported by a compelling interest to survive First Amendment scrutiny. Cf. *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

McCLESKEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

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

No. 89–7024. Argued October 31, 1990—Decided April 16, 1991

To rebut petitioner McCleskey's alibi defense at his 1978 Georgia trial for murder and a related crime, the State called Offie Evans, the occupant of the jail cell next to McCleskey's, who testified that McCleskey had admitted and boasted about the killing. On the basis of this and other evidence supporting McCleskey's guilt, the jury convicted him and sentenced him to death. After the State Supreme Court affirmed, he filed an unsuccessful petition for state habeas corpus relief, alleging, *inter alia*, that his statements to Evans were elicited in a situation created by the State to induce him to make incriminating statements without the assistance of counsel in violation of *Massiah* v. *United States*, 377 U. S. 201. He then filed his first federal habeas petition, which did not raise a *Massiah* claim, and a second state petition, both of which were ultimately unsuccessful. Finally, he filed his second federal habeas petition in 1987, basing a *Massiah* challenge on a 21-page statement that Evans had made to police two weeks before the trial. The document, which the State furnished at McCleskey's request shortly before he filed his second federal petition, related conversations that were consistent with Evans' trial testimony, but also recounted the tactics used by Evans to engage McCleskey in conversation. Moreover, at a hearing on the petition, Ulysses Worthy, a jailer during McCleskey's pretrial incarceration whose identity came to light after the petition was filed, gave testimony indicating that Evans' cell assignment had been made at the State's behest. In light of the Evans statement and Worthy's testimony, the District Court found an *ab initio* relationship between Evans and the State and granted McCleskey relief under *Massiah*. The Court of Appeals reversed on the basis of the doctrine of abuse of the writ, which defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent habeas corpus petition.

Held: McCleskey's failure to raise his *Massiah* claim in his first federal habeas petition constituted abuse of the writ. Pp. 477–503.

(a) Much confusion exists as to the proper standard for applying the abuse-of-the-writ doctrine, which refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. This Court has hereto-

fore defined such abuse in an oblique way, through dicta and denials of certiorari petitions or stay applications, see *Witt* v. *Wainwright*, 470 U. S. 1039, 1043 (MARSHALL, J., dissenting), and, because of historical changes and the complexity of the subject, has not always followed an unwavering line in its conclusions as to the writ's availability, *Fay* v. *Noia*, 372 U. S. 391, 411–412. Pp. 477–489.

(b) Although this Court's federal habeas decisions do not all admit of ready synthesis, a review of these precedents demonstrates that a claim need not have been deliberately abandoned in an earlier petition in order to establish that its inclusion in a subsequent petition constitutes abuse of the writ, see, *e. g.*, *Sanders* v. *United States*, 373 U. S. 1, 18; that such inclusion constitutes abuse if the claim could have been raised in the first petition, but was omitted through inexcusable neglect, see, *e. g.*, *Delo* v. *Stokes*, 495 U. S. 320, 321–322; and that, because the doctrines of procedural default and abuse of the writ implicate nearly identical concerns, the determination of inexcusable neglect in the abuse context should be governed by the same standard used to determine whether to excuse a habeas petitioner's state procedural defaults, see, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72. Thus, when a prisoner files a second or subsequent habeas petition, the government bears the burden of pleading abuse of the writ. This burden is satisfied if the government, with clarity and particularity, notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then shifts to petitioner. To excuse his failure to raise the claim earlier, he must show cause—*e. g.*, that he was impeded by some objective factor external to the defense, such as governmental interference or the reasonable unavailability of the factual basis for the claim—as well as actual prejudice resulting from the errors of which he complains. He will not be entitled to an evidentiary hearing if the district court determines as a matter of law that he cannot satisfy the cause and prejudice standard. However, if he cannot show cause, the failure to earlier raise the claim may nonetheless be excused if he can show that a fundamental miscarriage of justice—the conviction of an innocent person—would result from a failure to entertain the claim. Pp. 489–497.

(c) McCleskey has not satisfied the foregoing standard for excusing the omission of his *Massiah* claim from his first federal habeas petition. He lacks cause for that omission, and, therefore, the question whether he would be prejudiced by his inability to raise the claim need not be considered. See *Murray* v. *Carrier*, 477 U. S. 478, 494. That he may not have known about, or been able to discover, the Evans document before filing his first federal petition does not establish cause, since knowlege gleaned from the trial about the jail-cell conversations and

Evans' conduct, as well as McCleskey's admitted participation in those conversations, put him on notice that he should pursue the *Massiah* claim in the first federal petition as he had done in his first state petition. Nor does the unavailability of Worthy's identity and testimony at the time of the first federal petition establish cause, since the fact that Evans' statement was the only new evidence McCleskey had when he filed the *Massiah* claim in his second federal petition demonstrates the irrelevance of Worthy to that claim. Moreover, cause cannot be established by the State's allegedly wrongful concealment of the Evans document until 1987, since the District Court found no wrongdoing in the failure to hand over the document earlier, and since any initial concealment would not have prevented McCleskey from raising a *Massiah* claim in the first federal petition. *Amadeo* v. *Zant*, 486 U. S. 214, 224, distinguished. Furthermore, the narrow miscarriage of justice exception to the cause requirement is of no avail to McCleskey, since he cannot demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person. The record demonstrates that that violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. In fact, the Evans statement that McCleskey now embraces confirms his guilt. Pp. 497–503.

890 F. 2d 342, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 506.

John Charles Boger argued the cause for petitioner. With him on the briefs were *Robert H. Stroup*, *Julius L. Chambers III*, *Richard H. Burr III*, *George H. Kendall*, and *Anthony G. Amsterdam*.

Mary Beth Westmoreland, Senior Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Michael J. Bowers*, Attorney General, *William B. Hill, Jr.*, Deputy Attorney General, and *Susan V. Boleyn*, Senior Assistant Attorney General.*

**Mark E. Olive* filed a brief for the Alabama Capital Representation Resource Center et al. as *amici curiae* urging reversal.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

JUSTICE KENNEDY delivered the opinion of the Court.

The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus. Petitioner Warren McCleskey in a second federal habeas petition presented a claim under *Massiah* v. *United States*, 377 U. S. 201 (1964), that he failed to include in his first federal petition. The Court of Appeals for the Eleventh Circuit held that assertion of the *Massiah* claim in this manner abused the writ. Though our analysis differs from that of the Court of Appeals, we agree that the petitioner here abused the writ, and we affirm the judgment.

I

McCleskey and three other men, all armed, robbed a Georgia furniture store in 1978. One of the robbers shot and killed an off duty policeman who entered the store in the midst of the crime. McCleskey confessed to the police that he participated in the robbery. When on trial for both the robbery and the murder, however, McCleskey renounced his confession after taking the stand with an alibi denying all involvement. To rebut McCleskey's testimony, the prosecution called Offie Evans, who had occupied a jail cell next to McCleskey's. Evans testified that McCleskey admitted shooting the officer during the robbery and boasted that he would have shot his way out of the store even in the face of a dozen policemen.

Although no one witnessed the shooting, further direct and circumstantial evidence supported McCleskey's guilt of the murder. An eyewitness testified that someone ran from the store carrying a pearl-handled pistol soon after the robbery. Other witnesses testified that McCleskey earlier had stolen a pearl-handled pistol of the same caliber as the bullet that killed the officer. Ben Wright, one of McCleskey's accomplices, confirmed that during the crime McCleskey carried a white-handled handgun matching the caliber of the fatal bul-

let. Wright also testified that McCleskey admitted shooting the officer. Finally, the prosecutor introduced McCleskey's confession of participation in the robbery.

In December 1978, the jury convicted McCleskey of murder and sentenced him to death. Since his conviction, McCleskey has pursued direct and collateral remedies for more than a decade. We describe this procedural history in detail, both for a proper understanding of the case and as an illustration of the context in which allegations of abuse of the writ arise.

On direct appeal to the Supreme Court of Georgia, McCleskey raised six grounds of error. A summary of McCleskey's claims on direct appeal, as well as those he asserted in each of his four collateral proceedings, is set forth in the Appendix to this opinion, *infra*, at 503. The portion of the appeal relevant for our purposes involves McCleskey's attack on Evans' rebuttal testimony. McCleskey contended that the trial court "erred in allowing evidence of [McCleskey's] oral statement admitting the murder made to [Evans] in the next cell, because the prosecutor had deliberately withheld such statement" in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963). *McClesky* v. *State*, 245 Ga. 108, 112, 263 S. E. 2d 146, 149 (1980). A unanimous Georgia Supreme Court acknowledged that the prosecutor did not furnish Evans' statement to the defense, but ruled that because the undisclosed evidence was not exculpatory, McCleskey suffered no material prejudice and was not denied a fair trial under *Brady*. 245 Ga., at 112–113, 263 S. E. 2d, at 149. The court noted, moreover, that the evidence McCleskey wanted to inspect was "introduced to the jury in its entirety" through Evans' testimony, and that McCleskey's argument that "the evidence was needed in order to prepare a proper defense or impeach other witnesses ha[d] no merit because the evidence requested was statements made by [McCleskey] himself." *Ibid.* The court rejected McCleskey's other contentions and

affirmed his conviction and sentence. *Ibid.* We denied certiorari. *McClesky* v. *Georgia*, 449 U. S. 891 (1980).

McCleskey then initiated postconviction proceedings. In January 1981, he filed a petition for state habeas corpus relief. The amended petition raised 23 challenges to his murder conviction and death sentence. See Appendix, *infra*, at 503. Three of the claims concerned Evans' testimony. First, McCleskey contended that the State violated his due process rights under *Giglio* v. *United States*, 405 U. S. 150 (1972), by its failure to disclose an agreement to drop pending escape charges against Evans in return for his cooperation and testimony. App. 20. Second, McCleskey reasserted his *Brady* claim that the State violated his due process rights by the deliberate withholding of the statement he made to Evans while in jail. App. 21. Third, McCleskey alleged that admission of Evans' testimony violated the Sixth Amendment right to counsel as construed in *Massiah* v. *United States*, *supra*. On this theory, "[t]he introduction into evidence of [his] statements to [Evans], elicited in a situation created to induce [McCleskey] to make incriminating statements without the assistance of counsel, violated [McCleskey's] right to counsel under the Sixth Amendment to the Constitution of the United States." App. 22.

At the state habeas corpus hearing, Evans testified that one of the detectives investigating the murder agreed to speak a word on his behalf to the federal authorities about certain federal charges pending against him. The state habeas court ruled that the *ex parte* recommendation did not implicate *Giglio*, and it denied relief on all other claims. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause, and we denied his second petition for a writ of certiorari. *McCleskey* v. *Zant*, 454 U. S. 1093 (1981).

In December 1981, McCleskey filed his first federal habeas corpus petition in the United States District Court for the Northern District of Georgia, asserting 18 grounds for relief.

See Appendix, *infra*, at 504–505. The petition failed to allege the *Massiah* claim, but it did reassert the *Giglio* and *Brady* claims. Following extensive hearings in August and October 1983, the District Court held that the detective's statement to Evans was a promise of favorable treatment, and that failure to disclose the promise violated *Giglio*. *McCleskey* v. *Zant*, 580 F. Supp. 338, 380–384 (ND Ga. 1984). The District Court further held that Evans' trial testimony may have affected the jury's verdict on the charge of malice murder. On these premises it granted relief. *Id.*, at 384.

The Court of Appeals reversed the District Court's grant of the writ. *McCleskey* v. *Kemp*, 753 F. 2d 877 (CA11 1985). The court held that the State had not made a promise to Evans of the kind contemplated by *Giglio*, and that in any event the *Giglio* error would be harmless. 753 F. 2d, at 884–885. The court affirmed the District Court on all other grounds. We granted certiorari limited to the question whether Georgia's capital sentencing procedures were constitutional, and denied relief. *McCleskey* v. *Kemp*, 481 U. S. 279 (1987).

McCleskey continued his postconviction attacks by filing a second state habeas corpus action in 1987 which, as amended, contained five claims for relief. See Appendix, *infra*, at 505. One of the claims again centered on Evans' testimony, alleging that the State had an agreement with Evans that it had failed to disclose. The state trial court held a hearing and dismissed the petition. The Supreme Court of Georgia denied McCleskey's application for a certificate of probable cause.

In July 1987, McCleskey filed a second federal habeas action, the one we now review. In the District Court, McCleskey asserted seven claims, including a *Massiah* challenge to the introduction of Evans' testimony. See Appendix, *infra*, at 506. McCleskey had presented a *Massiah* claim, it will be recalled, in his first state habeas action when he alleged that the conversation recounted by Evans at trial had been "elic-

ited in a situation created to induce" him to make an incriminating statement without the assistance of counsel. The first federal petition did not present a *Massiah* claim. The proffered basis for the *Massiah* claim in the second federal petition was a 21-page signed statement that Evans made to the Atlanta Police Department on August 1, 1978, two weeks before the trial began. The department furnished the document to McCleskey one month before he filed his second federal petition.

The statement related pretrial jailhouse conversations that Evans had with McCleskey and that Evans overheard between McCleskey and Bernard Dupree. By the statement's own terms, McCleskey participated in all the reported jail-cell conversations. Consistent with Evans' testimony at trial, the statement reports McCleskey admitting and boasting about the murder. It also recounts that Evans posed as Ben Wright's uncle and told McCleskey he had talked with Wright about the robbery and the murder.

In his second federal habeas petition, McCleskey asserted that the statement proved Evans "was acting in direct concert with State officials" during the incriminating conversations with McCleskey, and that the authorities "deliberately elicited" inculpatory admissions in violation of McCleskey's Sixth Amendment right to counsel. *Massiah* v. *United States*, 377 U. S., at 206. 1 Tr. Exh. 1, pp. 11–12. Among other responses, the State of Georgia contended that McCleskey's presentation of a *Massiah* claim for the first time in the second federal petition was an abuse of the writ. 28 U. S. C. § 2244(b); Rule 9(b) of the Rules Governing § 2254 Cases.

The District Court held extensive hearings in July and August 1987 focusing on the arrangement the jailers had made for Evans' cell assignment in 1978. Several witnesses denied that Evans had been placed next to McCleskey by design or instructed to overhear conversations or obtain statements from McCleskey. McCleskey's key witness was Ulysses

Worthy, a jailer at the Fulton County Jail during the summer of 1978. McCleskey's lawyers contacted Worthy after a detective testified that the 1978 Evans statement was taken in Worthy's office. The District Court characterized Worthy's testimony as "often confused and self-contradictory." *McCleskey* v. *Kemp*, No. C87–1517A (ND Ga., Dec. 23, 1987), App. 81. Worthy testified that someone at some time requested permission to move Evans near McCleskey's cell. He contradicted himself, however, concerning when, why, and by whom Evans was moved, and about whether he overheard investigators urging Evans to engage McCleskey in conversation. *Id.*, at 76–81.

On December 23, 1987, the District Court granted McCleskey relief based upon a violation of *Massiah*. *Id.*, at 63–97. The court stated that the Evans statement "contains strong indication of an *ab initio* relationship between Evans and the authorities." *Id.*, at 84. In addition, the court credited Worthy's testimony suggesting that the police had used Evans to obtain incriminating information from McCleskey. Based on the Evans statement and portions of Worthy's testimony, the District Court found that the jail authorities had placed Evans in the cell adjoining McCleskey's "for the purpose of gathering incriminating information"; that "Evans was probably coached in how to approach McCleskey and given critical facts unknown to the general public"; that Evans talked with McCleskey and eavesdropped on McCleskey's conversations with others; and that Evans reported what he had heard to the authorities. *Id.*, at 83. These findings, in the District Court's view, established a *Massiah* violation.

In granting habeas relief, the District Court rejected the State's argument that McCleskey's assertion of the *Massiah* claim for the first time in the second federal petition constituted an abuse of the writ. The court ruled that McCleskey did not deliberately abandon the claim after raising it in his first state habeas petition. "This is not a case," the District

Court reasoned, "where petitioner has reserved his proof or deliberately withheld his claim for a second petition." *Id.*, at 84. The District Court also determined that when McCleskey filed his first federal petition, he did not know about either the 21-page Evans document or the identity of Worthy, and that the failure to discover the evidence for the first federal petition "was not due to [McCleskey's] inexcusable neglect." *Id.*, at 85.

The Eleventh Circuit reversed, holding that the District Court abused its discretion by failing to dismiss McCleskey's *Massiah* claim as an abuse of the writ. 890 F. 2d 342 (1989). The Court of Appeals agreed with the District Court that the petitioner must "show that he did not deliberately abandon the claim and that his failure to raise it [in the first federal habeas proceeding] was not due to inexcusable neglect." *Id.*, at 346–347. Accepting the District Court's findings that at the first petition stage McCleskey knew neither the existence of the Evans statement nor the identity of Worthy, the court held that the District Court "misconstru[ed] the meaning of deliberate abandonment." *Id.*, at 348–349. Because McCleskey included a *Massiah* claim in his first state petition, dropped it in his first federal petition, and then reasserted it in his second federal petition, he "made a knowing choice not to pursue the claim after having raised it previously" that constituted a prima facie showing of "deliberate abandonment." 890 F. 2d, at 349. The court further found the State's alleged concealment of the Evans statement irrelevant because it "was simply the catalyst that caused counsel to pursue the *Massiah* claim more vigorously" and did not itself "demonstrate the existence of a *Massiah* violation." *Id.*, at 350. The court concluded that McCleskey had presented no reason why counsel could not have discovered Worthy earlier. *Ibid.* Finally, the court ruled that McCleskey's claim did not fall within the ends of justice exception to the abuse-of-the-writ doctrine because any

Massiah violation that may have been committed would have been harmless error. 890 F. 2d, at 350–351.

McCleskey petitioned this Court for a writ of certiorari, alleging numerous errors in the Eleventh Circuit's abuse-of-the-writ analysis. In our order granting the petition, we requested the parties to address the following additional question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" 496 U. S. 904 (1990).

II

The parties agree that the government has the burden of pleading abuse of the writ, and that once the government makes a proper submission, the petitioner must show that he has not abused the writ in seeking habeas relief. See *Sanders* v. *United States*, 373 U. S. 1, 10–11 (1963); *Price* v. *Johnston*, 334 U. S. 266, 292 (1948). Much confusion exists though, on the standard for determining when a petitioner abuses the writ. Although the standard is central to the proper determination of many federal habeas corpus actions, we have had little occasion to define it. Indeed, there is truth to the observation that we have defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications. See *Witt* v. *Wainwright*, 470 U. S. 1039, 1043 (1985) (MARSHALL, J., dissenting). Today we give the subject our careful consideration. We begin by tracing the historical development of some of the substantive and procedural aspects of the writ, and then consider the standard for abuse that district courts should apply in actions seeking federal habeas corpus relief.

A

The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81–82, empowered federal courts to issue writs of habeas corpus to prisoners "in custody, under or by colour of the authority of

the United States." In the early decades of our new federal system, English common law defined the substantive scope of the writ. *Ex parte Watkins*, 3 Pet. 193, 201–203 (1830). Federal prisoners could use the writ to challenge confinement imposed by a court that lacked jurisdiction, *ibid.*, or detention by the Executive without proper legal process, see *Ex parte Wells*, 18 How. 307 (1856).

The common-law limitations on the scope of the writ were subject to various expansive forces, both statutory and judicial. See generally Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463–499 (1963). The major statutory expansion of the writ occurred in 1867, when Congress extended federal habeas corpus to prisoners held in state custody. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. For the most part, however, expansion of the writ has come through judicial decisionmaking. As then-JUSTICE REHNQUIST explained in *Wainwright* v. *Sykes*, 433 U. S. 72, 79 (1977), the Court began by interpreting the concept of jurisdictional defect with generosity to include sentences imposed without statutory authorization, *Ex parte Lange*, 18 Wall. 163, 176 (1874), and convictions obtained under an unconstitutional statute, *Ex parte Siebold*, 100 U. S. 371, 376–377 (1880). Later, we allowed habeas relief for confinement under a state conviction obtained without adequate procedural protections for the defendant. *Frank* v. *Mangum*, 237 U. S. 309 (1915); *Moore* v. *Dempsey*, 261 U. S. 86 (1923).

Confronting this line of precedents extending the reach of the writ, in *Waley* v. *Johnston*, 316 U. S. 101 (1942), "the Court openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review, and acknowledged that such review is available for claims of 'disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.'" *Wainwright* v. *Sykes*, *supra*, at 79 (quoting *Waley* v. *Johnston*, *supra*, at

104–105). With the exception of Fourth Amendment violations that a petitioner has been given a full and fair opportunity to litigate in state court, *Stone* v. *Powell*, 428 U. S. 465, 495 (1976), the writ today appears to extend to all dispositive constitutional claims presented in a proper procedural manner. See *Brown* v. *Allen*, 344 U. S. 443 (1953); *Wainwright* v. *Sykes*, *supra*, at 79.

One procedural requisite is that a petition not lead to an abuse of the writ. We must next consider the origins and meaning of that rule.

B

At common law, res judicata did not attach to a court's denial of habeas relief. "[A] refusal to discharge on one writ [was] not a bar to the issuance of a new writ." 1 W. Bailey, Habeas Corpus and Special Remedies 206 (1913) (citing cases). "[A] renewed application could be made to every other judge or court in the realm, and each court or judge was bound to consider the question of the prisoner's right to a discharge independently, and not to be influenced by the previous decisions refusing discharge." W. Church, Writ of Habeas Corpus § 386, p. 570 (2d ed. 1893) (hereinafter Church). See, *e. g.*, *Ex parte Kaine*, 14 F. Cas. 78, 80 (No. 7,597) (CC SDNY 1853); *In re Kopel*, 148 F. 505, 506 (SDNY 1906). The rule made sense because at common law an order denying habeas relief could not be reviewed. Church 570; L. Yackle, Postconviction Remedies § 151, p. 551 (1981); Goddard, A Note on Habeas Corpus, 65 L. Q. Rev. 30, 32 (1949). Successive petitions served as a substitute for appeal. See W. Duker, A Constitutional History of Habeas Corpus 5–6 (1980); Church 570; Goddard, *supra*, at 35.

As appellate review became available from a decision in habeas refusing to discharge the prisoner, courts began to question the continuing validity of the common-law rule allowing endless successive petitions. Church 602. Some courts rejected the common-law rule, holding a denial of habeas relief

res judicata. See, *e. g.*, *Perry* v. *McLendon*, 62 Ga. 598, 603–605 (1879); *McMahon* v. *Mead*, 30 S. D. 515, 518, 139 N. W. 122, 123 (1912); *Ex parte Heller*, 146 Wis. 517, 524, 131 N. W. 991, 994 (1911). Others adopted a middle position between the extremes of res judicata and endless successive petitions. Justice Field's opinion on circuit in *Ex parte Cuddy*, 40 F. 62 (CC SD Cal. 1889), exemplifies this balance.

> "[W]hile the doctrine of *res judicata* does not apply, . . . the officers before whom the second application is made may take into consideration the fact that a previous application had been made to another officer and refused; and in some instances that fact may justify a refusal of the second. The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it. . . . In what I have said I refer, of course, to cases where a second application is made upon the same facts presented, or which might have been presented, on the first. The question is entirely different when subsequent occurring events have changed the situation of the petitioner so as in fact to present a new case for consideration. In the present application there are no new facts which did not exist when the first was presented. . . . I am of the opinion that in such a case a second application should not be heard . . . ." *Id.*, at 65–66.

Cf. *Ex parte Moebus*, 148 F. 39, 40–41 (NH 1906) (second petition disallowed "unless some substantial change in the circumstances had intervened").

We resolved the confusion over the continuing validity of the common-law rule, at least for federal courts, in *Salinger* v. *Loisel*, 265 U. S. 224 (1924), and *Wong Doo* v. *United States*, 265 U. S. 239 (1924). These decisions reaffirmed that res judicata does not apply "to a decision on *habeas corpus* refusing to discharge the prisoner." *Salinger* v. *Loisel*,

supra, at 230; see *Wong Doo* v. *United States*, *supra*, at 240. They recognized, however, that the availability of appellate review required a modification of the common-law rule allowing endless applications. As we explained in *Salinger:*

> "In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed . . . ." 265 U. S., at 230–231.

Relying on Justice Field's opinion in *Ex parte Cuddy*, we announced that second and subsequent petitions should be

> "disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are (a) the existence of another remedy, such as a right in ordinary course to an appellate review in the criminal case, and (b) a prior refusal to discharge on a like application." 265 U. S., at 231.

Because the lower court in *Salinger* had not disposed of the subsequent application for habeas corpus by reliance on dismissal of the prior application, the decision did not present an opportunity to apply the doctrine of abuse of the writ. 265 U. S., at 232. *Wong Doo* did present the question. There, the District Court had dismissed on res judicata grounds a second petition containing a due process claim that was raised, but not argued, in the first federal habeas petition. The petitioner "had full opportunity to offer proof of [his due process claim] at the hearing on the first petition," and he offered "[n]o reason for not presenting the proof at the outset . . . ." *Wong Doo*, 265 U. S., at 241. The record of the first petition did not contain proof of the due process claim,

but "what [was] said of it there and in the briefs show[ed] that it was accessible all the time." *Ibid.* In these circumstances, we upheld the dismissal of the second petition. We held that "according to a sound judicial discretion, controlling weight must have been given to the prior refusal." *Ibid.* So while we rejected res judicata in a strict sense as a basis for dismissing a later habeas action, we made clear that the prior adjudication bore vital relevance to the exercise of the court's discretion in determining whether to consider the petition.

Price v. *Johnston*, 334 U. S. 266 (1948), the next decision in this line, arose in a somewhat different context from *Salinger* or *Wong Doo*. In *Price*, the petitioner's fourth habeas petition alleged a claim that, arguably at least, was neither the explicit basis of a former petition nor inferable from the facts earlier alleged. The District Court and Court of Appeals dismissed the petition without hearing on the sole ground that the claim was not raised in one of the earlier habeas actions. We reversed and remanded, reasoning that the dismissal "precluded a proper development of the issue of the allegedly abusive use of the *habeas corpus* writ." 334 U. S., at 293. We explained that the State must plead an abuse of the writ with particularity, and that the burden then shifts to petitioner to show that presentation of the new claim does not constitute abuse. *Id.*, at 292. The District Court erred because it dismissed the petition without affording the petitioner an opportunity to explain the basis for raising his claim late. We gave directions for the proper inquiry in the trial court. If the explanation "is inadequate, the court may dismiss the petition without further proceedings." *Ibid.* But if a petitioner "present[s] adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay," he must be given the opportunity to develop these matters in a hearing. *Id.*, at 291–292. Without considering whether the petitioner had abused the writ, we remanded the case.

Although *Price* recognized that abuse-of-the-writ principles limit a petitioner's ability to file repetitive petitions, it also contained dicta touching on the standard for abuse that appeared to contradict this point. *Price* stated that "the three prior refusals to discharge petitioner can have no bearing or weight on the disposition to be made of the new matter raised in the fourth petition." *Id.*, at 289. This proposition ignored the significance of appellate jurisdictional changes, see *supra*, at 479–480, as well as the general disfavor we had expressed in *Salinger* and *Wong Doo* toward endless repetitive petitions. It did not even comport with language in *Price* itself which recognized that in certain circumstances new claims raised for the first time in a second or subsequent petition should not be entertained. As will become clear, the quoted portion of *Price* has been ignored in our later decisions.

One month after the *Price* decision, Congress enacted legislation, which for the first time addressed the issue of repetitive federal habeas corpus petitions:

> "No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." 28 U. S. C. § 2244 (1964 ed.).

Because § 2244 allowed a district court to dismiss a successive petition that "present[ed] no new ground not theretofore presented and determined," one might have concluded, by negative implication, that Congress denied permission to dismiss any petition that alleged new grounds for relief. Such an interpretation would have superseded the judicial principles

recognizing that claims not raised or litigated in a prior petition could, when raised in a later petition, constitute abuse. But the Reviser's Note to the 1948 statute made clear that as a general matter Congress did not intend the new section to disrupt the judicial evolution of habeas principles, 28 U. S. C. § 2244 (1964 ed.) (Reviser's Note), and we confirmed in *Sanders* v. *United States*, 373 U. S., at 11–12, that Congress' silence on the standard for abuse of the writ involving a new claim was "not intended to foreclose judicial application of the abuse-of-writ principle as developed in *Wong Doo* and *Price*."

Sanders also recognized our special responsibility in the development of habeas corpus with respect to another provision of the 1948 revision of the judicial code, 28 U. S. C. § 2255 (1964 ed.). The statute created a new postconviction remedy for federal prisoners with a provision for repetitive petitions different from the one found in § 2244. While § 2244 permitted dismissal of subsequent habeas petitions that "present[ed] no new ground not theretofore presented and determined," § 2255 allowed a federal district court to refuse to entertain a subsequent petition seeking "similar relief." On its face, § 2255 appeared to announce a much stricter abuse-of-the-writ standard than its counterpart in § 2244. We concluded in *Sanders*, however, that the language in § 2255 "cannot be taken literally," and construed it to be the "material equivalent" of the abuse standard in § 2244. *Sanders* v. *United States*, 373 U. S., at 13–14.

In addition to answering these questions, *Sanders* undertook a more general "formulation of basic rules to guide the lower federal courts" concerning the doctrine of abuse of the writ. *Id.*, at 15. After reiterating that the government must plead abuse of the writ and the petitioner must refute a well-pleaded allegation, *Sanders* addressed the definition of and rationale for the doctrine. It noted that equitable principles governed abuse of the writ, including "the principle that a suitor's conduct in relation to the matter at hand may

disentitle him to the relief he seeks," and that these principles must be applied within the sound discretion of district courts. *Id.*, at 17–18. The Court furnished illustrations of writ abuse:

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless, piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." *Id.*, at 18.

The Court also cited *Fay* v. *Noia*, 372 U. S. 391, 438–440 (1963), and *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963), for further guidance on the doctrine of abuse of the writ, stating that the principles of those cases "govern equally here." 373 U. S., at 18. Finally, *Sanders* established that federal courts must reach the merits of an abusive petition if "the ends of justice demand." *Ibid.*

Three years after *Sanders*, Congress once more amended the habeas corpus statute. The amendment was an attempt to alleviate the increasing burden on federal courts caused by successive and abusive petitions by "introducing a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966); see also H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5–6 (1966). The amendment recast § 2244 into three subparagraphs. Subparagraph (a) deletes the reference to state prisoners in the old § 2244 but left the provision otherwise intact. 28 U. S. C. § 2244(a). Subparagraph (c) states that where a state prisoner seeks relief for an alleged denial of a federal

constitutional right before this Court, any decision rendered by the Court shall be "conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right . . . ." 28 U. S. C. § 2244(c).

Congress added subparagraph (b) to address repetitive applications by state prisoners:

> "(b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus on behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U. S. C. § 2244(b).

Subparagraph (b) establishes a "qualified application of the doctrine of res judicata." S. Rep. No. 1797, *supra*, at 2. It states that a federal court "need not entertain" a second or subsequent habeas petition "unless" the petitioner satisfies two conditions. First, the subsequent petition must allege a new ground, factual or otherwise. Second, the applicant must satisfy the judge that he did not deliberately withhold the ground earlier or "otherwise abus[e] the writ." See *Smith* v. *Yeager*, 393 U. S. 122, 125 (1968) ("essential question [under § 2244(b)] is whether the petitioner 'deliberately withheld the newly asserted ground' in the prior proceeding, or 'otherwise abused the writ'"). If the petitioner meets these conditions, the court must consider the subsequent pe-

tition as long as other habeas errors, such as nonexhaustion, 28 U. S. C. § 2254(b), or procedural default, *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), are not present.

Section 2244(b) raises, but does not answer, other questions. It does not state whether a district court may overlook a deliberately withheld or otherwise abusive claim to entertain the petition in any event. That is, it does not state the limits on the district court's discretion to entertain abusive petitions. Nor does the statute define the term "abuse of the writ." As was true of similar silences in the original 1948 version of § 2244, however, see *supra*, at 484, Congress did not intend § 2244(b) to foreclose application of the court-announced principles defining and limiting a district court's discretion to entertain abusive petitions. See *Delo* v. *Stokes*, 495 U. S. 320, 321–322 (1990) (District Court abused discretion in entertaining a new claim in a fourth federal petition that was an abuse of the writ).

Rule 9(b) of the Rules Governing Habeas Corpus Proceedings, promulgated in 1976, also speaks to the problem of new grounds for relief raised in subsequent petitions. It provides:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." 28 U. S. C. § 2254 Rule 9(b).

Like 28 U. S. C. § 2244(b), Rule 9(b) "incorporates the judge-made principle governing the abuse of the writ set forth in *Sanders*." *Rose* v. *Lundy*, 455 U. S. 509, 521 (1982) (plurality opinion); *id.*, at 533 (Brennan, J., concurring in part and dissenting in part) (same). The Advisory Committee Notes make clear that a new claim in a subsequent petition should not be entertained if the judge finds the failure to raise it earlier "inexcusable." Advisory Committee Notes to

Rule 9, 28 U. S. C., pp. 426–427. The Notes also state that a retroactive change in the law and newly discovered evidence represent acceptable excuses for failing to raise the claim earlier. *Id.*, at 427.

In recent years we have applied the abuse-of-the-writ doctrine in various contexts. In *Woodard* v. *Hutchins*, 464 U. S. 377 (1984) *(per curiam)*, the petitioner offered no explanation for asserting three claims in a second federal habeas petition not raised in the first. Five Justices inferred from the lack of explanation that the three claims "could and should have been raised in" the first petition, and that the failure to do so constituted abuse of the writ. *Id.*, at 378–379, and n. 3 (Powell, J., joined by four Justices, concurring in grant of application to vacate stay). Similarly, in *Antone* v. *Dugger*, 465 U. S. 200 (1984) *(per curiam)*, we upheld the Court of Appeals' judgment that claims presented for the first time in a second federal petition constituted an abuse of the writ. We rejected petitioner's argument that he should be excused from his failure to raise the claims in the first federal petition because his counsel during first federal habeas prepared the petition in haste and did not have time to become familiar with the case. *Id.*, at 205–206, and n. 4. And just last Term, we held that claims raised for the first time in a fourth federal habeas petition abused the writ because they "could have been raised" or "could have been developed" in the first federal habeas petition. *Delo* v. *Stokes*, *supra*, at 321–322. See also *Kuhlmann* v. *Wilson*, 477 U. S. 436, 444, n. 6 (1986) (plurality opinion) (petition that raises grounds "available but not relied upon in a prior petition" is an example of abuse of the writ); *Straight* v. *Wainwright*, 476 U. S. 1132, 1133 (1986) (Powell, J., joined by three Justices, concurring in denial of stay) (new arguments in second petition that "plainly could have been raised earlier" constitute abuse of the writ); *Rose* v. *Lundy*, *supra*, at 521 (plurality opinion) (prisoner who proceeds with exhausted claims in first federal

petition and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions).

III

Our discussion demonstrates that the doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions. Because of historical changes and the complexity of the subject, the Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ." *Fay* v. *Noia*, 372 U. S., at 411–412. Today we attempt to define the doctrine of abuse of the writ with more precision.

Although our decisions on the subject do not all admit of ready synthesis, one point emerges with clarity: Abuse of the writ is not confined to instances of deliberate abandonment. *Sanders* mentioned deliberate abandonment as but one example of conduct that disentitled a petitioner to relief. *Sanders* cited a passage in *Townsend* v. *Sain*, 372 U. S., at 317, which applied the principle of inexcusable neglect, and noted that this principle also governs in the abuse-of-the-writ context, *Sanders* v. *United States*, 373 U. S., at 18.

As *Sanders*' reference to *Townsend* demonstrates, as many Courts of Appeals recognize, see, *e. g.*, 890 F. 2d, at 346–347 (case below); *Hall* v. *Lockhart*, 863 F. 2d 609, 610 (CA8 1988); *Jones* v. *Estelle*, 722 F. 2d 159, 163 (CA5 1983); *Miller* v. *Bordenkircher*, 764 F. 2d 245, 250–252 (CA4 1985), and as McCleskey concedes, Brief for Petitioner 39–40, 45–48, a petitioner may abuse the writ by failing to raise a claim through inexcusable neglect. Our recent decisions confirm that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice. See, *e. g.*, *Delo* v. *Stokes*, 495 U. S., at 321–322; *Antone* v. *Dugger*, *supra*, at 205–206. See also 28 U. S. C. § 2244(b) (recognizing that a petitioner

can abuse the writ in a fashion that does not constitute deliberate abandonment).

The inexcusable neglect standard demands more from a petitioner than the standard of deliberate abandonment. But we have not given the former term the content necessary to guide district courts in the ordered consideration of allegedly abusive habeas corpus petitions. For reasons we explain below, a review of our habeas corpus precedents leads us to decide that the same standard used to determine whether to excuse state procedural defaults should govern the determination of inexcusable neglect in the abuse-of-the-writ context.

The prohibition against adjudication in federal habeas corpus of claims defaulted in state court is similar in purpose and design to the abuse-of-the-writ doctrine, which in general prohibits subsequent habeas consideration of claims not raised, and thus defaulted, in the first federal habeas proceeding. The terms "abuse of the writ" and "inexcusable neglect," on the one hand, and "procedural default," on the other, imply a background norm of procedural regularity binding on the petitioner. This explains the presumption against habeas adjudication both of claims defaulted in state court and of claims defaulted in the first round of federal habeas. A federal habeas court's power to excuse these types of defaulted claims derives from the court's equitable discretion. See *Reed* v. *Ross*, 468 U. S. 1, 9 (1984) (procedural default); *Sanders* v. *United States*, 373 U. S., at 17–18 (abuse of the writ). In habeas, equity recognizes that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." *Id.*, at 17. For these reasons, both the abuse-of-the-writ doctrine and our procedural default jurisprudence concentrate on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.

The doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the signifi-

cant costs of federal habeas corpus review. To begin with, the writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague* v. *Lane*, 489 U. S. 288, 309 (1989). And when a habeas petitioner succeeds in obtaining a new trial, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time," *Kuhlmann* v. *Wilson*, *supra*, at 453, prejudice the government and diminish the chances of a reliable criminal adjudication. Though *Fay* v. *Noia*, *supra*, may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality. See, *e. g.*, *Teague* v. *Lane*, *supra*, at 308–309; *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986); *Reed* v. *Ross*, *supra*, at 10; *Engle* v. *Isaac*, 456 U. S. 107, 127 (1982).

Finality has special importance in the context of a federal attack on a state conviction. *Murray* v. *Carrier*, *supra*, at 487; *Engle* v. *Isaac*, *supra*, at 128. Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Murray* v. *Carrier*, *supra*, at 487 (quoting *Engle*, *supra*, at 128). Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

Habeas review extracts further costs. Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 260 (1973) (Powell, J., concurring). Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to

present claims when evidence is fresh. *Reed* v. *Ross*, *supra*, at 13; *Wainwright* v. *Sykes*, 433 U. S., at 89.

Far more severe are the disruptions when a claim is presented for the first time in a second or subsequent federal habeas petition. If "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused," *Engle* v. *Isaac*, *supra*, at 126–127, the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system.

> "A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." Bator, 76 Harv. L. Rev., at 452–453 (footnotes omitted).

If reexamination of a conviction in the first round of federal habeas stretches resources, examination of new claims raised in a second or subsequent petition spreads them thinner still. These later petitions deplete the resources needed for federal litigants in the first instance, including litigants commencing their first federal habeas action. The phenomenon calls to mind Justice Jackson's admonition that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U. S., at 537 (opinion concurring in result). And if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition.

The federal writ of habeas corpus overrides all these considerations, essential as they are to the rule of law, when a petitioner raises a meritorious constitutional claim in a

proper manner in a habeas petition. Our procedural default jurisprudence and abuse-of-the-writ jurisprudence help define this dimension of procedural regularity. Both doctrines impose on petitioners a burden of reasonable compliance with procedures designed to discourage baseless claims and to keep the system open for valid ones; both recognize the law's interest in finality; and both invoke equitable principles to define the court's discretion to excuse pleading and procedural requirements for petitioners who could not comply with them in the exercise of reasonable care and diligence. It is true that a habeas court's concern to honor state procedural default rules rests in part on respect for the integrity of procedures "employed by a coordinate jurisdiction within the federal system," *Wainwright* v. *Sykes*, *supra*, at 88, and that such respect is not implicated when a petitioner defaults a claim by failing to raise it in the first round of federal habeas review. Nonetheless, the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments.

We conclude from the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ that the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts. We have held that a procedural default will be excused upon a showing of cause and prejudice. *Wainwright* v. *Sykes*, *supra*. We now hold that the same standard applies to determine if there has been an abuse of the writ through inexcusable neglect.

In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray* v. *Carrier*, 477 U. S., at 488. Objec-

tive factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.*, at 486–488. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains." *United States* v. *Frady*, 456 U. S. 152, 168 (1982).

Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice. *Murray* v. *Carrier*, *supra*, at 485.

The cause and prejudice analysis we have adopted for cases of procedural default applies to an abuse-of-the-writ inquiry in the following manner. When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that petitioner cannot satisfy the standard. If petitioner cannot show cause, the failure to raise the claim in an earlier petition may

nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim. Application of the cause and prejudice standard in the abuse-of-the-writ context does not mitigate the force of *Teague* v. *Lane*, 489 U. S. 288 (1989), which prohibits, with certain exceptions, the retroactive application of new law to claims raised in federal habeas. Nor does it imply that there is a constitutional right to counsel in federal habeas corpus. See *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further").

Although the cause and prejudice standard differs from some of the language in *Price* v. *Johnston*, 334 U. S. 266 (1948), it is consistent with *Cuddy*, *Salinger*, *Wong Doo*, and *Sanders*, as well as our modern abuse-of-the-writ decisions, including *Antone*, *Woodard*, and *Delo*. In addition, the exception to cause for fundamental miscarriages of justice gives meaningful content to the otherwise unexplained "ends of justice" inquiry mandated by *Sanders*. *Sanders* drew the phrase "ends of justice" from the 1948 version of § 2244. 28 U. S. C. § 2244 (1964 ed.) (judge need not entertain subsequent application if he is satisfied that "the ends of justice will not be served by such inquiry"). *Sanders* v. *United States*, 373 U. S., at 15–17. Although the 1966 revision to the habeas statute eliminated any reference to an "ends of justice" inquiry, a plurality of the Court in *Kuhlmann* v. *Wilson*, 477 U. S., at 454, held that this inquiry remained appropriate, and required federal courts to entertain successive petitions when a petitioner supplements a constitutional claim with a "colorable showing of factual innocence." The miscarriage of justice exception to cause serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty," *Stone* v. *Powell*, 428 U. S., at 492–493, n. 31, guaranteeing that the ends of justice will be served in full.

Considerations of certainty and stability in our discharge of the judicial function support adoption of the cause and prejudice standard in the abuse-of-the-writ context. Well defined in the case law, the standard will be familiar to federal courts. Its application clarifies the imprecise contours of the term "inexcusable neglect." The standard is an objective one, and can be applied in a manner that comports with the threshold nature of the abuse-of-the-writ inquiry. See *Price* v. *Johnston*, 334 U. S., at 287 (abuse of the writ is "preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself"). Finally, the standard provides "a sound and workable means of channeling the discretion of federal habeas courts." *Murray* v. *Carrier*, 477 U. S., at 497. "[I]t is important, in order to preclude individualized enforcement of the Constitution in different parts of the Nation, to lay down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts." *Brown* v. *Allen*, 344 U. S., at 501–502 (opinion of Frankfurter, J.).

The cause and prejudice standard should curtail the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process. "Federal courts should not continue to tolerate—even in capital cases—this type of abuse of the writ of habeas corpus." *Woodard* v. *Hutchins*, 464 U. S., at 380. The writ of habeas corpus is one of the centerpieces of our liberties. "But the writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown* v. *Allen*, *supra*, at 512 (opinion of Frankfurter, J.). Adoption of the cause and prejudice standard acknowledges the historic purpose and function of the writ in our constitutional system, and, by preventing its abuse, assures its continued efficacy.

We now apply these principles to the case before us.

IV

McCleskey based the *Massiah* claim in his second federal petition on the 21-page Evans document alone. Worthy's identity did not come to light until the hearing. The District Court found, based on the document's revelation of the tactics used by Evans in engaging McCleskey in conversation (such as his pretending to be Ben Wright's uncle and his claim that he was supposed to participate in the robbery), that the document established an *ab initio* relationship between Evans and the authorities. It relied on the finding and on Worthy's later testimony to conclude that the State committed a *Massiah* violation.

This ruling on the merits cannot come before us or any federal court if it is premised on a claim that constitutes an abuse of the writ. We must consider, therefore, the preliminary question whether McCleskey had cause for failing to raise the *Massiah* claim in his first federal petition. The District Court found that neither the 21-page document nor Worthy were known or discoverable before filing the first federal petition. Relying on these findings, McCleskey argues that his failure to raise the *Massiah* claim in the first petition should be excused. For reasons set forth below, we disagree.

That McCleskey did not possess, or could not reasonably have obtained, certain evidence fails to establish cause if other known or discoverable evidence could have supported the claim in any event. "[C]ause . . . requires a showing of some external impediment *preventing* counsel from constructing or raising the claim." *Murray* v. *Carrier*, 477 U. S., at 492 (emphasis added). For cause to exist, the external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim. See *id.*, at 488 (cause if "interference by officials . . . made compliance

impracticable"); *Amadeo* v. *Zant*, 486 U. S. 214, 222 (1988) (cause if unavailable evidence "was the reason" for default). Abuse-of-the-writ doctrine examines *petitioner's* conduct: The question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process, see 28 U. S. C. § 2254 Rule 6 (Discovery); Rule 7 (Expansion of Record); Rule 8 (Evidentiary Hearing). The requirement of cause in the abuse-of-the-writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition. If what petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal habeas petition, what he does not know is irrelevant. Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim.

In applying these principles, we turn first to the 21-page signed statement. It is essential at the outset to distinguish between two issues: (1) Whether petitioner knew about or could have discovered the 21-page document; and (2) whether he knew about or could have discovered the evidence the document recounted, namely, the jail-cell conversations. The District Court's error lies in its conflation of the two inquiries, an error petitioner would have us perpetuate here.

The 21-page document unavailable to McCleskey at the time of the first petition does not establish that McCleskey had cause for failing to raise the *Massiah* claim at the outset.* Based on testimony and questioning at trial, McCles-

*We accept as not clearly erroneous the District Court finding that the document itself was neither known nor reasonably discoverable at the time of the first federal petition. We note for the sake of completeness, however, that this finding is not free from substantial doubt. The record contains much evidence that McCleskey knew, or should have known, of the written document. When McCleskey took the stand at trial, the prosecu-

key knew that he had confessed the murder during jail-cell conversations with Evans, knew that Evans claimed to be a relative of Ben Wright during the conversations, and knew that Evans told the police about the conversations. Knowledge of these facts alone would put McCleskey on notice to pursue the *Massiah* claim in his first federal habeas petition as he had done in the first state habeas petition.

But there was more. The District Court's finding that the 21-page document established an *ab initio* relationship between Evans and the authorities rested in its entirety on conversations in which McCleskey himself participated.

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tor asked him about conversations with a prisoner in an adjacent cell. These questions provoked a side-bar conference. The lawyers for the defense reasserted their request for "statements from the defendant," to which the court responded that "a statement . . . was furnished to the Court but . . . doesn't help [McCleskey]." App. 17. If there were any doubt about an additional document, it is difficult to see why such doubt had not evaporated by the time of the direct appeal and both the first state and first federal habeas actions. In those proceedings McCleskey made deliberate withholding of a statement by McCleskey to Evans the specific basis for a *Brady* claim. In rejecting this claim on direct review, the Georgia Supreme Court said: "The prosecutor showed the defense counsel his file, *but did not furnish this witness' [i. e. Evans'] statement.*" *McClesky* v. *State*, 245 Ga. 108, 112, 263 S. E. 2d 146, 150 (1980) (emphasis added). At the first state habeas corpus hearing, McCleskey's trial counsel testified that the prosecutor told him that the statement of an unnamed individual had been presented to the trial court but withheld from the defense. The prosecutor made clear the individual's identity in his February 1981 state habeas deposition when he stated:

". . . Offie Evans gave his statement but it was not introduced at the trial. It was part of that matter that was made [in] in camera inspection by the judge prior to trial." App. 25.

All of this took place before the first federal petition. The record, then, furnishes strong evidence that McCleskey knew or should have known of the Evans document before the first federal petition but chose not to pursue it. We need not pass upon the trial court's finding to the contrary, however, for the relevant question in this case is whether he knew or should have known of the contents of the conversations recounted in the document.

Though at trial McCleskey denied the inculpatory conversations, his current arguments presuppose them. Quite apart from the inequity in McCleskey's reliance on that which he earlier denied under oath, the more fundamental point remains that because McCleskey participated in the conversations reported by Evans, he knew everything in the document that the District Court relied upon to establish the *ab initio* connection between Evans and the police. McCleskey has had at least constructive knowledge all along of the facts he now claims to have learned only from the 21-page document. The unavailability of the document did not prevent McCleskey from raising the *Massiah* claim in the first federal petition and is not cause for his failure to do so. And of course, McCleskey cannot contend that his false representations at trial constitute cause for the omission of a claim from the first federal petition.

The District Court's determination that jailer Worthy's identity and testimony could not have been known prior to the first federal petition does not alter our conclusion. It must be remembered that the 21-page statement was the only new evidence McCleskey had when he filed the *Massiah* claim in the second federal petition in 1987. Under McCleskey's own theory, nothing was known about Worthy even then. If McCleskey did not need to know about Worthy and his testimony to press the *Massiah* claim in the second petition, neither did he need to know about him to assert it in the first. Ignorance about Worthy did not prevent McCleskey from raising the *Massiah* claim in the first federal petition and will not excuse his failure to do so.

Though this reasoning suffices to show the irrelevance of the District Court's finding concerning Worthy, the whole question illustrates the rationale for requiring a prompt investigation and the full pursuit of habeas claims in the first petition. At the time of the first federal petition, written logs and records with prison staff names and assignments existed. By the time of the second federal petition officials had

destroyed the records pursuant to normal retention schedules. Worthy's inconsistent and confused testimony in this case demonstrates the obvious proposition that factfinding processes are impaired when delayed. Had McCleskey presented this claim in the first federal habeas proceeding when official records were available, he could have identified the relevant officers and cell assignment sheets. The critical facts for the *Massiah* claim, including the reason for Evans' placement in the cell adjacent to McCleskey's and the precise conversation that each officer had with Evans before he was put there, likely would have been reconstructed with greater precision than now can be achieved. By failing to raise the *Massiah* claim in 1981, McCleskey foreclosed the procedures best suited for disclosure of the facts needed for a reliable determination.

McCleskey nonetheless seeks to hold the State responsible for his omission of the *Massiah* claim in the first petition. His current strategy is to allege that the State engaged in wrongful conduct in withholding the 21-page document. This argument need not detain us long. When all is said and done, the issue is not presented in the case, despite all the emphasis upon it in McCleskey's brief and oral argument. The Atlanta police turned over the 21-page document upon request in 1987. The District Court found no misrepresentation or wrongful conduct by the State in failing to hand over the document earlier, and our discussion of the evidence in the record concerning the existence of the statement, see n., *supra*, as well as the fact that at least four courts have considered and rejected petitioner's *Brady* claim, belies McCleskey's characterization of the case. And as we have taken care to explain, the document is not critical to McCleskey's notice of a *Massiah* claim anyway.

Petitioner's reliance on the procedural default discussion in *Amadeo* v. *Zant*, 486 U. S. 214 (1988), is misplaced. In *Amadeo* the Court mentioned that government concealment of evidence could be cause for a procedural default if it "was

the reason for the failure of a petitioner's lawyers to raise the jury challenge in the trial court." *Id.*, at 222. This case differs from *Amadeo* in two crucial respects. First, there is no finding that the State concealed evidence. And second, even if the State intentionally concealed the 21-page document, the concealment would not establish cause here because, in light of McCleskey's knowledge of the information in the document, any initial concealment would not have prevented him from raising the claim in the first federal petition.

As McCleskey lacks cause for failing to raise the *Massiah* claim in the first federal petition, we need not consider whether he would be prejudiced by his inability to raise the alleged *Massiah* violation at this late date. See *Murray* v. *Carrier*, 477 U. S., at 494 (rejecting proposition that showing of prejudice permits relief in the absence of cause).

We do address whether the Court should nonetheless exercise its equitable discretion to correct a miscarriage of justice. That narrow exception is of no avail to McCleskey. The *Massiah* violation, if it be one, resulted in the admission at trial of truthful inculpatory evidence which did not affect the reliability of the guilt determination. The very statement McCleskey now seeks to embrace confirms his guilt. As the District Court observed:

> "After having read [the Evans statement], the court has concluded that nobody short of William Faulkner could have contrived that statement, and as a consequence finds the testimony of Offie Evans absolutely to be true, and the court states on the record that it entertains absolutely no doubt as to the guilt of Mr. McCleskey." 4 Tr. 4.

We agree with this conclusion. McCleskey cannot demonstrate that the alleged *Massiah* violation caused the conviction of an innocent person. *Murray* v. *Carrier*, *supra*, at 496.

The history of the proceedings in this case, and the burden upon the State in defending against allegations made for the

first time in federal court some nine years after the trial, reveal the necessity for the abuse-of-the-writ doctrine. The cause and prejudice standard we adopt today leaves ample room for consideration of constitutional errors in a first federal habeas petition and in a later petition under appropriate circumstances. Petitioner has not satisfied this standard for excusing the omission of the *Massiah* claim from his first petition. The judgment of the Court of Appeals is

Affirmed.

APPENDIX TO OPINION OF THE COURT

Petitioner's Claims for Relief at Various Stages of the Litigation

1. *Direct Appeal.* On direct appeal, McCleskey raised the following claims: (1) the death penalty was administered in a discriminatory fashion because of prosecutorial discretion; (2) the prosecutor conducted an illegal postindictment lineup; (3) the trial court erred in admitting at trial the statement McCleskey made to the police; (4) the trial court erred in allowing Evans to testify about McCleskey's jail-house confession; (5) the prosecutor failed to disclose certain impeachment evidence; and (6) the trial court erred in admitting evidence of McCleskey's prior criminal acts. *McClesky* v. *State*, 245 Ga. 108, 112–114, 263 S. E. 2d 146, 149–151 (1980).

2. *First State Habeas Corpus Petition.* McCleskey's first state habeas petition alleged the following constitutional violations: (1) the Georgia death penalty is administered arbitrarily, capriciously, and whimsically; (2) Georgia officials imposed McCleskey's capital sentence pursuant to a pattern and practice of discrimination on the basis of race, sex, and poverty; (3) the death penalty lacks theoretical or factual justification and fails to serve any rational interest; (4) McCleskey's death sentence is cruel and unusual punishment in light of all mitigating factors; (5) McCleskey received inadequate notice and opportunity to be heard; (6) the jury did not constitute a fair cross section of the community; (7) the jury was biased

in favor of the prosecution; (8) the trial court improperly excused two jurors who were opposed to the death penalty; (9) McCleskey's postarrest statement should have been excluded because it was obtained after an allegedly illegal arrest; (10) the postarrest statement was extracted involuntarily; (11) the State failed to disclose an "arrangement" with one of its key witnesses, Evans; (12) the State deliberately withheld a statement made by McCleskey to Evans; (13) the trial court erred in failing to grant McCleskey funds to employ experts in aid of his defense; (14) three witnesses for the State witnessed a highly suggestive lineup involving McCleskey prior to trial; (15) the trial court's jury instructions concerning intent impermissibly shifted the burden of persuasion to McCleskey; (16) the prosecution impermissibly referred to the appellate process during the sentencing phase; (17) the trial court improperly admitted evidence of other crimes for which McCleskey had not been convicted; (18) the trial court's instructions concerning evidence of McCleskey's other bad acts was overbroad; (19) the appellate review procedures of Georgia denied McCleskey effective assistance of counsel, a fair hearing, and the basic tools of an adequate defense; (20) the means by which the death penalty is administered inflicts wanton and unnecessary torture; (21) McCleskey was denied effective assistance of counsel in numerous contexts; (22) introduction of statements petitioner made to Evans were elicited in a situation created to induce McCleskey to make incriminating statements; and (23) the evidence was insufficient to convict McCleskey of capital murder. Petition, HC No. 4909, 2 Tr., Exh. H.

3. *First Federal Habeas Corpus Petition.* McCleskey raised the following claims in his first federal habeas petition: (1) the Georgia death penalty discriminated on the basis of race; (2) the State failed to disclose an "understanding" with Evans; (3) the trial court's instructions to the jury impermissibly shifted the burden to McCleskey; (4) the prosecutor improperly referred to the appellate process at the sentencing

phase; (5) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense; (6) the trial court's instructions concerning evidence of McCleskey's other bad acts was overbroad; (7) the trial court's instructions gave the jury too much discretion to consider nonstatutory aggravating circumstances; (8) the trial court improperly admitted evidence of other crimes for which McCleskey had not been convicted; (9) three witnesses for the State witnessed a highly suggestive lineup involving McCleskey prior to trial; (10) McCleskey's postarrest statement should have been excluded because it was extracted involuntarily; (11) the trial court impermissibly excluded two jurors who were opposed to the death penalty; (12) the death penalty lacks theoretical or factual justification and fails to serve any rational interest; (13) the State deliberately withheld a statement made by McCleskey to Evans; (14) the evidence was insufficient to convict McCleskey of capital murder; (15) McCleskey's counsel failed to investigate the State's evidence adequately; (16) McCleskey's counsel failed to raise certain objections or make certain motions at trial; (17) McCleskey's counsel failed to undertake an independent investigation of possible mitigating circumstances prior to trial; and (18) after trial, McCleskey's counsel failed to review and correct the judge's sentence report. *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga. 1984).

4. *Second State Habeas Petition.* In his second state habeas petition, McCleskey alleged the following claims: (1) the prosecutor systematically excluded blacks from the jury; (2) the State of Georgia imposed the death penalty against McCleskey in a racially discriminatory manner; (3) the State failed to disclose its agreement with Evans; (4) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense; and (5) the prosecutor improperly referred to the appellate process at the sentencing phase. Petition, 2 Tr., Exh. G.

5. *Second Federal Habeas Corpus Petition.* In his second federal habeas petition, McCleskey alleged the following claims: (1) Evans' testimony concerning his conversation with McCleskey was inadmissible because Evans acted as a state informant in a situation created to induce McCleskey to make incriminating statements; (2) the State failed to correct the misleading testimony of Evans; (3) the State failed to disclose "an arrangement" with Evans; (4) the prosecutor improperly referred to the appellate process at the sentencing phase; (5) the State systematically excluded blacks from McCleskey's jury; (6) the death penalty was imposed on McCleskey pursuant to a pattern and practice of racial discrimination by Georgia officials against black defendants; and (7) the trial court impermissibly refused to grant McCleskey funds to employ experts in aid of his defense. Federal Habeas Petition, 1 Tr., Exh. 1.

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

Today's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding longstanding legal principles, the Court radically redefines the content of the "abuse of the writ" doctrine, substituting the strict-liability "cause and prejudice" standard of *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), for the good-faith "deliberate abandonment" standard of *Sanders* v. *United States*, 373 U. S. 1 (1963). This doctrinal innovation, which repudiates a line of judicial decisions codified by Congress in the governing statute and procedural rules, was by no means foreseeable when the petitioner in this case filed his first federal habeas application. Indeed, the new rule announced and applied today was not even *requested* by respondent at any point in this litigation. Finally, rather than remand this case for reconsideration in light of its new standard, the majority performs an independent reconstruction of the record, disregarding the factual findings of the District Court and applying its new rule in a

manner that encourages state officials to *conceal* evidence that would likely prompt a petitioner to raise a particular claim on habeas. Because I cannot acquiesce in this unjustifiable assault on the Great Writ, I dissent.

I

Disclaiming innovation, the majority depicts the "cause and prejudice" test as merely a clarification of existing law. Our decisions, the majority explains, have left "[m]uch confusion . . . on the standard for determining when a petitioner abuses the writ." *Ante*, at 477. But amidst this "confusion," the majority purports to discern a trend toward the cause-and-prejudice standard and concludes that this is the rule that best comports with "our habeas corpus precedents," *ante*, at 490; see *ante*, at 495, and with the "complex and evolving body of equitable principles" that have traditionally defined the abuse-of-the-writ doctrine, *id.*, at 489. This attempt to gloss over the break between today's decision and established precedents is completely unconvincing.

Drawing on the practice at common law in England, this Court long ago established that the power of a federal court to entertain a second or successive petition should turn not on "the inflexible doctrine of *res judicata*" but rather on the exercise of "sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the subject." *Wong Doo* v. *United States*, 265 U. S. 239, 240–241 (1924); accord, *Salinger* v. *Loisel*, 265 U. S. 224, 230–232 (1924). Thus, in *Wong Doo*, the Court held that the District Court acted within its discretion in dismissing a petition premised on a ground that was raised but expressly abandoned in an earlier petition. "The petitioner had full opportunity," the Court explained, "to offer proof [of the abandoned ground] at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then." 265 U. S., at 241. Noting that the evidence supporting the abandoned ground had been "ac-

cessible all the time," the Court inferred that petitioner, an alien seeking to forestall his imminent deportation, had split his claims in order to "postpone the execution of the [deportation] order." *Ibid.*

In *Price* v. *Johnston*, 334 U. S. 266 (1948), in contrast, the Court held that the District Court abused its discretion by summarily dismissing a petition that raised a claim not asserted in any of three previous petitions filed by the same prisoner. Whereas it had been clear from the record that the petitioner in *Wong Doo* had possessed access to the facts supporting his abandoned claim, the District Court in *Price* had no basis for assuming that the prisoner had "acquired no new or additional information since" the disposition of his earlier petitions. *Id.*, at 290. "[E]ven if it [had been] found that petitioner did have prior knowledge of all the facts concerning the allegation in question," the Court added, the District Court should not have dismissed the petition before affording the prisoner an opportunity to articulate "some justifiable reason [why] he was previously unable to assert his rights or was unaware of the significance of relevant facts." *Id.*, at 291.

In *Sanders* v. *United States*, 373 U. S. 1 (1963), the Court crystallized the various factors bearing on a district court's discretion to entertain a successive petition.[1] The Court in *Sanders* distinguished successive petitions raising previously asserted grounds from those raising previously unasserted grounds. With regard to the former class of petitions, the Court explained, the district court may give "[c]ontrolling weight . . . to [the] denial of a prior application" unless "the ends of justice would . . . be served by reaching the merits of the subsequent application." *Id.*, at 15. With regard to the

[1] Although *Sanders* examined the abuse-of-the-writ question in the context of a motion for collateral review filed under 28 U. S. C. § 2255, the Court made it clear that the same principles apply in the context of a petition for habeas corpus filed under 28 U. S. C. § 2254. See 373 U. S., at 12–15.

latter, however, the district court *must* reach the merits of the petition *unless* "there has been an abuse of the writ . . . ." *Id.*, at 17. In determining whether the omission of the claim from the previous petition constitutes an abuse of the writ, the judgment of the district court is to be guided chiefly by the "'[equitable] principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" *Ibid.*, quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963).

> "Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in *Wong Doo*, the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay." 373 U. S., at 18.

What emerges from *Sanders* and its predecessors is essentially a good-faith standard. As illustrated by *Wong Doo*, the principal form of bad faith that the "abuse of the writ" doctrine is intended to deter is the deliberate abandonment of a claim the factual and legal basis of which are known to the petitioner (or his counsel) when he files his first petition. The Court in *Sanders* stressed this point by equating its analysis with that of *Fay* v. *Noia*, *supra*, which established the then-prevailing "deliberate bypass" test for the cognizability of claims on which a petitioner procedurally defaulted in state proceedings. See 373 U. S., at 18. A petitioner also abuses the writ under *Sanders* when he uses the writ to achieve some end other than expeditious relief from unlawful confinement—such as "to vex, harass, or delay." However, so long

as the petitioner's previous application was based on a good-faith assessment of the claims available to him, see *Price* v. *Johnston*, *supra*, at 289; *Wong Doo*, *supra*, at 241; the denial of the application does not bar the petitioner from availing himself of "new or additional information," *Price* v. *Johnston*, *supra*, at 290, in support of a claim not previously raised. Accord, Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427.

"Cause and prejudice"—the standard currently applicable to procedural defaults in state proceedings, see *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)—imposes a much stricter test. As this Court's precedents make clear, a petitioner has *cause* for failing effectively to present his federal claim in state proceedings only when "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule . . . ." *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). Under this test, the state of mind of counsel is largely irrelevant. Indeed, this Court has held that even counsel's *reasonable* perception that a particular claim is without factual or legal foundation does not excuse the failure to raise that claim in the absence of an objective, external impediment to counsel's efforts. See *Smith* v. *Murray*, 477 U. S. 527, 535–536 (1986). In this sense, the cause component of the *Wainwright* v. *Sykes* test establishes a *strict-liability* standard.[2]

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[2] Contrary to the majority's suggestion, this Court's more recent decisions on abuse of the writ by no means foreshadowed the shift to *Sykes*' strict-liability standard. The cases cited by the majority all involved eleventh-hour dispositions of capital stay applications, and the cursory analysis in each ruling suggests merely that the habeas petitioner failed to carry his burden of articulating a credible explanation for having failed to raise the claim in an earlier petition. See Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427 ("[T]he petitioner has the burden of proving that he has not abused the writ"); accord, *Price* v. *Johnston*, 334 U. S. 266, 292 (1948); see also *Sanders* v. *United States*, 373 U. S. 1, 10 (1963) (Government merely has burden to plead abuse of the writ). Thus, in *Woodard* v. *Hutchins*, 464 U. S. 377 (1984) *(per curiam)*, the five Jus-

Equally foreign to our abuse-of-the-writ jurisprudence is the requirement that a petitioner show "prejudice." Under *Sanders*, a petitioner who articulates a justifiable reason for failing to present a claim in a previous habeas application is not required in addition to demonstrate any particular degree of prejudice before the habeas court must consider his claim. If the petitioner demonstrates that his claim has merit, it is the State that must show that the resulting constitutional error was harmless beyond a reasonable doubt. See L. Yackle, Postconviction Remedies § 133, p. 503 (1981).[3]

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tices concurring in the order concluded that the habeas petitioner had abused the writ because he "offer[ed] *no explanation* for having failed to raise [three new] claims in his first petition for habeas corpus." *Id.*, at 379 (Powell, J., joined by Burger, C. J., BLACKMUN, REHNQUIST, and O'CONNOR, JJ., concurring in order vacating stay) (emphasis added). A petitioner who gives no explanation for omitting his claims from a previous application necessarily fails to carry his burden of justification. Similarly, in *Antone* v. *Dugger*, 465 U. S. 200 (1984) *(per curiam)*, the Court rejected as "meritless" the petitioner's claim that the imminence of his execution prevented his counsel from identifying all of the claims that could be raised in the first petition, because the petitioner's execution had in fact been stayed during the pendency of the original habeas proceeding. *Id.*, at 206, n. 4. Finally, in *Delo* v. *Stokes*, 495 U. S. 320 (1990) *(per curiam)*, the Court in a five-sentence analysis concluded that the petitioner had abused the writ by raising a claim the legal basis of which was readily apparent at the time of the first petition. *Id.*, at 321–322. The opinion says nothing about whether the petitioner offered any explanation to rebut the presumption that the petitioner had deliberately abandoned this claim. In short, the analysis in these decisions is as consistent with *Sanders*' deliberate-abandonment test as with *Sykes*' cause-and-prejudice test.

[3] The majority is simply incorrect, moreover, when it claims that the "prejudice" component of the *Sykes* test is "[w]ell defined in the case law." *Ante*, at 496. The Court in *Sykes* expressly declined to define this concept, see 433 U. S., at 91, and since then, the Court has elaborated upon "prejudice" only as it applies to nonconstitutional jury-instruction challenges, leaving "the import of the term in other situations . . . an open question." *United States* v. *Frady*, 456 U. S. 152, 168 (1982). Thus, far from resolving "confusion" over the proper application of the abuse-of-the-writ doctrine, today's decision creates it.

II

The real question posed by the majority's analysis is not *whether* the cause-and-prejudice test departs from the principles of *Sanders*—for it clearly does—but whether the majority has succeeded in *justifying* this departure as an exercise of this Court's common-lawmaking discretion. In my view, the majority does not come close to justifying its new standard.

A

Incorporation of the cause-and-prejudice test into the abuse-of-the-writ doctrine cannot be justified as an exercise of this Court's common-lawmaking discretion, because this Court has no discretion to exercise in this area. Congress has affirmatively ratified the *Sanders* good-faith standard in the governing statute and procedural rules, thereby insulating that standard from judicial repeal.

The abuse-of-the-writ doctrine is embodied in 28 U. S. C. § 2244(b) and in Habeas Corpus Rule 9(b). Enacted three years after *Sanders*, § 2244(b) recodified the statutory authority of a district court to dismiss a second or successive petition, amending the statutory language to incorporate the *Sanders* criteria:

> "[A] subsequent application for a writ of habeas corpus . . . need not be entertained by a court . . . unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court . . . is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ." 28 U. S. C. § 2244(b).

Consistent with *Sanders*, the purpose of the recodification was to spare a district court the obligation to entertain a petition "containing allegations identical to those asserted in a previous application that has been denied, or predicated upon grounds *obviously well known to [the petitioner] when [he]*

filed the preceding application." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966) (emphasis added). Rule 9(b) likewise adopts *Sanders'* terminology:

> "A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

There can be no question that § 2244(b) and Rule 9(b) codify *Sanders*. The legislative history of, and Advisory Committee's Notes to, Rule 9(b) expressly so indicate, see 28 U. S. C., pp. 426–427; H. R. Rep. No. 94–1471, pp. 5–6 (1976), and such has been the universal understanding of this Court, see *Rose* v. *Lundy*, 455 U. S. 509, 521 (1982), of the lower courts, see, *e. g.*, *Williams* v. *Lockhart*, 862 F. 2d 155, 157 (CA8 1988); *Neuschafer* v. *Whitley*, 860 F. 2d 1470, 1474 (CA9 1988), cert. denied, *sub nom. Demosthenes* v. *Neuschafer*, 493 U. S. 906 (1989); 860 F. 2d, at 1479 (Alarcon, J., concurring in result); *Davis* v. *Dugger*, 829 F. 2d 1513, 1518, n. 13 (CA11 1987); *Passman* v. *Blackburn*, 797 F. 2d 1335, 1341 (CA5 1986), cert. denied, 480 U. S. 948 (1987); *United States* v. *Talk*, 597 F. 2d 249, 250–251 (CA10 1979); *United States ex rel. Fletcher* v. *Brierley*, 460 F. 2d 444, 446, n. 4A (CA3), cert. denied, 409 U. S. 1044 (1972), and of commentators, see, *e. g.*, 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4267, pp. 477–478 (2d ed. 1988); L. Yackle, *supra*, § 154.[4]

[4] In this respect, the abuse-of-the-writ doctrine rests on a different foundation from the procedural-default doctrine. In *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), the Court emphasized that the procedural-default rule set down in *Fay* v. *Noia*, 372 U. S. 391 (1963), derived only from "comity" considerations, 433 U. S., at 83, and explained that the content of this doctrine is therefore subject to the Court's traditional, common-law discretion "to overturn or modify its earlier views of the scope of the writ, even

The majority concedes that § 2244(b) and Rule 9(b) codify *Sanders*, see *ante*, at 487, but concludes nonetheless that Congress did "not answer" all of the "questions" concerning the abuse-of-the-writ doctrine, *ibid.* The majority emphasizes that § 2244(b) refers to second or successive petitions from petitioners who have "deliberately withheld the newly asserted ground . . . *or otherwise abused the writ*" without exhaustively cataloging the ways in which the writ may "otherwise" be "abused." See *ante*, at 486, 489–490. From this "silenc[e]," the majority infers a congressional delegation of lawmaking power broad enough to encompass the engrafting of the cause-and-prejudice test onto the abuse-of-the-writ doctrine. *Ante*, at 487.

It is difficult to take this reasoning seriously. Because "cause" under *Sykes* makes the mental state of the petitioner (or his counsel) irrelevant, "cause" completely subsumes "deliberate abandonment." See *Engle* v. *Isaac*, 456 U. S. 107, 130, n. 36 (1982); see also *Wainwright* v. *Sykes*, 433 U. S., at 87. Thus, if merely failing to raise a claim without "cause"—that is, without some external impediment to raising it—necessarily constitutes an abuse of the writ, the statutory reference to *deliberate* withholding of a claim would be rendered superfluous. Insofar as *Sanders* was primarily concerned with limiting dismissal of a second or subsequent petition to instances in which the petitioner had deliberately abandoned the new claim, see 373 U. S., at 18, the suggestion that Congress invested courts with the discretion to read this language out of the statute is completely irreconcilable with the proposition that § 2244(b) and Rule 9(b) codify *Sanders*.

To give content to "otherwise abus[e] the writ" as used in § 2244(b), we must look to *Sanders*. As I have explained,

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where the statutory language authorizing judicial action has remained unchanged," *id.*, at 81. But unlike *Fay* v. *Noia*'s "deliberate bypass" test for procedural defaults, the "deliberate abandonment" test of *Sanders* has been expressly ratified by Congress. This legislative action necessarily constrains the scope of this Court's common-lawmaking discretion.

the Court in *Sanders* identified two broad classes of bad-faith conduct that bar adjudication of a claim not raised in a previous habeas application: the deliberate abandonment or withholding of that claim from the first petition; and the filing of a petition aimed at some purpose other than expeditious relief from unlawful confinement, such as "to vex, harass, or delay." See *ibid.* By referring to second or successive applications from habeas petitioners who have "deliberately withheld the newly asserted ground *or* otherwise abused the writ," § 2244(b) tracks this division. Congress may well have selected the phrase "otherwise abused the writ" with the expectation that courts would continue to elaborate upon the types of dilatory tactics that, in addition to deliberate abandonment of a known claim, constitute an abuse of the writ. But consistent with Congress' intent to codify *Sanders'* good-faith test, such elaborations must be confined to circumstances in which a petitioner's omission of an unknown claim is conjoined with his *intentional* filing of a petition for an improper purpose, such as "to vex, harass or delay."

The majority tacitly acknowledges this constraint on the Court's interpretive discretion by suggesting that "cause" is tantamount to "inexcusable neglect." This claim, too, is untenable. The majority exaggerates when it claims that the "inexcusable neglect" formulation—which this Court has never applied in an abuse-of-the-writ decision—functions as an independent standard for evaluating a petitioner's failure to raise a claim in a previous habeas application. It is true that *Sanders* compared its own analysis to the analysis in *Townsend* v. *Sain*, 372 U. S. 293 (1963), which established that a district court should deny an evidentiary hearing if the habeas petitioner inexcusably neglected to develop factual evidence in state proceedings. See *id.*, at 317. *Townsend*, however, expressly equated "inexcusable neglect" with the "deliberate bypass" test of *Fay* v. *Noia*. See 372 U. S., at

317.[5] But even if "inexcusable neglect" does usefully describe a class of abuses separate from deliberate abandonment, the melding of "cause and prejudice" into the abuse-of-the-writ doctrine cannot be defended as a means of "giving content" to "inexcusable neglect." *Ante*, at 490. For under *Sykes*' strict-liability standard, mere attorney negligence is *never* excusable. See *Murray* v. *Carrier*, 477 U. S., at 488 ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . , we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default").

Confirmation that the majority today exercises legislative power not properly belonging to this Court is supplied by Congress' own recent consideration and rejection of an amendment to § 2244(b). It is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes. See *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 837, n. 12 (1983); *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 478–479 (1952); see also *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 534–535 (1982). Yet that is exactly the effect of today's decision. As reported out of the House Committee on the Judiciary, § 1303 of H. R. 5269, 101st Cong., 2d Sess. (1990), would have required dismissal of any second or subsequent application by a habeas petitioner under sentence of death unless the peti-

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[5] Indeed, Congress expressly amended Rule 9(b) to eliminate language that would have established a standard similar to "inexcusable neglect." As initially submitted to Congress, Rule 9(b) would have authorized a district court to entertain a second or successive petition raising a previously unasserted ground unless the court "finds that the failure of the petitioner to assert th[at] groun[d] in a prior petition is *not excusable*." H. R. Rep. No. 94–1471, p. 8 (1976) (emphasis added). Explaining that "the 'not excusable' language [would] creat[e] a new and undefined standard that [would] g[ive] a judge too broad a discretion to dismiss a second or successive petition," Congress substituted *Sanders*' "abuse of the writ" formulation. See *id.*, at 5. This amendment was designed to "brin[g] Rule 9(b) into conformity with existing law." *Ibid.*

tioner raised a new claim "the factual basis of [which] could not have been discovered by *the exercise of reasonable diligence*," H. R. Rep. No. 101–681, pt. 1, p. 29 (1990) (emphasis added).[6] The Committee Report accompanying this legislation explained that "courts have properly construed section 2244(b) and Rule 9(b) as codifications of the guidelines the [Supreme] Court itself prescribed in *Sanders*." *Id.*, at 119 (citation omitted). The Report justified adoption of the tougher "reasonable diligence" standard on the ground that "[t]he *Sanders* guidelines have not . . . satisfactorily met concerns that death row prisoners may file second or successive habeas corpus applications as a means of extending litigation." *Ibid.* Unfazed by Congress' rejection of this legislation, the majority arrogates to itself the power to repeal *Sanders* and to replace it with a tougher standard.[7]

B

Even if the fusion of cause-and-prejudice into the abuse-of-the-writ doctrine were not foreclosed by the will of Congress, the majority fails to demonstrate that such a rule would be a wise or just exercise of the Court's common-lawmaking discretion. In fact, the majority's abrupt change in law subverts the policies underlying § 2244(b) and unfairly prejudices the petitioner in this case.

The majority premises adoption of the cause-and-prejudice test almost entirely on the importance of "finality." See *ante*, at 490–493. At best, this is an insufficiently developed justification for cause-and-prejudice or any other possible conception of the abuse-of-the-writ doctrine. For the very

[6] House bill 5269 was the House version of the legislation that became the Crime Control Act of 1990, Pub. L. 101–647, 104 Stat. 4789 the final version of which left § 2244(b) unamended.

[7] Moreover, the rejected amendment to § 2244(b) would have changed the standard only for second or subsequent petitions filed by petitioners under a sentence of death, leaving the *Sanders* standard intact for noncapital petitioners. The majority's decision today changes the standard for *all* habeas petitioners.

essence of the Great Writ is our criminal justice system's commitment to suspending "[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders*, 373 U. S., at 8. To recognize this principle is not to make the straw-man claim that the writ must be accompanied by "'[a] procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude.'" *Ante*, at 492, quoting Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 452 (1963). Rather, it is only to point out the plain fact that we may not, "[u]nder the guise of fashioning a procedural rule, . . . wip[e] out the practical efficacy of a jurisdiction conferred by Congress on the District Courts." *Brown* v. *Allen*, 344 U. S. 443, 498–499 (1953) (opinion of Frankfurter, J.).

The majority seeks to demonstrate that cause-and-prejudice strikes an acceptable balance between the State's interest in finality and the purposes of habeas corpus by analogizing the abuse-of-the-writ doctrine to the procedural-default doctrine. According to the majority, these two doctrines "implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review." *Ante*, at 490–491. And because this Court has already deemed cause-and-prejudice to be an appropriate standard for assessing procedural defaults, the majority reasons, the same standard should be used for assessing the failure to raise a claim in a previous habeas petition. See *ante*, at 490–493.

This analysis does not withstand scrutiny. This Court's precedents on the procedural-default doctrine identify two purposes served by the cause-and-prejudice test. The first purpose is to promote respect for a State's legitimate procedural rules. See, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1, 14 (1984); *Sykes*, 433 U. S., at 87–90. As the Court has explained, the willingness of a habeas court to entertain a claim that a state court has deemed to be procedurally barred "undercut[s] the

State's ability to enforce its procedural rules," *Engle* v. *Isaac*, 456 U. S., at 129, and may cause "state courts themselves [to be] less stringent in their enforcement," *Sykes*, *supra*, at 89. See generally Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1150–1158 (1986). The second purpose of the cause-and-prejudice test is to preserve the connection between federal collateral review and the general "deterrent" function served by the Great Writ. "'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" *Teague* v. *Lane*, 489 U. S. 288, 306 (1989) (plurality opinion), quoting *Desist* v. *United States*, 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting); see *Rose* v. *Mitchell*, 443 U. S. 545, 563 (1979). Obviously, this understanding of the disciplining effect of federal habeas corpus presupposes that a criminal defendant has given the state trial and appellate courts a fair opportunity to pass on his constitutional claims. See *Murray* v. *Carrier*, 477 U. S., at 487; *Engle* v. *Isaac*, *supra*, at 128–129. With regard to both of these purposes, the strictness of the cause-and-prejudice test has been justified on the ground that the defendant's procedural default is akin to an independent and adequate state-law ground for the judgment of conviction. See *Sykes*, *supra*, at 81–83.

Neither of these concerns is even remotely implicated in the abuse-of-the-writ setting. The abuse-of-the-writ doctrine clearly contemplates a situation in which a petitioner (as in this case) *has* complied with applicable state-procedural rules and effectively raised his constitutional claim in state proceedings; were it otherwise, the abuse-of-the-writ doctrine would not perform a screening function independent from that performed by the procedural-default doctrine and by the requirement that a habeas petitioner exhaust his state remedies, see 28 U. S. C. §§ 2254(b), (c). Cf. *ante*, at 486–487. Because the abuse-of-the-writ doctrine presupposes that the

petitioner has effectively raised his claim in state proceedings, a decision by the habeas court to entertain the claim notwithstanding its omission from an earlier habeas petition will neither breed disrespect for state-procedural rules nor unfairly subject state courts to federal collateral review in the absence of a state-court disposition of a federal claim.[8]

Because the abuse-of-the-writ doctrine addresses the situation in which a federal habeas court must determine whether to hear a claim withheld from *another* federal habeas court, the test for identifying an abuse must strike an appropriate balance between finality and review in *that* setting. Only when informed by *Sanders* does § 2244(b) strike an efficient balance. A habeas petitioner's own interest in liberty furnishes a powerful incentive to assert in his first petition all claims that the petitioner (or his counsel) believes have a reasonable prospect for success. See Note, 83 Harv. L. Rev. 1038, 1153–1154 (1970); see also *Rose* v. *Lundy*, 455 U. S., at 520 ("The prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims"). *Sanders'* bar on the later assertion of claims omitted in bad faith adequately fortifies this natural incentive. At the same time, however, the petitioner faces an effective *disincentive* to asserting any claim that he believes does not have a reasonable prospect for

[8] Insofar as the habeas court's entertainment of the petitioner's claim in these circumstances depends on the petitioner's articulation of a justifiable reason for having failed to raise the claim in the earlier federal petition, see *Sanders*, 373 U. S., at 17–18; *Price* v. *Johnston*, 334 U. S., at 291, the federal court may very well be considering the claim on the basis of evidence discovered after, or legal developments that postdate, the termination of the state proceedings. But the decision to permit a petitioner to avail himself of federal habeas relief under those conditions is one that Congress expressly made in authorizing district courts to entertain second or successive petitions under § 2244(b) and Rule 9(b). See S. Rep. No. 1797, at 2 ("newly discovered evidence" is basis for second petition raising previously unasserted ground); Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427 ("A retroactive change in the law and newly discovered evidence are examples" of "instances in which petitioner's failure to assert a ground in a prior petition is excusable").

success: the adverse adjudication of such a claim will bar its reassertion under the successive-petition doctrine, see 28 U. S. C. §2244(b); *Sanders*, *supra*, at 17, whereas omission of the claim will not prevent the petitioner from asserting the claim for the first time in a later petition should the discovery of new evidence or the advent of intervening changes in law invest the claim with merit, S. Rep. No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427.

The cause-and-prejudice test destroys this balance. By design, the cause-and-prejudice standard creates a near-irrebuttable presumption that omitted claims are permanently barred. This outcome not only conflicts with Congress' intent that a petitioner be free to avail himself of newly discovered evidence or intervening changes in law, S. Rep. No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427, but also subverts the statutory disincentive to the assertion of frivolous claims. Rather than face the cause-and-prejudice bar, a petitioner will assert all conceivable claims, whether or not these claims reasonably appear to have merit. The possibility that these claims will be adversely adjudicated and thereafter be barred from relitigation under the successive-petition doctrine will not effectively discourage the petitioner from asserting them, for the petitioner will have virtually no expectation that any withheld claim could be revived should his assessment of its merit later prove mistaken. Far from promoting efficiency, the majority's rule thus invites the very type of "baseless claims," *ante*, at 493, that the majority seeks to avert.

The majority's adoption of the cause-and-prejudice test is not only unwise, but also manifestly unfair. The proclaimed purpose of the majority's new strict-liability standard is to increase to the maximum extent a petitioner's incentive to investigate all conceivable claims before filing his first petition. See *ante*, at 498. Whatever its merits, this was *not* the rule when the petitioner *in this case* filed his first pe-

tition. From the legislative history of § 2244(b) and Rule 9(b) and from the universal agreement of courts and commentators, see *supra*, at 513, McCleskey's counsel could have reached no other conclusion but that his investigatory efforts in preparing his client's petition would be measured against the *Sanders* good-faith standard. There can be little question that his efforts satisfied that test; indeed, the District Court expressly concluded that McCleskey's counsel on his first habeas conducted a reasonable and competent investigation before concluding that a claim based on *Massiah* v. *United States*, 377 U. S. 201 (1964), would be without factual foundation. See App. 84–85; see also *infra*, at 526. Before today, that would have been enough. The Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of "new rules" that enforce the constitutional rights of citizens charged with criminal wrongdoing. See *Butler* v. *McKellar*, 494 U. S. 407, 412–414 (1990); *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990); *Teague* v. *Lane*, 489 U. S., at 299–310 (plurality opinion).

This injustice is compounded by the Court's activism in fashioning its new rule. The applicability of *Sykes*' cause-and-prejudice test was not litigated in either the District Court or the Court of Appeals. The additional question that we requested the parties to address reasonably could have been read to relate merely to the burden of proof under the abuse-of-the-writ doctrine;[9] it evidently did not put the parties on notice that this Court was contemplating a change in the governing legal standard, since respondent did not even mention *Sykes* or cause-and-prejudice in his brief or at oral

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[9] The question reads: "Must *the State* demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?" 496 U. S. 904 (1990) (emphasis added).

argument, much less request the Court to adopt this standard.[10] In this respect, too, today's decision departs from norms that inform the proper judicial function. See *Heckler* v. *Campbell*, 461 U. S. 458, 468, n. 12 (1983) (Court will consider ground in support of judgment not raised below only in extraordinary case); accord, *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 39 (1989). It cannot be said that McCleskey had a fair opportunity to challenge the reasoning that the majority today invokes to strip him of his *Massiah* claim.

III

The manner in which the majority applies its new rule is as objectionable as the manner in which the majority creates that rule. As even the majority acknowledges, see *ante*, at 470, the standard that it announces today is not the one employed by the Court of Appeals, which purported to rely on *Sanders*, see 890 F. 2d 342, 347 (CA11 1989). See *ante*, at 470. Where, as here, application of a different standard from the one applied by the lower court requires an in-depth review of the record, the ordinary course is to remand so that the parties have a fair opportunity to address, and the lower court to consider, all of the relevant issues. See, *e. g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 257 (1986); *Mandel* v. *Bradley*, 432 U. S. 173, 179 (1977) *(per curiam)*; see also *United States* v. *Hasting*, 461 U. S. 499, 515–518 (1983) (STEVENS, J., concurring in judgment) (Court should not undertake record-review "function that can better be performed by other judges").

[10] Petitioner McCleskey addressed the applicability of the cause-and-prejudice test only in his reply brief and in response to arguments raised by *amicus curiae* Criminal Justice Legal Foundation. It is well established, however, that this Court will not consider an argument advanced by *amicus* when that argument was not raised or passed on below and was not advanced in this Court by the party on whose behalf the argument is being raised. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Bell* v. *Wolfish*, 441 U. S. 520, 531, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

A remand would have been particularly appropriate in this case in view of the patent deficiencies in the reasoning of the Court of Appeals. The Court of Appeals concluded that McCleskey deliberately abandoned his *Massiah* claim because his counsel "made a knowing choice not to pursue the claim after having raised it" unsuccessfully on state collateral review. 890 F. 2d, at 349. This reasoning, which the majority declines to endorse, is obviously faulty. As I have explained, the abuse-of-the-writ doctrine is independent from the procedural-default and exhaustion doctrines; § 2244(b) and Rule 9(b) contemplate a habeas petitioner who has effectively presented his claim in state proceedings but withheld that claim from a previous habeas application. Because § 2244(b) and Rule 9(b) authorize the district court to consider such a claim under appropriate circumstances, it cannot be the case that a petitioner invariably abuses the writ by consciously failing to include in his first habeas petition a claim raised in state proceedings. Insofar as Congress intended that the district court excuse the withholding of a claim when the petitioner produces newly discovered evidence or intervening changes in law, S. Rep. No. 1797, at 2; Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 427, a petitioner cannot be deemed to have deliberately abandoned the claim in an earlier habeas proceeding unless the petitioner was aware *then* of the evidence and law that support the claim. See, *e. g.*, *Wong Doo*, 265 U. S., at 241. If the Court of Appeals had properly applied *Sanders*, it would almost certainly have agreed with the District Court's conclusion that McCleskey was *not* aware of the evidence that supported his *Massiah* claim when he filed his first petition. In any case, because the Court of Appeals' reversal was based on an erroneous application of *Sanders*, the majority's decision not to remand cannot be justified on the ground that the Court of Appeals would necessarily have decided the case the same way under the cause-and-prejudice standard.

Undaunted by the difficulty of applying its new rule without the benefit of any lower court's preliminary consideration, the majority forges ahead to perform its own independent review of the record. The majority concludes that McCleskey had no cause to withhold his *Massiah* claim because all of the evidence supporting that claim was available before he filed his first habeas petition. The majority purports to accept the District Court's finding that Offie Evans' 21-page statement was, at that point, being held beyond McCleskey's reach. See *ante*, at 498, and n.[11] But the State's failure to produce this document, the majority explains, furnished no excuse for McCleskey's failure to assert his *Massiah* claim "because McCleskey participated in the conversations reported by Evans," and therefore "knew everything in the document that the District Court relied upon to establish the *ab initio* connection between Evans and the police." *Ante*, at 500. The majority also points out that no

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[11] Nonetheless, "for the sake of completeness," the majority feels constrained to express its opinion that "this finding is not free from substantial doubt." *Ante*, at 498, n. Pointing to certain vague clues arising at different points during the state proceedings at trial and on direct and collateral review, the majority asserts that "[t]he record . . . furnishes strong evidence that McCleskey knew or should have known of the Evans document before the first federal petition." *Ante*, at 499, n. It is the majority's account, however, that is incomplete. Omitted is any mention of the State's evasions of counsel's repeated attempts to compel disclosure of any statement in the State's possession. In particular, the majority neglects to mention the withholding of the statement from a box of documents produced during discovery in McCleskey's state collateral-review action; these documents were represented to counsel as comprising "*a complete copy* of the prosecutor's file resulting from the criminal prosecution of Warren McCleskey in Fulton County." App. 29 (emphasis added). McCleskey ultimately obtained the statement by filing a request under a state "open records" statute that was not construed to apply to police-investigative files until six years after McCleskey's first federal habeas proceeding. See generally *Napper* v. *Georgia Television Co.*, 257 Ga. 156, 356 S. E. 2d 640 (1987). This fact, too, is missing from the majority's account.

external force impeded McCleskey's discovery of the testimony of jailer Worthy. See *ibid.*

To appreciate the hollowness—and the dangerousness—of this reasoning, it is necessary to recall the District Court's central finding: that the State *did* covertly plant Evans in an adjoining cell for the purpose of eliciting incriminating statements that could be used against McCleskey at trial. See App. 83. Once this finding is credited, it follows that the State affirmatively misled McCleskey and his counsel throughout their unsuccessful pursuit of the *Massiah* claim in state collateral proceedings and their investigation of that claim in preparing for McCleskey's first federal habeas proceeding. McCleskey's counsel deposed or interviewed the assistant district attorney, various jailers, and other government officials responsible for Evans' confinement, all of whom denied any knowledge of an agreement between Evans and the State. See App. 25–28, 44–47, 79, 85.

Against this background of deceit, the State's withholding of Evans' 21-page statement assumes critical importance. The majority overstates McCleskey's and his counsel's awareness of the statement's contents. For example, the statement relates that state officials were present when Evans made a phone call at McCleskey's request to McCleskey's girlfriend, Plaintiff's Exh. 8, p. 14, a fact that McCleskey and his counsel had no reason to know and that strongly supports the District Court's finding of an *ab initio* relationship between Evans and the State. But in any event, the importance of the statement lay much less in what the statement said than in its simple *existence*. Without the statement, McCleskey's counsel had nothing more than his client's testimony to back up counsel's own suspicion of a possible *Massiah* violation; given the state officials' adamant denials of any arrangement with Evans, and given the state habeas court's rejection of the *Massiah* claim, counsel quite reasonably concluded that raising this claim in McCleskey's first habeas petition would be futile. All this changed once

counsel finally obtained the statement, for at that point, there was credible, independent corroboration of counsel's suspicion. This additional evidence not only gave counsel the reasonable expectation of success that had previously been lacking, but also gave him a basis for conducting further investigation into the underlying claim. Indeed, it was by piecing together the circumstances under which the statement had been transcribed that McCleskey's counsel was able to find Worthy, a state official who was finally willing to admit that Evans had been planted in the cell adjoining McCleskey's.[12]

The majority's analysis of this case is dangerous precisely because it treats as irrelevant the effect that the State's disinformation strategy had on counsel's assessment of the reasonableness of pursing the *Massiah* claim. For the majority, all that matters is that no external obstacle barred McCleskey from finding Worthy. But obviously, counsel's decision even to look for evidence in support of a particular claim has to be informed by what counsel reasonably perceives to be the prospect that the claim may have merit; in this case, by withholding the 21-page statement and by affirmatively misleading counsel as to the State's involvement with Evans, state officials created a climate in which McCleskey's first habeas counsel was perfectly justified in focusing his attentions elsewhere. The sum and substance of the majority's analysis is that McCleskey had no "cause" for failing to assert the *Massiah* claim because he did not try

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[12] The majority gratuitously characterizes Worthy's testimony as being contradictory on the facts essential to McCleskey's *Massiah* claim. See *ante*, at 475. According to the District Court—which is obviously in a better position to know than is the majority—"Worthy never wavered from the fact that someone, at some point, requested his permission to move Evans to be near McCleskey." App. 78; accord *id.*, at 81 ("The fact that someone, at some point, requested his permission to move Evans is the one fact from which Worthy never wavered in his two days of direct and cross-examination. The state has introduced no affirmative evidence that Worthy is either lying or mistaken").

hard enough to pierce the State's veil of deception. Because the majority excludes from its conception of cause any recognition of how state officials can distort a petitioner's reasonable perception of whether pursuit of a particular claim is worthwhile, the majority's conception of "cause" creates an incentive for state officials to engage in this very type of misconduct.

Although the majority finds it unnecessary to reach the question whether McCleskey was "prejudiced" by the *Massiah* violation in this case, I have no doubt that the admission of Evans' testimony at trial satisfies any fair conception of this prong of the *Sykes* test. No witness from the furniture store was able to identify which of the four robbers shot the off-duty police officer. The State did put on evidence that McCleskey had earlier stolen the pearl-handled pistol that was determined to be the likely murder weapon, but the significance of this testimony was clouded by a codefendant's admission that he had been carrying this weapon for weeks at a time, App. 16, and by a prosecution witness' own prior statement that she had seen only the codefendant carry the pistol, *id.*, at 11–14. See also *id.*, at 89 (District Court finding that "the evidence on [McCleskey's] possession of the gun in question was conflicting"). Outside of the self-serving and easily impeachable testimony of the codefendant, the *only* evidence that directly supported the State's identification of McCleskey as the triggerman was the testimony of Evans. As the District Court found, "Evans' testimony about the petitioner's incriminating statements was critical to the state's case." *Id.*, at 89. Without it, the jury might very well have reached a different verdict.

Thus, as I read the record, McCleskey should be entitled to the consideration of his petition for habeas corpus even under the cause-and-prejudice test. The case is certainly close enough to warrant a remand so that the issues can be fully and fairly briefed.

IV

Ironically, the majority seeks to defend its doctrinal innovation on the ground that it will promote respect for the "rule of law." *Ante*, at 492. Obviously, respect for the rule of law must start with those who are responsible for *pronouncing* the law. The majority's invocation of "'the orderly administration of justice,'" *ante*, at 496, rings hollow when the majority itself tosses aside established precedents without explanation, disregards the will of Congress, fashions rules that defy the reasonable expectations of the persons who must conform their conduct to the law's dictates, and applies those rules in a way that rewards state misconduct and deceit. Whatever "abuse of the writ" today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function.

I dissent.

EASTERN AIRLINES, INC. *v.* FLOYD ET AL.

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

No. 89–1598. Argued October 29, 1990—Decided April 17, 1991

After petitioner's plane narrowly avoided crashing during a flight between Miami and the Bahamas, respondent passengers filed separate complaints seeking damages solely for mental distress arising out of the incident. The District Court consolidated the proceedings and ruled that Article 17 of the Warsaw Convention, which sets forth conditions under which an international air carrier can be held liable for injuries to passengers, does not allow recovery for mental anguish alone. The Court of Appeals reversed, holding that the phrase "lésion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress.

Held:

1. Article 17 does not allow recovery for purely mental injuries. Pp. 534–553.

(a) When interpreting a treaty, this Court begins with the treaty's text and the context in which the written words are used. Other general rules of construction may be brought to bear on difficult or ambiguous passages; and, since treaties are construed more liberally than private agreements, the Court may look beyond the written words to the treaty's history, the negotiations, and the practical construction adopted by the parties. Pp. 534–535.

(b) Neither the Warsaw Convention itself nor any of the applicable legal sources demonstrates that the relevant Article 17 phrase, "lésion corporelle," should be translated other than as "bodily injury"—a narrow meaning excluding purely mental injuries. Bilingual dictionaries suggest that that translation is proper, and any concerns that the dictionary definitions may be too general for purposes of treaty interpretation are partly allayed when, as here, the definitions accord with the main English translations of the Convention, including the text employed by the Senate when it ratified the Convention. Moreover, a review of relevant French legal materials reveals no legislation, judicial decisions, or scholarly writing indicating that in 1929, the year the Convention was drafted, "lésion corporelle" had a meaning in French law encompassing psychic injuries. It is unlikely that the understanding of the term "lésion corporelle" as "bodily injury" that was apparently held by the Convention's contracting parties would have been displaced by a meaning abstracted from French damages law, which, at the relevant time,

evidently allowed recovery for psychic injury, particularly when the psychic injury cause of action would not have been recognized in many other countries represented at the Convention. Nor is this conclusion altered by an examination of Article 17's structure, whereby "lésion corporelle" might plausibly be read to refer to a general class of injuries including internal injuries, in contrast with other language in the Article covering bodily ruptures. Although the official German translation of "lésion corporelle" adopted by Austria, Germany, and Switzerland used German terms whose closest English translation is apparently "infringement on the health," this Court is reluctant to place much weight on an English translation of a German translation of a French text, particularly in the absence of any German, Austrian, or Swiss cases adhering to the broad interpretation that the German delegate evidently espoused. Pp. 535–542.

(c) Translating "lésion corporelle" as "bodily injury" is consistent with the negotiating history of the Convention. It is reasonable to infer that the drafters of the language that ultimately became Article 17 rejected broader proposed language, which almost certainly would have permitted recovery for emotional distress, in order to limit the types of recoverable injuries. Moreover, a review of the documentary record for the Warsaw Conference confirms that neither the drafters nor the signatories specifically considered liability for psychic injury, apparently because many, if not most, countries did not recognize recovery for such injuries at the time. Thus, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had intended to allow such recovery, as did the signatories to the Berne Convention on International Rail. The narrower reading of "lésion corporelle" also is consistent with the primary purpose of the Warsaw Convention's contracting parties, who were more concerned with limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry than they were with providing full recovery to injured passengers. Pp. 542–546.

(d) On balance, the evidence of the post-1929 conduct and interpretations of the Warsaw Convention signatories supports the narrow translation of "lésion corporelle." Although a 1951 proposal to substitute "affection corporelle" for "lésion corporelle" was never implemented, the discussion and vote suggest that, in the view of the 20 signatories on the committee that adopted the proposal, "lésion corporelle" had a distinctly physical scope. Moreover, although the Hague Protocol of 1955, the Montreal Agreement of 1966, and the Guatemala City Protocol of 1971 all refer to "personal injury" rather than "bodily injury," none of these agreements support the broad interpretation reached by the Court of Appeals. There is no evidence that any of them was intended to effect a substantive change in, or clarification of, the provisions of Article 17. The Hague Protocol refers to "personal injury" only in the

context of giving airline passengers notice that the Warsaw Convention in most cases imposes limits of liability for "death or personal injury." Additionally, the Montreal Agreement does not and cannot purport to speak for the Warsaw Convention signatories, since it is not a treaty, but merely an agreement among the major international air carriers. Furthermore, the Guatemala City Protocol is not in effect in the international arena, since only a few countries have ratified it, and cannot be considered dispositive in this country, since it has not been ratified by the Senate. Also unpersuasive is the reasoning of the Supreme Court of Israel, in the only apparent judicial decision from a Warsaw Convention signatory addressing the question, that "desirable jurisprudential policy" mandates an expansive reading of Article 17 to reach purely psychic injuries. This Court cannot give effect to the Israeli court's perceived policy without convincing evidence that the signatories' intent with respect to Article 17 would allow recovery for purely psychic injury. This Court's construction better accords with the Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation, since subjecting international air carriers to *strict* liability for purely mental distress, as would the Guatemala City Protocol and the Montreal Agreement, would be controversial for most signatory countries. Pp. 546–552.

2. The issue whether passengers can recover for mental injuries accompanied by physical injuries is not presented or addressed here, since respondents do not allege physical injury or physical manifestation of injury. Nor does this Court reach the question whether the Convention provides the exclusive cause of action for injuries sustained during international air transportation, since the Court of Appeals did not address it and certiorari was not granted to consider it here. Pp. 552–553.

872 F. 2d 1462, reversed.

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

John Michael Murray argued the cause for petitioner. With him on the briefs were *Aurora A. Ares* and *Linda Singer Stein.*

Joel D. Eaton argued the cause and filed a brief for respondents.

JUSTICE MARSHALL delivered the opinion of the Court.

Article 17 of the Warsaw Convention[1] sets forth conditions under which an international air carrier can be held lia-

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T. S. No. 876

ble for injuries to passengers. This case presents the question whether Article 17 allows recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury.

I

On May 5, 1983, an Eastern Airlines flight departed from Miami, bound for the Bahamas. Shortly after takeoff, one of the plane's three jet engines lost oil pressure. The flight crew shut down the failing engine and turned the plane around to return to Miami. Soon thereafter, the second and third engines failed due to loss of oil pressure. The plane began losing altitude rapidly, and the passengers were informed that the plane would be ditched in the Atlantic Ocean. Fortunately, after a period of descending flight without power, the crew managed to restart an engine and land the plane safely at Miami International Airport. 872 F. 2d 1462, 1466 (CA11 1989).

Respondents, a group of passengers on the flight, brought separate complaints against petitioner, Eastern Airlines, Inc. (Eastern), each claiming damages solely for mental distress arising out of the incident. The District Court entertained each complaint in a consolidated proceeding.[2] Eastern conceded that the engine failure and subsequent prepreparations for ditching the plane amounted to an "accident" under Article 17 of the Convention but argued that Article 17 also makes physical injury a condition of liability. See *In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport*, 629 F. Supp. 307, 312 (SD Fla. 1986). Relying on another federal court's analysis of the French authentic text

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(1934), note following 49 U. S. C. App. § 1502 (hereinafter Warsaw Convention or Convention).

[2] Each complaint contained two state-law tort claims, a state-law claim for breach of contract, and a claim for recovery under the Warsaw Convention. *In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport*, 629 F. Supp. 307, 309 (SD Fla. 1986). The District Court dismissed all claims. *Ibid.* We address only the theory of recovery claimed under the Warsaw Convention.

and negotiating history of the Convention, see *Burnett* v. *Trans World Airlines, Inc.*, 368 F. Supp. 1152 (NM 1973), the District Court concluded that mental anguish alone is not compensable under Article 17. See 629 F. Supp., at 314.

The Court of Appeals for the Eleventh Circuit reversed, holding that the phrase "lésion corporelle" in the authentic French text of Article 17 encompasses purely emotional distress. See 872 F. 2d, at 1480. To support its conclusion, the court examined the French legal meaning of the the term "lésion corporelle," the concurrent and subsequent history of the Convention, and cases interpreting Article 17. See *id.*, at 1471–1480. We granted certiorari, 496 U. S. 904 (1990), to resolve a conflict between the Eleventh Circuit's decision in this case and the New York Court of Appeals' decision in *Rosman* v. *Trans World Airlines, Inc.*, 34 N. Y. 2d 385, 314 N. E. 2d 848 (1974), which held that purely psychic trauma is not compensable under Article 17.[3] We now hold that Article 17 does not allow recovery for purely mental injuries.

II

"When interpreting a treaty, we 'begin "with the text of the treaty and the context in which the written words are used."'" *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 699 (1988), quoting *Société Nationale Industrielle Aérospatiale* v. *United States District Court*, 482

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[3] Courts of first instance also have disagreed on this issue. Compare *Borham* v. *Pan American World Airways*, 19 Aviation Cases 18,236 (CCH) (SDNY 1986) (purely mental injury covered); and *Karfunkel* v. *Compagnie Nationale Air France*, 427 F. Supp. 971 (SDNY 1977) (same); and *Krystal* v. *British Overseas Airways Corp.*, 403 F. Supp. 1322 (CD Cal. 1975) (same); and *Husserl* v. *Swiss Air Transport Co.*, 388 F. Supp. 1238 (SDNY 1975) *(Husserl II)* (same); and *Palagonia* v. *Trans World Airlines*, 110 Misc. 2d 478, 442 N. Y. S. 2d 670 (Sup. 1978) (same) with *Burnett* v. *Trans World Airlines, Inc.*, 368 F. Supp. 1152 (NM 1973) (excluding purely mental injury); and *Husserl* v. *Swiss Air Transport Co.*, 351 F. Supp. 702 (SDNY 1972) *(Husserl I)*, aff'd, 485 F. 2d 1240 (CA2 1973) (same).

U. S. 522, 534 (1987), quoting *Air France* v. *Saks*, 470 U. S. 392, 397 (1985). Accord, *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S. 122, 134 (1989); *Maximov* v. *United States*, 373 U. S. 49, 53–54 (1963). "Other general rules of construction may be brought to bear on difficult or ambiguous passages." *Volkswagenwerk*, *supra*, at 700. Moreover, "'treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.'" *Saks*, *supra*, at 396, quoting *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 431–432 (1943). Accord, *Volkswagenwerk*, *supra*, at 700. We proceed to apply these methods in turn.

A

Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis. See *Saks*, *supra*, at 397–399. The text reads as follows:

> "Le transporteur est responsable du dommage survenu *en cas de mort, de blessure ou de toute autre lésion corporelle* subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." 49 Stat. 3005 (emphasis added).

The American translation of this text, employed by the Senate when it ratified the Convention in 1934, reads:

> "The carrier shall be liable for damage sustained *in the event of the death or wounding of a passenger or any other bodily injury* suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018 (emphasis added).

Thus, under Article 17, an air carrier is liable for passenger injury only when three conditions are satisfied: (1) there has

been an accident, in which (2) the passenger suffered "mort," "blessure," "ou . . . toute autre lésion corporelle," and (3) the accident took place on board the aircraft or in the course of operations of embarking or disembarking. As petitioner concedes, the incident here took place on board the aircraft and was an "accident" for purposes of Article 17. See 872 F. 2d, at 1471. Moreover, respondents concede that they suffered neither "mort" nor "blessure" from the mishap.[4] Therefore, the narrow issue presented here is whether, under the proper interpretation of "lésion corporelle," condition (2) is satisfied when a passenger has suffered only a mental or psychic injury.

We must consider the "French legal meaning" of "lésion corporelle" for guidance as to the shared expectations of the parties to the Convention because the Convention was drafted in French by continental jurists. See *Saks*, *supra*, at 399. Perhaps the simplest method of determining the meaning of a phrase appearing in a foreign legal text would be to consult a bilingual dictionary. Such dictionaries suggest that a proper translation of "lésion corporelle" is "bodily injury." See, *e. g.*, J. Jéraute, Vocabulaire Français-Anglais et Anglais-Français de Termes et Locutions Juridiques 205 (1953) (translating "bodily harm" or "bodily injury" as "lésion ou blessure corporelle"); see also *id.*, at 95 (translating the term "lésion" as "injury, damage, prejudice, wrong"); *id.*, at 41 (giving as one sense of "corporel" the English word "bodily"); 3 Grand Larousse de la Langue Française 1833 (1987) (defining "lésion" as a "[m]odification de la structure d'un tissu vivant sous l'influence d'une cause morbide"). These translations, if correct, clearly suggest that Article 17

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[4] Courts and commentators agree that "blessure" refers only to "a particular case of physical impact," 872 F. 2d 1462, 1472–1473 (CA11 1989), and thus does not by itself allow recovery for purely psychic harm. See also R. Mankiewicz, The Liability Regime of the International Air Carrier 146 (1981) (hereinafter Mankiewicz). Respondents do not contend that "blessure" has any other meaning.

does *not* permit recovery for purely psychic injuries.[5] Although we have previously relied on such French dictionaries as a primary method for defining terms in the Warsaw Convention, see *Saks*, *supra*, at 400, and n. 3, we recognize that dictionary definitions may be too general for purposes of treaty interpretation. Our concerns are partly allayed when, as here, the dictionary translation accords with the wording used in the "two main translations of the 1929 Convention in English." Mankiewicz 197. As we noted earlier, the translation used by the United States Senate when ratifying the Warsaw Convention equated "lésion corporelle" with "bodily injury." See *supra*, at 535. The same wording appears in the translation used in the United Kingdom Carriage by Air Act of 1932. See L. Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook 199, 204 (1988) (hereinafter Goldhirsch). We turn, then, to French legal materials, *Saks*, 470 U. S., at 400, to determine whether French jurists' contemporary understanding of the term "lésion corporelle" differed from its translated meaning.

In 1929, as in the present day, lawyers trained in French civil law would rely on the following principal sources of French law: (1) legislation, (2) judicial decisions, and (3) scholarly writing. See generally 1 M. Planiol & G. Ripert, Traité élémentaire de droit civil, pt. 1, Nos. 10, 122, 127 (12th ed. 1939) (Louisiana State Law Inst. trans. 1959); F.

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[5] There is much agreement even among courts that believe that "lésion corporelle" does provide recovery for such injuries that, if "bodily injury" is the correct translation of "lésion corporelle," Article 17 does not permit recovery for purely psychic injuries. See, *e. g.*, 872 F. 2d, at 1471 ("While the use of the word *corporelle* would, if read literally, appear to imply that recovery for *dommage mentale* is unavailable, we are persuaded that this literal reading is unwarranted"); *Palagonia* v. *Trans World Airlines*, *supra*, at 482, 442 N. Y. S. 2d, at 673 (arguing that "[t]he dictionary or literal translation of *lésion corporelle* as 'bodily injury' is not accurate as used in a legal document"). But see, *Husserl II*, *supra*, at 1250 (arguing that "bodily injury" "can . . . be construed to relate to emotional and mental injury").

Gény, Méthode d'Interprétation et Sources en Droit Privé Positif Nos. 45–50 (2d ed. 1954) (Louisiana State Law Inst. trans. 1963); R. David, French Law: Its Structure, Sources, and Methodology 154 (M. Kindred trans. 1972). Our review of these materials indicates neither that "lésion corporelle" was a widely used legal term in French law nor that the term specifically encompassed psychic injuries.

Turning first to legislation, we find no French legislative provisions in force in 1929 that contained the phrase "lésion corporelle." The principal provision of the French Civil Code relating to the scope of compensable injuries appears to be Article 1382, which provides in very general terms: "Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est . . . arrivé, à le réparer." See 2 Planiol & Ripert, *supra*, at pt. 1, No. 863 (translating Article 1382 as, "Every act whatever of man which causes damage to another obliges him by whose fault it happened to repair it").

Turning next to cases, we likewise discover no French court decisions in or before 1929 that explain the phrase "lésion corporelle," nor do the parties direct us to any. Indeed, we find no French case construing Article 17 of the Warsaw Convention to cover psychic injury. The only reports of French cases we did find that used the term "lésion corporelle" are relatively recent and involve physical injuries caused by automobile accidents and other incidents.[6] These cases tend to support the conclusion that, in French legal usage, the term "lésion corporelle" refers only to physical in-

[6] In the several such cases that we found, there was no evidence that French courts would use the term "lésion corporelle" to describe purely psychic injuries. In one case, for example, the highest French court of ordinary jurisdiction, the Cour de Cassation, specifically distinguished "coups et blessures volontaires" ("intentional blows and injuries") sustained by the plaintiff—which the court characterized as "lésions"—from "[les] troubles de nature névrotique" ("neurotic disorders") from which the plaintiff suffered as a result of a prior incident. See *Judgment of November 4, 1971*, Cour de Cassation, 1971 Bull. Civ. II 219, 220.

juries. However, because they were decided well after the drafting of the Warsaw Convention, these cases do not necessarily reflect the contracting parties' understanding of the term "lésion corporelle."

Turning finally to French treatises and scholarly writing covering the period leading up to the Warsaw Convention, we find no materials (and the parties have brought none to our attention) indicating that "lésion corporelle" embraced psychic injury. Subsequent to the adoption of the Warsaw Convention, some scholars have argued that "lésion corporelle" as used in Article 17 should be interpreted to encompass such injury. See, *e. g.*, Mankiewicz 146 (arguing that "in French law the expression *lésion corporelle* covers any 'personal' injury whatsoever"); G. Miller, Liability in International Air Transport 128 (1977) (hereinafter Miller) (arguing that "a liberal interpretation of [Article 17] would be more in line with the spirit of the Convention"). These scholars draw on the fact that, by 1929, France—unlike many other countries, see *infra*, at 544–545, and n. 10—permitted tort recovery for mental distress. See, *e. g.*, 2 Planiol & Ripert, *supra*, at pt. 1, No. 868A (citing cases awarding damages for injury to honor and for loss of affection). However, this *general* proposition of French tort law does not demonstrate that the *specific* phrase chosen by the contracting parties—"lésion corporelle"—covers purely psychic injury.

We find it noteworthy, moreover, that scholars who read "lésion corporelle" as encompassing psychic injury do not base their argument on explanations of this term in French cases or French treatises or even in the French Civil Code; rather, they chiefly rely on the principle of French tort law that any damage can "giv[e] rise to reparation when it is real and has been verified." 2 Planiol & Ripert, *supra*, at pt. 1, No. 868. We do not dispute this principle of French law. However, we have been directed to no French case prior to 1929 that allowed recovery based on that principle for the

type of mental injury claimed here—injury caused by fright or shock—absent an incident in which *someone* sustained physical injury.[7] Since our task is to "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties," *Saks*, *supra*, at 399, we find it unlikely that those parties' apparent understanding of the term "lésion corporelle" as "bodily injury" would have been displaced by a meaning abstracted from the French law of damages. Particularly is this so when the cause of action for psychic injury that evidently was possible under French law in 1929 would not have been recognized in many other countries represented at the Warsaw Convention. See *infra*, at 544–545, and n. 10.

Nor is this conclusion altered by our examination of Article 17's structure. In the decision below, the Court of Appeals found that the Article's wording "suggests that the drafters did not intend to exclude any particular category of damages," because if they had intended "to refer only to injury caused by physical impact," they "would not have singled out

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[7] Of the two cases cited by Mankiewicz to demonstrate that French law did compensate mental injuries, one involved recovery by a stepdaughter for emotional distress resulting from the death of her stepmother and the other involved recovery for injury to honor arising from adultery. See Mankiewicz 145 (citing decisions of the highest French court in 1923 and 1857). See also 11 International Encyclopedia of Comparative Law: Torts ch. 9, § 9–39, pp. 16–17, and nn. 114–115 (A. Tunc ed. 1972) (citing, as the first personal injury cases permitting recovery for nonpecuniary damages, an 1833 French decision in which "counsel for the plaintiff took as an illustration of *dommage moral* for which recovery should be permitted the grief of a family upon the death of one of their members" and an 1881 Belgian decision in a wrongful death case). Whether the "shared expectation" of the Warsaw Convention parties was that the distress experienced by relatives of injured or dead airline passengers qualified under Article 17 as "*dommage survenu* en cas de mort, [ou] de blessure . . . subie par un voyageur" ("*damage sustained* in the event of the death or wounding of a passenger") is a different question from whether psychic injury actually suffered by a passenger is encompassed by the term "lésion corporelle."

and specifically referred to a particular case of physical impact such as *blessure* ('wounding')." 872 F. 2d, at 1472–1473 (citing Mankiewicz 146). This argument, which has much the same force as the surplusage canon of domestic statutory construction, is plausible. Cf. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979). Yet one might draw a contrary inference from the same language. As noted, one meaning of "lésion" is a change in the structure of an organ due to injury or disease. See *supra*, at 536, citing 3 Grand Larousse de la Langue Française 1833 (1987). If "blessure" refers to injuries causing visible ruptures in the body (a common meaning of a "wounding"), "lésion corporelle" might well refer to a more general category of physical injuries that includes internal injuries caused, for example, by physical impact, smoke or exhaust inhalation, or oxygen deprivation. Admittedly, this inference still runs afoul of the Court of Appeals' surplusage argument. However, because none of the other sources of French legal meaning noted above support the Court of Appeals' construction, we are reluctant to give this argument dispositive weight.

The same structural argument offered by the Court of Appeals was advanced by one of the German delegates to the Warsaw Convention. See *Palagonia* v. *Trans World Airlines*, 110 Misc. 2d 478, 483, 442 N. Y. S. 2d 670, 673–674 (Sup. 1978) (quoting testimony of Otto Riese). Accordingly, the official German translation of "lésion corporelle" adopted by Austria, Germany, and Switzerland uses German terms whose closest English translation is apparently "infringement on the health." See Mankiewicz 146. We are reluctant, however, to place much weight on an English translation of a German translation of a French text, particularly when we have been unable to find (and the parties have not cited) any German, Austrian, or Swiss cases adhering to the broad interpretation of Article 17 that the German delegate evidently espoused.

In sum, neither the Warsaw Convention itself nor any of the applicable French legal sources demonstrates that "lésion corporelle" should be translated other than as "bodily injury"—a narrow meaning excluding purely mental injuries. However, because a broader interpretation of "lésion corporelle" reaching purely mental injuries is plausible, and the term is both ambiguous and difficult, see *supra*, at 535, we turn to additional aids to construction.[8]

B

Translating "lésion corporelle" as "bodily injury" is consistent, we think, with the negotiating history of the Convention. "The treaty that became the Warsaw Convention was first drafted at an international conference in Paris in 1925." *Air France* v. *Saks*, 470 U. S., at 401; see also *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S., at 139 (Brennan, J., concurring in judgment). See generally [1925 Paris] Conférence Internationale de Droit Privé Aérien (1936) (hereinafter Paris Conference). The final protocol of the Paris Conference contained an article specifying that: "'The carrier is liable for accidents, losses, breakdowns, and delays. It is not liable if it can prove that it has taken reasonable measures designed to pre-empt damage . . . .'" *Saks*, *supra*, at 401, translating Article 5 of the protocol, Paris Conference 87. It appears that "[t]his expansive provision, broadly holding carriers liable in the event of an accident, would almost certainly have permitted recovery for all types of injuries, including emotional distress." Sisk, Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of *Lésion Corporelle*, 25 Texas Int'l L. J. 127, 142 (1990), citing Miller 124.

The Paris Conference appointed a committee of experts, the Comité International Technique d'Experts Juridiques Aériens (CITEJA), to revise its final protocol for presenta-

[8] We will refer to these alternative interpretations of "lésion corporelle" as the "narrow" and "broad" readings of the term.

tion to the Warsaw Conference. See *Chan*, *supra*, at 139 (Brennan, J., concurring in judgment); *Saks*, *supra*, at 401. The CITEJA draft split the liability article of the Paris Conference's protocol into three provisions with one addressing damages for injury to passengers, the second addressing injury to goods, and the third addressing losses caused by delay. The CITEJA subsection on injury to passengers introduced the phrase "en cas de mort, de blessure ou de toute autre lésion corporelle." [Deuxième] Conférence Internationale de Droit Privé Aérien, 4–12 Octobre 171–172 (1929) (Article 21, subsection (a) of the CITEJA draft). This language was retained in Article 17 ultimately adopted by the Warsaw Conference. See 49 Stat. 3005. Although there is no definitive evidence explaining why the CITEJA drafters chose this narrower language, we believe it is reasonable to infer that the Conference adopted the narrower language to limit the types of recoverable injuries. Cf. *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S., at 700–701 (noting significance of change in negotiating history of Hague Service Convention from less precise term in draft to more precise term in final treaty provision).[9]

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[9] Courts and commentators, including the Court of Appeals, have cited the doctoral thesis of a French scholar, Yvonne Blanc-Dannery, as extrinsic evidence of the Warsaw parties' intent. See, *e. g.*, 872 F. 2d, at 1472; *Palagonia*, 110 Misc. 2d, at 482, 442 N. Y. S. 2d, at 673; Mankiewicz 146. According to Mankiewicz, the Blanc-Dannery thesis was written under the supervision of Georges Ripert. Mankiewicz 146, citing Blanc-Dannery, La Convention de Varsovie et les Régles du Transport Aérien International (1933) (hereinafter Blanc-Dannery). Georges Ripert was a leading French delegate at the Warsaw Convention and an expert of the French Government at the CITEJA proceedings. Minutes, Second International Conference on Private Aeronautical Law, October 4–12, 1929, Warsaw 6 (R. Horner & D. Legrez trans. 1975) (hereinafter Minutes). Mankiewicz translates a passage from the Blanc-Dannery thesis as follows: "'The use of the expression *lésion* after the words 'death' and 'wounding' encompasses and contemplates cases of traumatism and nervous troubles, the consequences of which do not immediately become manifest in the organism but which can be related to the accident.'" Mankiewicz 146. Eastern offers persua-

Our review of the documentary record for the Warsaw Conference confirms—and courts and commentators appear universally to agree—that there is no evidence that the drafters or signatories of the Warsaw Convention specifically considered liability for psychic injury or the meaning of "lésion corporelle." See generally Minutes. Two explanations commonly are offered for why the subject of mental injuries never arose during the Convention proceedings: (1) many jurisdictions did not recognize recovery for mental injury at that time, or (2) the drafters simply could not contemplate a psychic injury unaccompanied by a physical injury. See, *e. g.*, *Husserl* v. *Swiss Air Transport Co.*, 388 F. Supp. 1238, 1249 (SDNY 1975) *(Husserl II); Cie Air France* v. *Teichner*, 39 Revue Française de Droit Aérien 232, 242, 23 Eur. Tr. L. 87, 101 (Israel 1984); Mankiewicz 144–145; Miller 123–125. Indeed, the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference[10] persuades us that the signatories

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sive evidence that Mankiewicz's translation may be overbroad. See Reply Brief for Petitioner 2 (noting that the French word "perturbations" should be translated to connote a disturbance or aberration in a bodily organ or function rather than mere traumatisms or nervous troubles). Even if Mankiewicz's translation is accurate, however, Blanc-Dannery's asserted definition is not supported by evidence from the CITEJA or Warsaw proceedings. See Blanc-Dannery 62. In the absence of such support we find the Blanc-Dannery thesis to have little or no value as evidence of the drafters' intent.

[10] Although French law recognized recovery for certain types of mental distress long before the Convention was drafted, see Mankiewicz 145, in common-law jurisdictions mental distress generally was excluded from recovery in 1929. See Miller 113. Such recovery was not definitively recognized in the United Kingdom until the early 1940's. See Mankiewicz 145; J. Fleming, Law of Torts 49 (1985) (hereinafter Fleming). American courts insisted on a physical impact rule long after English courts abandoned the practice. See *ibid.;* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 54, p. 363 (5th ed. 1984). In the State of New York, where many Warsaw Convention cases have been litigated, recovery for purely mental injury was not recognized until 1961. See Mankiewicz 145, citing *Battalla* v. *State*, 10 N. Y. 2d 237, 176 N. E. 2d

had no specific intent to include such a remedy in the Convention. Because such a remedy was unknown in many, if not most, jurisdictions in 1929, the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had specifically intended to allow such recovery.

In this sense, we find it significant that, when the parties to a different international transport treaty wanted to make it clear that rail passengers could recover for purely psychic harms, the drafters made a specific modification to this effect. The liability provision of the Berne Convention on International Rail, drafted in 1952, originally conditioned liability on "la mort, les blessures et toute autre atteinte, à l'intégrité corporelle." International Convention Concerning the Carriage of Passengers and Luggage By Rail, Berne, Oct. 25, 1952, 242 U. N. T. S. 355, Article 28, p. 390. The drafters subsequently modified this provision to read "l'intégrité physique *ou mentale*." See Additional Convention to the International Convention Concerning the Carriage of Passengers and Luggage by Rail (CIV) of Feb. 25, 1961, Relating to the Liability of the Railway for Death of and Personal Injury to Passengers, done Feb. 26, 1966, Art. 2, reprinted in Transport: International Transport Treaties V–

729 (1961); see also Miller 113–115 (noting the post-1929 liberalization of rules for tort recovery in the United Kingdom and the United States). Several of the civil law and socialist signatories to the Warsaw Convention were slow to recognize recovery for nonpecuniary losses such as pain and suffering, grief caused by the death of a relative, or mental distress. See 11 International Encyclopedia of Comparative Law: Torts, Ch. 9, §§ 9-39, 9-40. The Netherlands, for example, did not permit nonpecuniary damages until 1943, and the German and Swiss Civil Codes generally barred nonpecuniary damages, though with certain exceptions—including an exception for cases of personal injury. See *id.*, at § 9–41. In addition, the Soviet Union, another original signatory, has never recognized compensation for nonpecuniary loss. *Id.*, at § 9–37. In countries barring recovery for nonpecuniary losses, recovery for mental injuries might have been available where financial loss could be shown, however, we are not aware of any such cases.

52 (Kluwer Publishers) (Supp. 1–10, Jan. 1986) (emphasis added).

The narrower reading of "lésion corporelle" also is consistent with the primary purpose of the contracting parties to the Convention: limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 256 (1984); Minutes 37; Lowenfeld & Mendelsohn, The United States and The Warsaw Convention, 80 Harv. L. Rev. 497, 498–499 (1967) (hereinafter Lowenfeld & Mendelsohn). Indeed, it was for this reason that the Warsaw delegates imposed a maximum recovery of $8,300 for an accident—a low amount even by 1929 standards. See Lowenfeld & Mendelsohn 498–499.[11] Whatever may be the current view among Convention signatories, in 1929 the parties were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers, and we read "lésion corporelle" in a way that respects that legislative choice.

C

We also conclude that, on balance, the evidence of the post-1929 "conduct" and "interpretations of the signatories," *Saks*, 470 U. S., at 403, supports the narrow translation of "lésion corporelle."

In the years following adoption of the Convention, some scholars questioned whether Article 17 extended to mental or emotional injury. See, *e. g.*, Beaumont, Need for Revision and Amplification of the Warsaw Convention, 16 J. Air L. & Com. 395, 402 (1949); R. Coquoz, Le Droit Privé International Aérien 122 (1938); Sullivan, The Codification of Air Carrier Liability by International Convention, 7 J. Air L. 1, 19 (1936). In 1951, a committee composed of 20 Warsaw

[11] The second goal of the Convention was to establish uniform rules governing documentation such as airline tickets and waybills and uniform procedure for addressing claims arising out of international transportation. See Minutes 85, 87; Lowenfeld & Mendelsohn 499. Our construction of "lésion corporelle" also is consistent with that goal. See *infra*, at 552.

Convention signatories met in Madrid and adopted a proposal to substitute "affection corporelle" for "lésion corporelle" in Article 17. See International Civil Aviation Organization Legal Committee, Minutes and Documents of the Eighth Session, Madrid, ICAO Doc. 7229–LC/133, pp. xiii, 137 (1951). The French delegate to the committee proposed this substitution because, in his view, the word "lésion" was too narrow, in that it "presupposed a rupture in the tissue, or a dissolution of continuity" which might not cover an injury such as mental illness or lung congestion caused by a breakdown in the heating apparatus of the aircraft. See *id.*, at 136. The United States delegate opposed this change if it "implied the inclusion of mental injury or emotional disturbances or upsets which were not connected with or the result of bodily injury," see *id.*, at 137, but the committee adopted it nonetheless, see *ibid.* Although the committee's proposed amendment was never subsequently implemented, its discussion and vote in Madrid suggest that, in the view of the 20 signatories on the committee, "lésion corporelle" in Article 17 had a distinctly physical scope.

In finding that the signatories' post-1929 conduct supports the broader interpretation of "lésion corporelle," the Court of Appeals relied on three international agreements: The Hague Protocol of 1955, The Montreal Agreement of 1966, and the Guatemala City Protocol of 1971. See 872 F. 2d, at 1474–1475. For each of these agreements, the Court of Appeals emphasized that English translations rendered "lésion corporelle" as "personal injury," instead of "bodily injury." In our view, none of these agreements support the broad interpretation of "lésion corporelle" reached by the Court of Appeals.

The Hague Protocol amended Article 3 of the Warsaw Convention,[12] which sets forth the particular information a pas-

[12] The Hague Protocol also amended the Convention to double the limit of liability for accidents to $16,600. See Hague Protocol Article XI, reprinted in Goldhirsch 268–269; Lowenfeld & Mendelsohn 507–509.

At the Hague Conference, the signatories were presented with a proposal to amend Article 17 to cover purely mental injuries. The Greek

senger's ticket must contain, to require notice of the limitation upon the carrier's liability for passenger injuries under the Convention. See Hague Protocol Article III, reprinted in Goldhirsch 266. While the authentic French version of Article 3 retained the phrase "lésion corporelle," the authentic *English* version of the Hague Protocol, which was proposed by the United States delegation, used the phrase "personal injury." See 2 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686–LC/140, p. 243 (proposal of the United States); see also Goldhirsch 266 (citing final version of Hague Protocol).[13] Citing *Saks*, the Court of Appeals treated the Hague Protocol's use of "personal injury" as a "'subsequent interpretatio[n] of the signatories'" that "helps clarify the meaning" of "lésion corporelle." See 872 F. 2d, at 1474–1475. However, we do not accept the argument that the Hague Protocol signatories intended "personal injury" to be an interpretive translation of "lésion corporelle" where there is no evidence that they intended the authentic English text to effect a substantive change in, or

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delegation proposed adding the word "mental" to Article 17 because it was "not clear" whether Article 17 allowed recovery for such injury. See 1 International Civil Aviation Organization, International Conference on Private Air Law, The Hague, Sept. 1955, ICAO Doc. 7686–LC/140, p. 261. No one seconded this proposal. *Ibid.* In the absence of further discussion by the delegates, we cannot infer much from that fact.

[13] According to the English text of the final version, passenger tickets must contain

"a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers *for death or personal injury* and in respect of loss of or damage to baggage." Goldhirsch 266 (emphasis added).

The French version of the text emphasized above reads: "en cas de mort ou de lésion corporelle." *Id.*, at 256.

clarification of that term. Moreover, the portion of Article 3 of the Hague Protocol in which "personal injury" appears is concerned solely with informing passengers that when the convention "governs" it "in most cases limits the liability of carriers for death or personal injury." See *supra*, n. 13. It may be, therefore, that the signatories used "personal injury" not as an interpretive translation of "lésion corporelle" but merely as a way of giving a summary description of the limitations of liability imposed by the Convention.

The Montreal Agreement of 1966 is similarly inconclusive. The Agreement, which affects only international flights with connecting points in the United States, raised the limit of accident liability to $75,000 and waived due-care defenses. See Montreal Agreement, reprinted in Goldhirsch 317–318; Lowenfeld & Mendelsohn 596–597. The Court of Appeals noted that, under the Montreal Agreement, the notice appearing on passenger tickets used the term "personal injury" rather than "bodily injury" and that the United States Civil Aeronautics Board used these terms interchangeably in approving the Agreement. 872 F. 2d, at 1474. For two reasons, we do not believe that this evidence bears on the signatories' understanding of "lésion corporelle" in Article 17. First, as the Court of Appeals acknowledged, "[t]he Montreal Agreement is not a treaty, but rather an agreement among all major international air carriers that imposes a quasi-legal and largely experimental system of liability essentially contractual in nature." *Id.*, at 1468–1469. Therefore, the Montreal Agreement does not and cannot purport to speak for the signatories to the Warsaw Convention. Second, the Montreal Agreement does not purport to change or clarify the provisions of Article 17.

We likewise do not believe that the Guatemala City Protocol of 1971 sheds any light upon the intended scope of Article 17. The Protocol was drafted in three authentic texts, English, French, and Spanish, but the French text was to control

in cases of conflict. See Guatemala City Protocol Article XXVI, reprinted in Goldhirsch 329. The Protocol amended the French text of Article 17 by deleting the word "blessure," while retaining "lésion corporelle." See 2 International Civil Aviation Organization, International Conference on Air Law, Guatemala City, ICAO Doc. 9040–LC/167–2, p. 183 (1972). Additionally, the English text of the Protocol substituted "personal injury" for "wounding or other bodily injury" in Article 17. See Guatemala City Protocol Article IV, reprinted in Goldhirsch 320–321. The Court of Appeals read the changes in both the French and English versions of Article 17 as supporting an interpretation of "lésion corporelle" broader than "bodily injury." See 872 F. 2d, at 1475.

For several reasons, however, we disagree. First, there is no evidence that the changes to the English or French text were intended to effect a substantive change or clarification. Cf. Miller 123 (noting that the change to the English text was inconspicuously proposed by a drafting group of the ICAO Legal Committee as a minor drafting improvement). Neither mental injuries nor the minor drafting changes were discussed at the Guatemala City Conference. See 1 International Civil Aviation Organization, International Conference on Air Law, Minutes, Guatemala City, ICAO Doc. 9040–LC/167–1, pp. 31–38, 41–63 (1972). Second, of the approximately 120 signatories to the Warsaw Convention, only a few countries have actually ratified the Guatemala City Protocol, see Mankiewicz 237, and therefore the Protocol is not in effect in the international arena. Likewise, we have stated that because the United States Senate has not ratified the Protocol we should not consider it to be dispositive. See *Saks*, *supra*, at 403.

We must also consult the opinions of our sister signatories in searching for the meaning of a "lésion corporelle." See *Saks*, 470 U. S., at 404. The only apparent judicial decision from a sister signatory addressing recovery for purely mental injuries under Article 17 is that of the Supreme Court of

Israel. That court held that Article 17 does allow recovery for purely psychic injuries. See *Cie Air France* v. *Teichner*, 39 Revue Française de Droit Aérien, at 243, 23 Eur. Tr. L., at 102.[14]

Teichner arose from the hijacking in 1976 of an Air France flight to Entebbe, Uganda. Passengers sought compensation for psychic injuries caused by the ordeal of the hijacking and detention at the Entebbe Airport. While acknowledging that the negotiating history of the Warsaw Convention was silent as to the availability of such compensation, *id.*, at 242, 23 Eur. Tr. L., at 101, the court determined that "desirable jurisprudential policy" ("la politique jurisprudentielle souhaitable") favored an expansive reading of Article 17 to reach purely psychic injuries. *Id.*, at 243, 23 Eur. Tr. L., at 102. In reaching this conclusion, the court emphasized the post-1929 development of the aviation industry and the evolution of Anglo-American and Israeli law to allow recovery for psychic injury in certain circumstances. *Ibid.*, 23 Eur. Tr. L., at 101–102. In addition, the court followed the view of Miller that this expansive construction was desirable to avoid an apparent conflict between the French and English versions of the Guatemala City Protocol. *Id.*, at 243–244, 23 Eur. Tr. L., at 102, citing Miller 128–129.

Although we recognize the deference owed to the Israeli court's interpretation of Article 17, see *Saks*, *supra*, at 404, we are not persuaded by that court's reasoning. Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery. As discussed, neither the language, negotiating history, nor postenactment interpretations of Article 17 clearly evidences such intent. Nor does the Guatemala City Protocol support the Israeli court's conclusion because nothing in the Protocol

[14] In the only published versions that we could find, the Israeli opinion is reported in French.

purports to amend Article 17 to reach mental injuries. Moreover, although the Protocol reflects a liberalization of attitudes toward passenger recovery in that it provides for strict liability, see Article IV, reprinted in Goldhirsch 320, the fact that the Guatemala City Protocol is still not in effect after almost 20 years since it was drafted should caution *against* attaching significance to it.

Moreover, we believe our construction of Article 17 better accords with the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation. See n. 11, *supra*. As noted, the Montreal Agreement subjects international carriers to strict liability for Article 17 injuries sustained on flights connected with the United States. See *supra*, at 549. Recovery for mental distress traditionally has been subject to a high degree of proof, both in this country and others. See Prosser and Keeton on Torts, at 60–65, 359–361 (American courts require extreme and outrageous conduct by the tortfeasor); Fleming 49–50 (British courts limit such recovery through the theory of foreseeabilty); Miller 114, 126 (French courts require proof of fault and proof that damage is direct and certain). We have no doubt that subjecting international air carriers to *strict* liability for purely mental distress would be controversial for most signatory countries. Our construction avoids this potential source of divergence.

III

We conclude that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. Although Article 17 renders air carriers liable for "damage sustained in the event of" ("dommage survenu en cas de") such injuries, see 49 Stat. 3005, 3018, we express no view as to whether passengers can recover for mental injuries that are accompanied by physical injuries. That issue is

not presented here because respondents do not allege physical injury or physical manifestation of injury. See App. 3–9.

Eastern urges us to hold that the Warsaw Convention provides the exclusive cause of action for injuries sustained during international air transportation. The Court of Appeals did not address this question, and we did not grant certiorari to consider it. We therefore decline to reach it here.

The judgment of the Court of Appeals is reversed.

It is so ordered.

COTTAGE SAVINGS ASSOCIATION *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 89–1965. Argued January 15, 1991—Decided April 17, 1991

Petitioner Cottage Savings Association simultaneously sold participation interests in 252 mortgages to four savings and loan associations and purchased from them participation interests in 305 other mortgages. All of the loans were secured by single-family homes. The fair market value of the package of participation interests exchanged by each side was approximately $4.5 million. The face value of the participation interests relinquished by Cottage Savings was $6.9 million. For Federal Home Loan Bank Board (FHLBB) accounting purposes, Cottage Savings' mortgages were treated as having been exchanged for "substantially identical" ones held by the other lenders. On its 1980 federal income tax return, Cottage Savings claimed a deduction for the adjusted difference between the face value of the interests it traded and the fair market value of the interests it received. Following the Commissioner's disallowance of the deduction, the Tax Court determined the deduction was pemissible. The Court of Appeals reversed, finding that Cottage Savings had realized its losses through the transaction, but that it was not entitled to a deduction because its losses were not actually sustained for purposes of § 165(a) of the Internal Revenue Code, which allows deductions only for bona fide losses.

Held:

1. Cottage Savings realized a tax-deductible loss because the properties it exchanged were materially different. Pp. 559–567.

(a) In order to avoid the cumbersome, abrasive, and unpredictable administrative task of valuing assets annually to determine whether their value has appreciated or depreciated, § 1001(a) of the Code defers the tax consequences of a gain or loss in property until it is realized through the "sale or disposition of [the] property." This rule serves administrative convenience because a change in the investment's form or extent can be easily detected by a taxpayer or an administrative officer. P. 559.

(b) An exchange of property constitutes a "disposition of property" under § 1001(a) only if the properties exchanged are materially different. Although the statute and its legislative history are silent on the subject, Treasury Regulation § 1.1001–1 includes a material difference require-

ment for realization to occur through a disposition of property. Treasury Regulation § 1.1001–1 should be given deference as a reasonable interpretation of § 1001(a). Where, as here, a Treasury Regulation long continues without substantial change and applies to a substantially reenacted statute, it is deemed to have congressional approval. The regulation is also consistent with this Court's landmark precedents on realization, which make clear that a taxpayer realizes taxable income only if the properties exchanged are "materially" or "essentially" different. *United States* v. *Phellis*, 257 U. S. 156, 173; *Weiss* v. *Stearn*, 265 U. S. 242, 253–254; *Marr* v. *United States*, 268 U. S. 536, 540–542. Since these cases were part of the contemporary legal context in which the substance of § 1001(a) was originally enacted, and since Congress has left their principles undisturbed through subsequent reenactments, it can be presumed that Congress intended to codify these principles in § 1001(a). Pp. 560–562.

(c) Properties are materially different if their respective possessors enjoy legal entitlements that are different in kind or extent. As long as the property entitlements are not identical, their exchange will allow both the Commissioner and the transacting taxpayer to fix the appreciated or depreciated values of the property relative to their tax bases. There is no support in *Phellis*, *Weiss*, or *Marr* for the Commissioner's "economic substitute" concept of material difference, under which differences would be material only when the parties, the relevant market, and the relevant regulatory body would consider them so. Moreover, the complexity of the Commissioner's approach both ill serves the goal of administrative convenience underlying the realization requirement and is incompatible with the Code's structure. Pp. 562–566.

(d) Cottage Savings' transactions easily satisfy the material difference test. Since the participation interests exchanged derived from loans that were made to different obligors and secured by different homes, the exchanged interests embodied legally distinct entitlements. Thus, Cottage Savings realized its losses at the point of the exchange, at which time both it and the Commissioner were in a position to determine the change in the value of its mortgages relative to their tax bases. The mortgages' status under the FHLBB's criteria has no bearing on this conclusion, since a mortgage can be "substantially identical" to the FHLBB and still exhibit "differences" that are "material" for purposes of the Code. Pp. 566–567.

2. Cottage Savings sustained its losses within the meaning of § 165(a) of the Code. The Commissioner's apparent argument that the losses were not bona fide is rejected, since there is no contention that the transaction was not conducted at arm's length or that Cottage Savings

retained *de facto* ownership of the participation interests it traded. *Higgins* v. *Smith*, 308 U. S. 473, distinguished. Pp. 567–568.

890 F. 2d 848, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which WHITE, J., joined, *post*, p. 568.

Dennis L. Manes argued the cause for petitioner. With him on the briefs was *Scott M. Slovin*.

Acting Solicitor General Roberts argued the cause for respondent. With him on the brief were *Assistant Attorney General Peterson*, *Deputy Solicitor General Wallace*, *Clifford M. Sloan*, *Richard Farber*, and *Bruce R. Ellisen*.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether a financial institution realizes tax-deductible losses when it exchanges its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. We hold that such a transaction does give rise to realized losses.

I

Petitioner Cottage Savings Association (Cottage Savings) is a savings and loan association (S & L) formerly regulated by the Federal Home Loan Bank Board (FHLBB).[1] Like many S & L's, Cottage Savings held numerous long-term, low-interest mortgages that declined in value when interest rates surged in the late 1970's. These institutions would have benefited from selling their devalued mortgages in order to realize tax-deductible losses. However, they were deterred from doing so by FHLBB accounting regulations, which required them to record the losses on their books.

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[1] Congress abolished the FHLBB in 1989. See § 401 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101–73, 103 Stat. 354.

Reporting these losses consistent with the then-effective FHLBB accounting regulations would have placed many S & L's at risk of closure by the FHLBB.

The FHLBB responded to this situation by relaxing its requirements for the reporting of losses. In a regulatory directive known as "Memorandum R–49," dated June 27, 1980, the FHLBB determined that S & L's need not report losses associated with mortgages that are exchanged for "substantially identical" mortgages held by other lenders.[2] The FHLBB's acknowledged purpose for Memorandum R–49 was to facilitate transactions that would generate tax losses but that would not substantially affect the economic position of the transacting S & L's.

This case involves a typical Memorandum R–49 transaction. On December 31, 1980, Cottage Savings sold "90% participation interests" in 252 mortgages to four S & L's. It simultaneously purchased "90% participation interests" in 305 mortgages held by these S & L's.[3] All of the loans in-

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[2] Memorandum R–49 listed 10 criteria for classifying mortgages as substantially identical.

"The loans involved must:

"1. involve single-family residential mortgages,

"2. be of similar type (e. g., conventionals for conventionals),

"3. have the same stated terms to maturity (e. g., 30 years),

"4. have identical stated interest rates,

"5. have similar seasoning (i. e., remaining terms to maturity),

"6. have aggregate principal amounts within the lesser of 2½% or $100,000 (plus or minus) on both sides of the transaction, with any additional consideration being paid in cash,

"7. be sold without recourse,

"8. have similar fair market values,

"9. have similar loan-to-value ratios at the time of the reciprocal sale, and

"10. have all security properties for both sides of the transaction in the same state." Record, Exh. 72–BT.

[3] By exchanging merely participation interests rather than the loans themselves, each party retained its relationship with the individual obligors. Consequently, each S & L continued to service the loans on which it

volved in the transaction were secured by single-family homes, most in the Cincinnati area. The fair market value of the package of participation interests exchanged by each side was approximately $4.5 million. The face value of the participation interests Cottage Savings relinquished in the transaction was approximately $6.9 million. See 90 T. C. 372, 378–382 (1988).

On its 1980 federal income tax return, Cottage Savings claimed a deduction for $2,447,091, which represented the adjusted difference between the face value of the participation interests that it traded and the fair market value of the participation interests that it received. As permitted by Memorandum R–49, Cottage Savings did not report these losses to the FHLBB. After the Commissioner of Internal Revenue disallowed Cottage Savings' claimed deduction, Cottage Savings sought a redetermination in the Tax Court. The Tax Court held that the deduction was permissible. See 90 T. C. 372 (1988).

On appeal by the Commissioner, the Court of Appeals reversed. 890 F. 2d 848 (CA6 1989). The Court of Appeals agreed with the Tax Court's determination that Cottage Savings had realized its losses through the transaction. See *id.*, at 852. However, the court held that Cottage Savings was not entitled to a deduction because its losses were not "actually" sustained during the 1980 tax year for purposes of 26 U. S. C. § 165(a). See 890 F. 2d, at 855.

Because of the importance of this issue to the S & L industry and the conflict among the Circuits over whether Memorandum R–49 exchanges produce deductible tax losses,[4] we granted certiorari. 498 U. S. 808 (1990). We now reverse.

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had transferred the participation interests and made monthly payments to the participation-interest holders. See 90 T. C. 372, 381 (1988).

[4] The two other Courts of Appeals that have considered the tax treatment of Memorandum R–49 transactions have found that these transactions do give rise to deductible losses. See *Federal Nat. Mortgage Assn.*

II

Rather than assessing tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer "realizes" the gain or loss. The realization requirement is implicit in § 1001(a) of the Code, 26 U. S. C. § 1001(a), which defines "[t]he gain [or loss] from the sale or other disposition of property" as the difference between "the amount realized" from the sale or disposition of the property and its "adjusted basis." As this Court has recognized, the concept of realization is "founded on administrative convenience." *Helvering* v. *Horst*, 311 U. S. 112, 116 (1940). Under an appreciation-based system of taxation, taxpayers and the Commissioner would have to undertake the "cumbersome, abrasive, and unpredictable administrative task" of valuing assets on an annual basis to determine whether the assets had appreciated or depreciated in value. See 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶5.2, p. 5–16 (2d ed. 1989). In contrast, "[a] change in the form or extent of an investment is easily detected by a taxpayer or an administrative officer." R. Magill, Taxable Income 79 (rev. ed. 1945).

Section 1001(a)'s language provides a straightforward test for realization: to realize a gain or loss in the value of property, the taxpayer must engage in a "sale or other disposition of [the] property." The parties agree that the exchange of participation interests in this case cannot be characterized as a "sale" under § 1001(a); the issue before us is whether the transaction constitutes a "disposition of property." The Commissioner argues that an exchange of property can be treated as a "disposition" under § 1001(a) only if the properties exchanged are materially different. The Commissioner further submits that, because the underlying mortgages

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v. *Commissioner*, 283 U. S. App. D. C. 53, 56–58, 896 F. 2d 580, 583–584 (1990); *San Antonio Savings Assn.* v. *Commissioner*, 887 F. 2d 577 (CA5 1989).

were essentially economic substitutes, the participation interests exchanged by Cottage Savings were not materially different from those received from the other S & L's. Cottage Savings, on the other hand, maintains that *any* exchange of property is a "disposition of property" under § 1001(a), regardless of whether the property exchanged is materially different. Alternatively, Cottage Savings contends that the participation interests exchanged were materially different because the underlying loans were secured by different properties.

We must therefore determine whether the realization principle in § 1001(a) incorporates a "material difference" requirement. If it does, we must further decide what that requirement amounts to and how it applies in this case. We consider these questions in turn.

A

Neither the language nor the history of the Code indicates whether and to what extent property exchanged must differ to count as a "disposition of property" under § 1001(a). Nonetheless, we readily agree with the Commissioner that an exchange of property gives rise to a realization event under § 1001(a) only if the properties exchanged are "materially different." The Commissioner himself has by regulation construed § 1001(a) to embody a material difference requirement:

> "Except as otherwise provided . . . the gain or loss realized from the conversion of property into cash, *or from the exchange of property for other property differing materially either in kind or in extent*, is treated as income or as loss sustained." Treas. Reg. § 1.1001–1, 26 CFR § 1.1001–1 (1990) (emphasis added).

Because Congress has delegated to the Commissioner the power to promulgate "all needful rules and regulations for the enforcement of [the Internal Revenue Code]," 26 U. S. C. § 7805(a), we must defer to his regulatory interpre-

tations of the Code so long as they are reasonable, see *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 476–477 (1979).

We conclude that Treasury Regulation § 1.1001–1 *is* a reasonable interpretation of § 1001(a). Congress first employed the language that now comprises § 1001(a) of the Code in § 202(a) of the Revenue Act of 1924, ch. 234, 43 Stat. 253; that language has remained essentially unchanged through various reenactments.[5] And since 1934, the Commissioner has construed the statutory term "disposition of property" to include a "material difference" requirement.[6] As we have recognized, "'Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reënacted statutes, are deemed to have received congressional approval and have the effect of law.'" *United States* v. *Correll*, 389 U. S. 299, 305–306 (1967), quoting *Helvering* v. *Winmill*, 305 U. S. 79, 83 (1938).

Treasury Regulation § 1.001–1 is also consistent with our landmark precedents on realization. In a series of early decisions involving the tax effects of property exchanges, this Court made clear that a taxpayer realizes taxable income

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[5] Section 202(a) of the 1924 Act provided:

"Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in subdivision (a) or (b) of section 204, and the loss shall be the excess of such basis over the amount realized."

The essence of this provision was reenacted in § 111(a) of Revenue Act of 1934, ch. 277, 48 Stat. 703; and then in § 111(a) of the Internal Revenue Code of 1939, ch. 1, 53 Stat. 37; and finally in § 1001(a) of the Internal Revenue Code of 1954, Pub. L. 591, 68A Stat. 295.

[6] What is now Treas. Reg. § 1.1001–1 originated as Treas. Reg. 86, Art. 111–1, which was promulgated pursuant to the Revenue Act of 1934. That regulation provided:

"Except as otherwise provided, the Act regards as income or as loss sustained, the gain or loss realized from the conversion of property into cash, *or from the exchange of property for other property differing materially either in kind or in extent*" (emphasis added).

only if the properties exchanged are "materially" or "essentially" different. See *United States* v. *Phellis*, 257 U. S. 156, 173 (1921); *Weiss* v. *Stearn*, 265 U. S. 242, 253–254 (1924); *Marr* v. *United States*, 268 U. S. 536, 540–542 (1925); see also *Eisner* v. *Macomber*, 252 U. S. 189, 207–212 (1920) (recognizing realization requirement). Because these decisions were part of the "contemporary legal context" in which Congress enacted § 202(a) of the 1924 Act, see *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979), and because Congress has left undisturbed through subsequent reenactments of the Code the principles of realization established in these cases, we may presume that Congress intended to codify these principles in § 1001(a), see *Pierce* v. *Underwood*, 487 U. S. 552, 567 (1988); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). The Commissioner's construction of the statutory language to incorporate these principles certainly was reasonable.

B

Precisely what constitutes a "material difference" for purposes of § 1001(a) of the Code is a more complicated question. The Commissioner argues that properties are "materially different" only if they differ in economic substance. To determine whether the participation interests exchanged in this case were "materially different" in this sense, the Commissioner argues, we should look to the attitudes of the parties, the evaluation of the interests by the secondary mortgage market, and the views of the FHLBB. We conclude that § 1001(a) embodies a much less demanding and less complex test.

Unlike the question *whether* § 1001(a) contains a material difference requirement, the question of *what constitutes* a material difference is not one on which we can defer to the Commissioner. For the Commissioner has not issued an authoritative, prelitigation interpretation of what property

exchanges satisfy this requirement.[7] Thus, to give meaning to the material difference test, we must look to the case law from which the test derives and which we believe Congress intended to codify in enacting and reenacting the language that now comprises § 1001(a). See *Lorillard* v. *Pons*, *supra*, at 580–581.

We start with the classic treatment of realization in *Eisner* v. *Macomber*, *supra*. In *Macomber*, a taxpayer who owned 2,200 shares of stock in a company received another 1,100 shares from the company as part of a pro rata stock dividend meant to reflect the company's growth in value. At issue was whether the stock dividend constituted taxable income. We held that it did not, because no gain was realized. See *id.*, at 207–212. We reasoned that the stock dividend merely reflected the increased worth of the taxpayer's stock, see *id.*, at 211–212, and that a taxpayer realizes increased worth of property only by receiving "something of exchangeable value *proceeding from* the property," see *id.*, at 207.

In three subsequent decisions—*United States* v. *Phellis*, *supra*; *Weiss* v. *Stearn*, *supra*; and *Marr* v. *United States*, *supra*—we refined *Macomber*'s conception of realization in the context of property exchanges. In each case, the taxpayer owned stock that had appreciated in value since its ac-

[7] In its brief in *United States* v. *Centennial Savings Bank FSB*, No. 89–1926, the United States cites two Revenue Rulings that support the position that mortgages exchanged through reciprocal mortgage sales are not materially different. See Brief for United States 25, n. 21 (citing Rev. Rul. 85–125, 1985–2 Cum. Bull. 180; Rev. Rul. 81–204, 1981–2 Cum. Bull. 157). Perhaps because the two Revenue Rulings postdate the reciprocal mortgage exchange transaction at issue here and do not purport to define the "differ materially" language in Treasury Regulation § 1.1001–1, the Commissioner has not argued that the position taken in these rulings is entitled to deference. Compare, *e. g.*, *National Muffler Dealers Assn., Inc.* v. *United States*, 440 U. S. 472, 483–484, and nn. 16–19 (1979) (deferring to position reflected in longstanding series of Revenue Rulings consistently adhering to same position in a variety of fact patterns). See generally *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965) (agency's reasonable interpretation of its own regulations is entitled to deference).

quisition. And in each case, the corporation in which the taxpayer held stock had reorganized into a new corporation, with the new corporation assuming the business of the old corporation. While the corporations in *Phellis* and *Marr* both changed from New Jersey to Delaware corporations, the original and successor corporations in *Weiss* both were incorporated in Ohio. In each case, following the reorganization, the stockholders of the old corporation received shares in the new corporation equal to their proportional interest in the old corporation.

The question in these cases was whether the taxpayers realized the accumulated gain in their shares in the old corporation when they received in return for those shares stock representing an equivalent proportional interest in the new corporations. In *Phellis* and *Marr*, we held that the transactions were realization events. We reasoned that because a company incorporated in one State has "different rights and powers" from one incorporated in a different State, the taxpayers in *Phellis* and *Marr* acquired through the transactions property that was "materially different" from what they previously had. *United States* v. *Phellis*, 257 U. S., at 169–173; see *Marr* v. *United States*, *supra*, at 540–542 (using phrase "essentially different"). In contrast, we held that no realization occurred in *Weiss*. By exchanging stock in the predecessor corporation for stock in the newly reorganized corporation, the taxpayer did not receive "a thing really different from what he theretofore had." *Weiss* v. *Stearn*, *supra*, at 254. As we explained in *Marr*, our determination that the reorganized company in *Weiss* was not "really different" from its predecessor turned on the fact that both companies were incorporated in the same State. See *Marr* v. *United States*, *supra*, at 540–542 (outlining distinction between these cases).

Obviously, the distinction in *Phellis* and *Marr* that made the stock in the successor corporations materially different from the stock in the predecessors was minimal. Taken to-

gether, *Phellis*, *Marr*, and *Weiss* stand for the principle that properties are "different" in the sense that is "material" to the Internal Revenue Code so long as their respective possessors enjoy legal entitlements that are different in kind or extent. Thus, separate groups of stock are not materially different if they confer "the same proportional interest of the same character in the same corporation." *Marr* v. *United States*, 268 U. S., at 540. However, they *are* materially different if they are issued by different corporations, *id.*, at 541; *United States* v. *Phellis*, *supra*, at 173, or if they confer "differen[t] rights and powers" in the same corporation, *Marr* v. *United States*, *supra*, at 541. No more demanding a standard than this is necessary in order to satisfy the administrative purposes underlying the realization requirement in § 1001(a). See *Helvering* v. *Horst*, 311 U. S., at 116. For, as long as the property entitlements are not identical, their exchange will allow both the Commissioner and the transacting taxpayer easily to fix the appreciated or depreciated values of the property relative to their tax bases.

In contrast, we find no support for the Commissioner's "economic substitute" conception of material difference. According to the Commissioner, differences between properties are material for purposes of the Code only when it can be said that the parties, the relevant market (in this case the secondary mortgage market), and the relevant regulatory body (in this case the FHLBB) would consider them material. Nothing in *Phellis*, *Weiss*, and *Marr* suggests that exchanges of properties must satisfy such a subjective test to trigger realization of a gain or loss.

Moreover, the complexity of the Commissioner's approach ill serves the goal of administrative convenience that underlies the realization requirement. In order to apply the Commissioner's test in a principled fashion, the Commissioner and the taxpayer must identify the relevant market, establish whether there is a regulatory agency whose views should be taken into account, and then assess how the relevant market

participants and the agency would view the transaction. The Commissioner's failure to explain how these inquiries should be conducted further calls into question the workability of his test.

Finally, the Commissioner's test is incompatible with the structure of the Code. Section 1001(c) of Title 26 provides that a gain or loss realized under § 1001(a) "shall be recognized" unless one of the Code's nonrecognition provisions applies. One such nonrecognition provision withholds recognition of a gain or loss realized from an exchange of properties that would appear to be economic substitutes under the Commissioner's material difference test. This provision, commonly known as the "like kind" exception, withholds recognition of a gain or loss realized "on the exchange of property held for productive use in a trade or business or for investment . . . for property of like kind which is to be held either for productive use in a trade or business or for investment." 26 U. S. C. § 1031(a)(1). If Congress had expected that exchanges of similar properties would *not* count as realization events under § 1001(a), it would have had no reason to bar recognition of a gain or loss realized from these transactions.

C

Under our interpretation of § 1001(a), an exchange of property gives rise to a realization event so long as the exchanged properties are "materially different"—that is, so long as they embody legally distinct entitlements. Cottage Savings' transactions at issue here easily satisfy this test. Because the participation interests exchanged by Cottage Savings and the other S & L's derived from loans that were made to different obligors and secured by different homes, the exchanged interests did embody legally distinct entitlements. Consequently, we conclude that Cottage Savings realized its losses at the point of the exchange.

The Commissioner contends that it is anomalous to treat mortgages deemed to be "substantially identical" by the

FHLBB as "materially different." The anomaly, however, is merely semantic; mortgages can be substantially identical for Memorandum R–49 purposes and still exhibit "differences" that are "material" for purposes of the Internal Revenue Code. Because Cottage Savings received entitlements different from those it gave up, the exchange put both Cottage Savings and the Commissioner in a position to determine the change in the value of Cottage Savings' mortgages relative to their tax bases. Thus, there is no reason not to treat the exchange of these interests as a realization event, regardless of the status of the mortgages under the criteria of Memorandum R–49.

III

Although the Court of Appeals found that Cottage Savings' losses were realized, it disallowed them on the ground that they were not sustained under § 165(a) of the Code, 26 U. S. C. § 165(a). Section 165(a) states that a deduction shall be allowed for "any loss sustained during the taxable year and not compensated for by insurance or otherwise." Under the Commissioner's interpretation of § 165(a),

> "To be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and, except as otherwise provided in section 165(h) and § 1.165–11, relating to disaster losses, actually sustained during the taxable year. Only a bona fide loss is allowable. Substance and not mere form shall govern in determining a deductible loss." Treas. Reg. § 1.165–1(b), 26 CFR § 1.165–1(b) (1990).

The Commissioner offers a minimal defense of the Court of Appeals' conclusion. The Commissioner contends that the losses were not sustained because they lacked "economic substance," by which the Commissioner seems to mean that the losses were not bona fide. We say "seems" because the Commissioner states the position in one sentence in a foot-

note in his brief without offering further explanation. See Brief for Respondent 34–35, n. 39. The only authority the Commissioner cites for this argument is *Higgins* v. *Smith*, 308 U. S. 473 (1939). See Brief for United States in No. 89–1926, p. 16, n. 11.

In *Higgins*, we held that a taxpayer did not sustain a loss by selling securities below cost to a corporation in which he was the sole shareholder. We found that the losses were not bona fide because the transaction was not conducted at arm's length and because the taxpayer retained the benefit of the securities through his wholly owned corporation. See *Higgins* v. *Smith*, *supra*, at 475–476. Because there is no contention that the transactions in this case were not conducted at arm's length, or that Cottage Savings retained *de facto* ownership of the participation interests it traded to the four reciprocating S & L's, *Higgins* is inapposite. In view of the Commissioner's failure to advance any other arguments in support of the Court of Appeals' ruling with respect to § 165(a), we conclude that, for purposes of this case, Cottage Savings sustained its losses within the meaning of § 165(a).

IV

For the reasons set forth above, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, with whom JUSTICE WHITE joins, concurring in part and dissenting in part in No. 89–1926, *post*, p. 573, and dissenting in No. 89–1965.

I agree that the early withdrawal penalties collected by Centennial Savings Bank FSB do not constitute "income by reason of the discharge . . . of indebtedness of the taxpayer," within the meaning of 26 U. S. C. § 108(a)(1) (1982 ed.), and that the penalty amounts are not excludable from Centennial's gross income. I therefore join Part III of the Court's opinion in No. 89–1926.

I dissent, however, from the Court's conclusions in these two cases that Centennial and Cottage Savings Association realized deductible losses for income tax purposes when each exchanged partial interests in one group of residential mortgage loans for partial interests in another like group of residential mortgage loans. I regard these losses as not recognizable for income tax purposes because the mortgage packages so exchanged were substantially identical and were not materially different.

The exchanges, as the Court acknowledges, were occasioned by Memorandum R–49, Record, Exh. 72–BT, issued by the Federal Home Loan Bank Board (FHLBB) on June 27, 1980, and by that Memorandum's relaxation of theretofore-existing accounting regulations and requirements, a relaxation effected to avoid placement of "many S & L's at risk of closure by the FHLBB" without substantially affecting the "economic position of the transacting S & L's." *Ante*, at 557. But the Memorandum, the Court notes, also had as a purpose the "facilit[ation of] transactions that would generate tax losses." *Ibid.* I find it somewhat surprising that an agency not responsible for tax matters would presume to dictate what is or is not a deductible loss for federal income tax purposes. I had thought that that was something within the exclusive province of the Internal Revenue Service, subject to administrative and judicial review. Certainly, the FHLBB's opinion in this respect is entitled to no deference whatsoever. See *United States* v. *Stewart*, 311 U. S. 60, 70 (1940); *Graff* v. *Commissioner*, 673 F. 2d 784, 786 (CA5 1982) (concurring opinion). The Commissioner, of course, took the opposing position. See Rev. Rul. 85–125, 1985–2 Cum. Bull. 180; Rev. Rul. 81–204, 1981–2 Cum. Bull. 157.

It long has been established that gain or loss in the value of property is taken into account for income tax purposes only if and when the gain or loss is "realized," that is, when it is tied to a realization event, such as the sale, exchange, or other disposition of the property. Mere variation in value—

the routine ups and downs of the marketplace—do not in themselves have income tax consequences. This is fundamental in income tax law.

In applying the realization requirement to an exchange, the properties involved must be materially different in kind or in extent. Treas. Reg. § 1.1001–1(a), 26 CFR § 1.1001–1(a) (1990). This has been the rule recognized administratively at least since 1935, see Treas. Regs. 86, Art. 111–1, issued under the Revenue Act of 1934, and by judicial decision. See, *e. g.*, *Mutual Loan & Savings Co.* v. *Commissioner*, 184 F. 2d 161 (CA5 1950). See also *Marr* v. *United States*, 268 U. S. 536, 541 (1925); *Weiss* v. *Stearn*, 265 U. S. 242, 254 (1924); *United States* v. *Phellis*, 257 U. S. 156 (1921). This makes economic as well as tax sense, for the parties obviously regard the exchanged properties as having equivalent values. In tax law, we should remember, substance rather than form determines tax consequences. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, 334 (1945); *Gregory* v. *Helvering*, 293 U. S. 465, 469–470 (1935); *Shoenberg* v. *Commissioner*, 77 F. 2d 446, 449 (CA8), cert. denied, 296 U. S. 586 (1935). Thus, the resolution of the exchange issue in these cases turns on the "materially different" concept. The Court recognizes as much. *Ante*, at 559–560.

That the mortgage participation partial interests exchanged in these cases were "different" is not in dispute. The materiality prong is the focus. A material difference is one that has the capacity to influence a decision. See, *e. g.*, *Kungys* v. *United States*, 485 U. S. 759, 770–771 (1988); *Basic Inc.* v. *Levinson*, 485 U. S. 224, 240 (1988); *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U. S. 438, 449 (1976).

The application of this standard leads, it seems to me, to only one answer—that the mortgage participation partial interests released were not materially different from the mortgage participation partial interests received. Memorandum R–49, as the Court notes, *ante*, at 557, n. 2, lists 10 factors that, when satisfied, as they were here, serve to classify the

interests as "substantially identical." These factors assure practical identity; surely, they then also assure that any difference cannot be of consequence. Indeed, nonmateriality is the full purpose of the Memorandum's criteria. The "proof of the pudding" is in the fact of its complete accounting acceptability to the FHLBB. Indeed, as has been noted, it is difficult to reconcile substantial identity for financial accounting purposes with a material difference for tax accounting purposes. See *First Federal Savings & Loan Assn. of Temple* v. *United States*, 694 F. Supp. 230, 245 (WD Tex. 1988), aff'd, 887 F. 2d 593 (CA5 1989), cert. pending No. 89–1927. Common sense so dictates.

This should suffice and be the end of the analysis. Other facts, however, solidify the conclusion: The retention by the transferor of 10% interests, enabling it to keep on servicing its loans; the transferor's continuing to collect the payments due from the borrowers so that, so far as the latter were concerned, it was business as usual, exactly as it had been; the obvious lack of concern or dependence of the transferor with the "differences" upon which the Court relies (as transferees, the taxpayers made no credit checks and no appraisals of collateral, see 890 F. 2d 848, 849 (CA6 1989)); 90 T. C. 372, 382 (1988); 682 F. Supp. 1389, 1392 (ND Tex. 1988); the selection of the loans by a computer programmed to match mortgages in accordance with the Memorandum R–49 criteria; the absence of even the names of the borrowers in the closing schedules attached to the agreements; Centennial's receipt of loan files only six years after its exchange, *id.*, at 1392, n. 5; the restriction of the interests exchanged to the same State; the identity of the respective face and fair market values; and the application by the parties of common discount factors to each side of the transaction—all reveal that any differences that might exist made no difference whatsoever and were not material. This demonstrates the real nature of the transactions, including nonmateriality of the claimed differences.

We should be dealing here with realities and not with superficial distinctions. As has been said many times, and as noted above, in income tax law we are to be concerned with substance and not with mere form. When we stray from that principle, the new precedent is likely to be a precarious beacon for the future.

I respectfully dissent on this issue.

Syllabus

UNITED STATES *v.* CENTENNIAL SAVINGS BANK FSB (RESOLUTION TRUST CORPORATION, RECEIVER)

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

No. 89–1926. Argued January 15, 1991—Decided April 17, 1991

During the 1981 tax year, respondent Centennial Savings Bank FSB exchanged participation interests in a set of mortgage loans for interests in a different set of mortgage loans held by another lender. All of the loans were secured by residential properties and had a face value substantially higher than their fair market value. In a separate set of transactions, Centennial collected early withdrawal penalties from customers who prematurely terminated their certificates of deposit (CD's). In its 1981 federal income tax return, Centennial claimed a deduction for the difference between the face value of the mortgage interests it surrendered and the fair market value of the mortgage interests it received. It also treated the early withdrawal penalties it received as "income by reason of the discharge . . . of indebtedness" excludable from gross income under 26 U. S. C. § 108(a)(1)(C) (1982 ed.). After the Internal Revenue Service disallowed the deduction of the losses associated with the mortgages and determined that Centennial was required to declare the early withdrawal penalties as income, Centennial paid the deficiencies and filed a refund action in the District Court. The court entered a judgment for petitioner United States on the mortgage-exchange issue and for Centennial on the early withdrawal penalty issue. The Court of Appeals reversed the mortgage-exchange ruling, but affirmed the early withdrawal penalty holding.

Held:

1. Centennial realized tax-deductible losses when it exchanged mortgage interests with the other lender. *Cottage Savings Assn.* v. *Commissioner*, *ante*, p. 554. Pp. 578–579.

2. The early withdrawal penalties collected by Centennial were not excludable from income under § 108(a)(1). A debtor realizes income from the "discharge of indebtedness" only when the income results from the forgiveness of, or release from, an obligation to repay assumed by the debtor at the outset of the debtor-creditor relationship. Here, the depositors who prematurely closed their accounts and incurred penalties did not forgive or release any repayment obligation on the part of Centennial, which paid exactly what it was obligated to pay according to the

terms of the agreements entered into at the time the CD's were established. This reading best comports with § 108's purpose, which is to mitigate the effect of treating a discharge of indebtedness as income so that the prospect of immediate tax liability will not discourage businesses from taking advantage of opportunities to repurchase or liquidate their debts at less than face value. A debtor who negotiates in advance the circumstances in which he will liquidate the debt is in a position to anticipate his need for cash with which to pay the resulting income tax and can negotiate the terms of the anticipated liquidation accordingly. Moreover, in this case, Centennial was committed to releasing the deposits at the sole election of the depositors. Thus, unlike a debtor considering the negotiation of an adjustment of the terms of a duty to repay, Centennial had no discretion to take the tax effects of a transaction into account before liquidating its obligation at less than face value. Pp. 579–584.

887 F. 2d 595, affirmed in part, reversed in part, and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined, in Parts I and III of which WHITE, J., joined, and in Part III of which BLACKMUN, J., joined. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, J., joined, *ante*, p. 568.

Acting Solicitor General Roberts argued the cause for the United States. With him on the briefs were *Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Clifford M. Sloan, Richard Farber,* and *Bruce R. Ellisen.*

Michael F. Duhl argued the cause for respondent. With him on the brief were *Mark L. Perlis, Frederic W. Hickman, Alfred J. T. Byrne, Colleen B. Bombardier,* and *Daniel R. Richards.**

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*Briefs of *amici curiae* urging affirmance were filed for the Federal National Mortgage Association by *Joseph Angland, Felix B. Laughlin, David C. Garlock, Richard F. Neel, Jr., Caryl S. Bernstein, Carolyn J. A. Swift,* and *Michel A. Dazé;* for Main Line Federal Savings Bank et al. by *Zachary P. Alexander;* and for the United States League of Savings Institutions by *Richard L. Bacon.*

JUSTICE MARSHALL delivered the opinion of the Court.*

In this case, we consider two questions relating to the federal income tax liability of respondent Centennial Savings Bank FSB (Centennial). The first is whether Centennial realized deductible losses when it exchanged its interests in one group of residential mortgage loans for another lender's interests in a different group of residential mortgage loans. The second is whether penalties collected by Centennial for the premature withdrawal of federally insured certificates of deposit (CD's) constituted "income by reason of the discharge . . . of indebtedness" excludable from gross income under 26 U. S. C. § 108(a)(1)(C) (1982 ed.). The Court of Appeals answered both questions affirmatively. We agree with the Court of Appeals that Centennial's mortgage exchange gave rise to an immediately deductible loss, but we reverse the Court of Appeals' determination that Centennial was entitled to exclude from its taxable income the early withdrawal penalties collected from its depositors.

I

Centennial is a mutual savings and loan institution (S & L) formerly regulated by the Federal Home Loan Bank Board (FHLBB).[1] At issue in this case are two sets of transactions involving Centennial in the 1981 tax year.

The first was Centennial's exchange of "90% participation interests" in a set of mortgage loans held by Centennial for "90% participation interests" in a different set of mortgage loans held by the Federal National Mortgage Association (FNMA).[2] Secured by residential properties located pri-

*JUSTICE WHITE joins Parts I and III of this opinion, and JUSTICE BLACKMUN joins Part III.

[1] While this case was pending on appeal, the FHLBB found Centennial to be insolvent. Centennial is currently under the receivership of the Resolution Trust Corporation.

[2] By exchanging merely participation interests, each party retained its relationships with the obligors of the exchanged loans. See *Cottage Savings Assn.* v. *Commissioner*, *ante*, at 557–558, n. 3.

marily in northern Texas, Centennial's 420 loans had a face value of approximately $8.5 million and a fair market value of approximately $5.7 million; FNMA's 377 loans, secured by properties located throughout Texas, likewise had a face value of approximately $8.5 million and a fair market value of $5.7 million. Centennial and FNMA structured the exchange so that the respective mortgage packages would be deemed "substantially identical" under the FHLBB's Memorandum R–49, dated June 27, 1980, a regulatory directive aimed at identifying mortgage exchanges that would not generate accounting losses for FHLBB regulatory purposes but that would generate deductible losses for federal tax purposes. See generally *Cottage Savings Assn.* v. *Commissioner*, *ante*, at 556–557. On its 1981 return, Centennial claimed a deduction for the loss of $2,819,218, the difference between the face value (and cost basis) of the mortgage interests surrendered to FNMA and the market value of the mortgage interests received from FNMA in return.

The second set of transactions was Centennial's collection of early withdrawal penalties from customers who prematurely terminated their CD accounts. Each CD agreement established a fixed-term, fixed-interest account. See App. 27–29. Consistent with federal regulations, each agreement also provided that the depositor would be required to pay a penalty to Centennial should the depositor withdraw the principal before maturity. See 12 CFR § 526.7(a) (1979); 12 CFR § 526.7(a) (1980); 12 CFR § 1204.103 (1981). Thus, in the event of premature withdrawal, the depositor was entitled under the CD agreement to the principal and accrued interest, minus the applicable penalty. See App. 27–29.

Centennial collected $258,019 in early withdrawal penalties in 1981. In its tax return for that year, Centennial treated the penalties as income from the discharge of indebtedness. Pursuant to 26 U. S. C. §§ 108 and 1017 (1982 ed.), Centennial excluded the $258,019 from its income and reduced the basis of its depreciable property by that amount.

On audit, the Internal Revenue Service disallowed the deduction of the losses associated with Centennial's mortgages, and determined that Centennial should have declared as income the early withdrawal penalties collected that year. After paying the resulting deficiencies, Centennial instituted this refund action in the District Court for the Northern District of Texas, which entered judgment for the United States on the mortgage-exchange issue, and for Centennial on the early withdrawal penalty issue. 682 F. Supp. 1389 (1988).

The Court of Appeals for the Fifth Circuit reversed in part and affirmed in part. 887 F. 2d 595 (1989). It reversed the District Court's ruling that Centennial did not realize a deductible loss in the mortgage-exchange transaction. Relying on its reasoning in another decision handed down the same day, see *San Antonio Savings Assn.* v. *Commissioner*, 887 F. 2d 577 (1989), the Court of Appeals concluded that although the respective mortgage packages exchanged by Centennial and FNMA were "substantially identical" under Memorandum R–49, the two sets of mortgages were nonetheless "materially different" for tax purposes because they were secured by different residential properties. See 887 F. 2d, at 600. Consequently, the court held, the exchange of the two sets of mortgages did give rise to a realization event for tax purposes, allowing Centennial immediately to recognize its losses. See *ibid.*

The Court of Appeals affirmed the District Court's conclusion that Centennial was entitled to treat the early withdrawal penalties as income from the discharge of indebtedness under § 108. The court reasoned that "the characterization of income as income from the discharge of indebtedness depends purely on the spread between the amount received by the debtor and the amount paid by him to satisfy his obligation." *Id.*, at 601. Under this test, the early withdrawal penalties constituted income from the discharge of indebtedness, the court concluded, because the penalties reduced the size of Centennial's obligation to its depositors. See *id.*,

at 601–602. The court rejected the United States' characterization of the penalties as merely a "medium of payment" for Centennial's performance of its "separate obligation" to release the deposits prior to maturity. *Id.*, at 604–605.

The United States thereafter petitioned this Court for a writ of certiorari. Because the Court of Appeals' dispositions of both the mortgage-exchange issue and the early withdrawal penalty issue are in conflict with decisions in other Circuits, and because of the importance of both issues for the savings and loan industry, we granted the petition. 498 U. S. 808 (1990).[3]

II

The question whether Centennial realized tax-deductible losses when it exchanged mortgage interests with FNMA is controlled by our decision in *Cottage Savings Assn.* v. *Commissioner*. In *Cottage Savings*, we recognized that a property exchange gives rise to a realization event for purposes of § 1001(a) of the Internal Revenue Code[4] so long as the ex-

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[3] The Fifth Circuit's conclusion that an exchange of mortgages that are "substantially identical" under Memorandum R–49 can give rise to realizable tax losses is in conflict with a decision of the Sixth Circuit. See *Cottage Savings Assn.* v. *Commissioner*, 890 F. 2d 848 (1989), rev'd and remanded, *ante*, p. 554. The Fifth Circuit's conclusion that early withdrawal penalties constitute discharge-from-indebtedness income under the pre-1986 version of § 108 is in conflict with a decision of the Seventh Circuit. See *Colonial Savings Assn.* v. *Commissioner*, 854 F. 2d 1001 (1988), cert. denied, 489 U. S. 1090 (1989). In 1986, Congress amended § 108, limiting its application to situations in which the taxpayer is insolvent or in bankruptcy at the time of the discharge of his indebtedness. See Pub. L. 99–514, § 822(a), 100 Stat. 2373; see also Pub. L. 100–647, § 1004(a)(1), 102 Stat. 3385 (1988) (extending § 108 to "qualified farm indebtedness"). We granted certiorari nonetheless in light of the significant number of pending cases concerning the tax status of early withdrawal penalties collected prior to 1986.

[4] "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of

changed properties are "materially different." *Ante*, at 560–562. We concluded that the properties are "different" in the sense "material" to the Code so long as they embody legally distinct entitlements. *Ante*, at 564–565.

That test is easily satisfied here. As in *Cottage Savings*, the participation interests exchanged here were in loans made to different obligors and secured by different properties. Thus, the interests embodied distinct entitlements. We therefore affirm the Court of Appeals' conclusion that Centennial was entitled to a refund of the disallowed losses claimed on its mortgages.

III

We next consider the question whether the early withdrawal penalties collected by Centennial constituted "income by reason of the discharge . . . of indebtedness" excludable from income under 26 U. S. C. § 108(a)(1) (1982 ed.). We conclude that the penalties were not subject to exclusion under § 108 because the depositors who paid these penalties did not "discharge" Centennial from any repayment obligation.

The version of § 108 in effect for the 1981 tax year states:

> "Gross income does not include any amount which (but for this subsection) would be includible in gross income by reason of the discharge (in whole or in part) of indebtedness of the taxpayer if—
>
> . . . . .
>
> "(C) the indebtedness discharged is qualified business indebtedness." 26 U. S. C. § 108(a)(1) (1982 ed.).

"[Q]ualified business indebtedness" includes "indebtedness . . . incurred or assumed . . . by a corporation." 26 U. S. C. § 108(d)(4)(A) (1982 ed.).[5] Income from the discharge of

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the adjusted basis provided in such section for determining loss over the amount realized." 26 U. S. C. § 1001(a).

[5] It also includes "indebtedness . . . incurred or assumed . . . by an individual in connection with property used in his trade or business." 26 U. S. C. § 108(d)(4)(A) (1982 ed.).

qualified business indebtedness can be excluded from gross income under § 108 only if the taxpayer elects to reduce the basis of his depreciable property by an amount equal to the income excluded. 26 U. S. C. §§ 108(c)(1), 108(d)(4)(B), 1017 (1982 ed.). Thus, the effect of § 108 is not genuinely to exempt such income from taxation, but rather to defer the payment of the tax by reducing the taxpayer's annual depreciation deductions or by increasing the size of taxable gains upon ultimate disposition of the reduced-basis property.

In characterizing early withdrawal penalties as discharge-of-indebtedness income, Centennial, like the Court of Appeals, focuses purely on the "spread" between the debt that Centennial assumed upon the opening of each CD account and the amount that it actually paid each depositor upon the closing of the account. See 887 F. 2d, at 601. When a depositor opens a CD account, Centennial notes, the bank becomes indebted to the depositor for the principal of the deposit plus accrued interest. By virtue of its collection of an early withdrawal penalty, however, the bank satisfies the debt for *less* than that amount should the depositor withdraw the principal before maturity. The end result, in Centennial's view, is no different from what it would have been had the bank and depositor (freed from the restraints of bank regulatory law) formed no agreement on an early withdrawal penalty at the outset but rather negotiated a forgiveness of that amount at the time of withdrawal.

We reject this analysis because it fails to make sense of § 108's use of the term "discharge." As used in § 108, the term "discharge . . . of indebtedness" conveys *forgiveness of*, or *release from*, an obligation to repay.[6] A depositor who

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[6] "Discharge" can be used to signify various means of extinguishing a legal duty. See generally Black's Law Dictionary 463 (6th ed. 1990). Thus, a debtor might be said to "discharge" his debt by satisfying it. But § 108 uses "income by reason of the discharge . . . of indebtedness" to refer to the change in the debtor's financial condition when the debtor is no longer legally required to satisfy his debt either in part or in full. "Dis-

prematurely closes his account and pays the early withdrawal penalty does not forgive or release any repayment obligation on the part of the financial institution. The CD agreement itself provides that the depositor will be entitled only to the principal and accrued interest, less the applicable penalty, should the depositor prematurely withdraw the principal. Through this formula, the depositor and the bank have determined in advance precisely how much the depositor will be entitled to receive should the depositor close the account on any day up to the maturity date. Thus, the depositor does not "discharge" the bank from an obligation when it accepts an amount equal to the principal and accrued interest minus the penalty, for this is exactly what the bank is obligated to pay under the terms of the CD agreement.

Because § 108 presupposes the "discharge" of an obligation to repay, we disagree with Centennial and the Court of Appeals' conclusion that the "spread" between the debt assumed by Centennial and the amount paid by Centennial upon the closing of the account is sufficient to trigger § 108. The existence of such a spread is sufficient to demonstrate that Centennial enjoyed an accession to income equal in size to the amount of the penalty. But because this income was not the product of the release of any obligation assumed by Centennial at the outset of the bank-depositor relationship, it does not constitute income "by reason of [a] discharge." In sum, to determine whether the debtor has realized "income by reason of the discharge . . . of indebtedness," it is necessary to look at *both* the end result of the transaction *and* the repayment terms agreed to by the parties at the outset of the debtor-creditor relationship.[7]

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charge" in this sense can occur only if the creditor cancels or forgives a repayment obligation.

[7] Renewing the argument that it unsuccessfully advanced in the Court of Appeals, the United States characterizes the penalties not as income by reason of the discharge of indebtedness, but rather as income for Centennial's performance of a "separate obligation." This argument

This common-sense reading of the statutory language best comports with the purpose underlying § 108. The tax-deferral mechanism in § 108 is designed to mitigate the effect of treating the discharge of indebtedness as *income*. See 26 U. S. C. § 61(a)(12) (1982 ed.) ("gross income . . . includ[es] . . . [i]ncome from discharge of indebtedness"). Borrowed funds are excluded from income in the first instance because the taxpayer's obligation to repay the funds offsets any increase in the taxpayer's assets; if the taxpayer is thereafter released from his obligation to repay, the taxpayer enjoys a net increase in assets equal to the forgiven portion of the debt, and the basis for the original exclusion thus evaporates. See *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, 3 (1931); *Commissioner* v. *Jacobson*, 336 U. S. 28, 38 (1949); see also *Commissioner* v. *Tufts*, 461 U. S. 300, 307, 310–311, n. 11 (1983). But while the cancellation of the obligation to repay increases the taxpayer's assets, it does not necessarily generate cash with which the taxpayer can pay the resulting income tax. Congress established the tax-deferral mechanism

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draws on authorities recognizing that § 108 does not apply when a creditor discharges a debtor's obligation in exchange for services or some other form of nonmonetary consideration. See *Spartan Petroleum Co.* v. *United States*, 437 F. Supp. 733 (SC 1977) (debt discharged in exchange for cancellation of distributorship agreement); *OKC Corp.* v. *Commissioner*, 82 T. C. 638, 649–650 (1984) (debt discharged in exchange for settlement of lawsuit). In that situation, the debt is not forgiven but is in fact satisfied in full through the debtor's performance of a "separate obligation"; discharge of the debt is merely the "medium of payment" for that performance, and must be treated as ordinary income for tax purposes. See S. Rep. No. 96–1035, p. 8, n. 6 (1980) ("Debt discharge that is only a medium for some other form of payment, such as a gift or salary, is treated as that form of payment rather than under the debt discharge rules"). See generally 1 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 6.4.7, p. 6–66 (2d ed. 1989). Because we conclude that Centennial's reliance on § 108 fails for a more fundamental reason—the absence of a "discharge" for purposes of the statute—we need not consider whether the early withdrawal penalties were actually payments for services unrelated to the debtor-creditor relationship.

in § 108 so that the prospect of immediate tax liability would not discourage businesses from taking advantage of opportunities to repurchase or liquidate their debts at less than face value. See H. R. Rep. No. 855, 76th Cong., 1st Sess., 5 (1939); S. Rep. No. 1631, 77th Cong., 2d Sess., 77–78 (1942). See generally Wright, Realization of Income Through Cancellations, Modifications, and Bargain Purchases of Indebtedness: I, 49 Mich. L. Rev. 459, 477, 492 (1951).

This rationale is squarely implicated only when the debtor is seeking forgiveness or cancellation of a pre-existing repayment obligation. A debtor who negotiates in advance the circumstances in which he will liquidate the debt for less than its face value is in a position to anticipate his need for cash with which to pay the resulting income tax and can negotiate the terms of the anticipated liquidation accordingly. Moreover, insofar as the CD agreements at issue in this case committed Centennial to releasing the deposits at the sole election of the depositors, Centennial abandoned any control whatsoever over whether and when these particular debt obligations would be liquidated. Consequently, unlike a debtor considering the negotiation of an adjustment of the terms of his duty to repay, Centennial had no discretion to take the tax effects of the transaction into account before liquidating its debt obligations at less than face value.

It is true, as Centennial points out, that construing § 108 to apply only to debt reductions stemming from a negotiated forgiveness of a duty to repay withholds a tax incentive to include "anticipatory discharge" terms in the credit agreement at the outset. But we read the statutory language as embodying a legislative choice not to extend the benefits of § 108's deferral mechanism that far. For the reasons that we have stated, Congress could easily have concluded that only debtors seeking a release from a pre-existing repayment obligation need or deserve the tax break conferred by § 108. Consistent with the rule that tax-exemption and -deferral provisions are to be construed narrowly, *Commissioner* v.

Jacobson, *supra*, at 49; *Elam* v. *Commissioner*, 477 F. 2d 1333, 1335 (CA6 1973), we conclude that Congress did not intend to extend the benefits of § 108 beyond the setting in which a creditor agrees to release a debtor from an obligation assumed at the outset of the relationship.

IV

For the foregoing reasons, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

For opinion of JUSTICE BLACKMUN, concurring in part and dissenting in part, see *ante*, p. 568.

CARNIVAL CRUISE LINES, INC. *v.* SHUTE ET VIR

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

No. 89–1647. Argued January 15, 1991—Decided April 17, 1991

After the respondents Shute, a Washington State couple, purchased passage on a ship owned by petitioner, a Florida-based cruise line, petitioner sent them tickets containing a clause designating courts in Florida as the agreed-upon fora for the resolution of disputes. The Shutes boarded the ship in Los Angeles, and, while in international waters off the Mexican coast, Mrs. Shute suffered injuries when she slipped on a deck mat. The Shutes filed suit in a Washington Federal District Court, which granted summary judgment for petitioner. The Court of Appeals reversed, holding, *inter alia*, that the forum-selection clause should not be enforced under *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, because it was not "freely bargained for," and because its enforcement would operate to deprive the Shutes of their day in court in light of evidence indicating that they were physically and financially incapable of pursuing the litigation in Florida.

Held: The Court of Appeals erred in refusing to enforce the forum-selection clause. Pp. 590–597.

(a) *The Bremen* Court's statement that a freely negotiated forum-selection clause, such as the one there at issue, should be given full effect, 407 U. S., at 12–13, does not support the Court of Appeals' determination that a nonnegotiated forum clause in a passage contract is never enforceable simply because it is not the subject of bargaining. Whereas it was entirely reasonable for *The Bremen* Court to have expected the parties to have negotiated with care in selecting a forum for the resolution of disputes arising from their complicated international agreement, it would be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form. Nevertheless, including a reasonable forum clause in such a form contract well may be permissible for several reasons. Because it is not unlikely that a mishap in a cruise could subject a cruise line to litigation in several different fora, the line has a special interest in limiting such fora. Moreover, a clause establishing *ex ante* the dispute resolution forum has the salutary effect of dispelling confusion as to where suits may be brought and defended, thereby sparing litigants time and expense and conserving judicial resources. Furthermore, it is likely that passengers purchasing tickets

containing a forum clause like the one here at issue benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued. Pp. 590–594.

(b) The Court of Appeals' conclusion that the clause here at issue should not be enforced because the Shutes are incapable of pursuing this litigation in Florida is not justified by *The Bremen* Court's statement that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 U. S., at 17. That statement was made in the context of a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." *Ibid.* Here, in contrast, Florida is not such a forum, nor—given the location of Mrs. Shute's accident—is this dispute an essentially local one inherently more suited to resolution in Washington than in Florida. In light of these distinctions, and because the Shutes do not claim lack of notice of the forum clause, they have not satisfied the "heavy burden of proof," *ibid.*, required to set aside the clause on grounds of inconvenience. Pp. 594–595.

(c) Although forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, there is no indication that petitioner selected Florida to discourage cruise passengers from pursuing legitimate claims or obtained the Shutes' accession to the forum clause by fraud or overreaching. P. 595.

(d) By its plain language, the forum-selection clause at issue does not violate 46 U. S. C. App. § 183c, which, *inter alia*, prohibits a vessel owner from inserting in any contract a provision depriving a claimant of a trial "by court of competent jurisdiction" for loss of life or personal injury resulting from negligence. Pp. 595–597.

897 F. 2d 377, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 597.

Richard K. Willard argued the cause for petitioner. With him on the briefs were *David L. Roll* and *Lawrence D. Winson.*

Gregory J. Wall argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Herbert L. Fenster, Stanley W. Land-*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this admiralty case we primarily consider whether the United States Court of Appeals for the Ninth Circuit correctly refused to enforce a forum-selection clause contained in tickets issued by petitioner Carnival Cruise Lines, Inc., to respondents Eulala and Russel Shute.

I

The Shutes, through an Arlington, Wash., travel agent, purchased passage for a 7-day cruise on petitioner's ship, the *Tropicale*. Respondents paid the fare to the agent who forwarded the payment to petitioner's headquarters in Miami, Fla. Petitioner then prepared the tickets and sent them to respondents in the State of Washington. The face of each ticket, at its left-hand lower corner, contained this admonition:

"SUBJECT TO CONDITIONS OF
CONTRACT ON LAST PAGES
IMPORTANT! PLEASE READ CONTRACT
—ON LAST PAGES 1, 2, 3" App. 15.

The following appeared on "contract page 1" of each ticket:

"TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

. . . . .

"3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

. . . . .

"8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract

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fair, and *Robin S. Conrad;* and for the International Committee of Passenger Lines by *John A. Flynn* and *James B. Nebel.*

shall be litigated, if at all, in and before a Court located in the State of Florida, U. S. A., to the exclusion of the Courts of any other state or country." *Id.*, at 16.

The last quoted paragraph is the forum-selection clause at issue.

II

Respondents boarded the *Tropicale* in Los Angeles, Cal. The ship sailed to Puerto Vallarta, Mexico, and then returned to Los Angeles. While the ship was in international waters off the Mexican coast, respondent Eulala Shute was injured when she slipped on a deck mat during a guided tour of the ship's galley. Respondents filed suit against petitioner in the United States District Court for the Western District of Washington, claiming that Mrs. Shute's injuries had been caused by the negligence of Carnival Cruise Lines and its employees. *Id.*, at 4.

Petitioner moved for summary judgment, contending that the forum clause in respondents' tickets required the Shutes to bring their suit against petitioner in a court in the State of Florida. Petitioner contended, alternatively, that the District Court lacked personal jurisdiction over petitioner because petitioner's contacts with the State of Washington were insubstantial. The District Court granted the motion, holding that petitioner's contacts with Washington were constitutionally insufficient to support the exercise of personal jurisdiction. See App. to Pet. for Cert. 60a.

The Court of Appeals reversed. Reasoning that "but for" petitioner's solicitation of business in Washington, respondents would not have taken the cruise and Mrs. Shute would not have been injured, the court concluded that petitioner had sufficient contacts with Washington to justify the District Court's exercise of personal jurisdiction. 897 F. 2d 377, 385–386 (CA9 1990).*

*The Court of Appeals had filed an earlier opinion also reversing the District Court and ruling that the District Court had personal jurisdic-

Turning to the forum-selection clause, the Court of Appeals acknowledged that a court concerned with the enforceability of such a clause must begin its analysis with *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." *Id.*, at 9–10. See 897 F. 2d, at 388. The appellate court concluded that the forum clause should not be enforced because it "was not freely bargained for." *Id.*, at 389. As an "independent justification" for refusing to enforce the clause, the Court of Appeals noted that there was evidence in the record to indicate that "the Shutes are physically and financially incapable of pursuing this litigation in Florida" and that the enforcement of the clause would operate to deprive them of their day in court and thereby contravene this Court's holding in *The Bremen*. 897 F. 2d, at 389.

We granted certiorari to address the question whether the Court of Appeals was correct in holding that the District Court should hear respondents' tort claim against petitioner. 498 U. S. 807–808 (1990). Because we find the forum-selection clause to be dispositive of this question, we need not consider petitioner's constitutional argument as to personal jurisdiction. See *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("'It is not the habit of the Court to decide questions of a constitutional nature un-

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tion over the cruise line and that the forum-selection clause in the tickets was unreasonable and was not to be enforced. 863 F. 2d 1437 (CA9 1988). That opinion, however, was withdrawn when the court certified to the Supreme Court of Washington the question whether the Washington long-arm statute, Wash. Rev. Code § 4.28.185 (1988), conferred personal jurisdiction over Carnival Cruise Lines for the claim asserted by the Shutes. See 872 F. 2d 930 (1989). The Washington Supreme Court answered the certified question in the affirmative on the ground that the Shutes' claim "arose from" petitioner's advertisement in Washington and the promotion of its cruises there. 113 Wash. 2d 763, 783 P. 2d 78 (1989). The Court of Appeals then "refiled" its opinion "as modified herein." See 897 F. 2d, at 380, n. 1.

less absolutely necessary to a decision of the case,'" quoting *Burton* v. *United States*, 196 U. S. 283, 295 (1905)).

III

We begin by noting the boundaries of our inquiry. First, this is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize. See *Archawski* v. *Hanioti*, 350 U. S. 532, 533 (1956); *The Moses Taylor*, 4 Wall. 411, 427 (1867); Tr. of Oral Arg. 36–37, 12, 47–48. Cf. *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22, 28–29 (1988). Second, we do not address the question whether respondents had sufficient notice of the forum clause before entering the contract for passage. Respondents essentially have conceded that they had notice of the forum-selection provision. Brief for Respondents 26 ("The respondents do not contest the incorporation of the provisions nor *[sic]* that the forum selection clause was reasonably communicated to the respondents, as much as three pages of fine print can be communicated"). Additionally, the Court of Appeals evaluated the enforceability of the forum clause under the assumption, although "doubtful," that respondents could be deemed to have had knowledge of the clause. See 897 F. 2d, at 389, and n. 11.

Within this context, respondents urge that the forum clause should not be enforced because, contrary to this Court's teachings in *The Bremen*, the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court. Additionally, respondents contend that the clause violates the Limitation of Vessel Owner's Liability Act, 46 U. S. C. App. § 183c. We consider these arguments in turn.

IV

A

Both petitioner and respondents argue vigorously that the Court's opinion in *The Bremen* governs this case, and each side purports to find ample support for its position in that

opinion's broad-ranging language. This seeming paradox derives in large part from key factual differences between this case and *The Bremen*, differences that preclude an automatic and simple application of *The Bremen*'s general principles to the facts here.

In *The Bremen*, this Court addressed the enforceability of a forum-selection clause in a contract between two business corporations. An American corporation, Zapata, made a contract with Unterweser, a German corporation, for the towage of Zapata's oceangoing drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. The agreement provided that any dispute arising under the contract was to be resolved in the London Court of Justice. After a storm in the Gulf of Mexico seriously damaged the rig, Zapata ordered Unterweser's ship to tow the rig to Tampa, Fla., the nearest point of refuge. Thereafter, Zapata sued Unterweser in admiralty in federal court at Tampa. Citing the forum clause, Unterweser moved to dismiss. The District Court denied Unterweser's motion, and the Court of Appeals for the Fifth Circuit, sitting en banc on rehearing, and by a sharply divided vote, affirmed. *In re Complaint of Unterweser Reederei, GmBH*, 446 F. 2d 907 (1971).

This Court vacated and remanded, stating that, in general, "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." 407 U. S., at 12–13 (footnote omitted). The Court further generalized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. The Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause. Instead, the Court discussed a number of factors that made it reasonable to enforce the clause at issue in *The Bremen* and

that, presumably, would be pertinent in any determination whether to enforce a similar clause.

In this respect, the Court noted that there was "strong evidence that the forum clause was a vital part of the agreement, and [that] it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.*, at 14 (footnote omitted). Further, the Court observed that it was not "dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum," and that in such a case, "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." *Id.*, at 17. The Court stated that even where the forum clause establishes a remote forum for resolution of conflicts, "the party claiming [unfairness] should bear a heavy burden of proof." *Ibid.*

In applying *The Bremen*, the Court of Appeals in the present litigation took note of the foregoing "reasonableness" factors and rather automatically decided that the forum-selection clause was unenforceable because, unlike the parties in *The Bremen*, respondents are not business persons and did not negotiate the terms of the clause with petitioner. Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.

The Bremen concerned a "far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." *Id.*, at 13. These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in *The*

Bremen to have expected Unterweser and Zapata to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract.

In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines. See, *e. g.*, *Hodes* v. *S. N. C. Achille Lauro ed Altri-Gestione*, 858 F. 2d 905, 910 (CA3 1988), cert. dism'd, 490 U. S. 1001 (1989). In this context, it would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line. But by ignoring the crucial differences in the business contexts in which the respective contracts were executed, the Court of Appeals' analysis seems to us to have distorted somewhat this Court's holding in *The Bremen*.

In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account for the realities of form passage contracts. As an initial matter, we do not adopt the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons: First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora. See *The Bremen*, 407 U. S., at 13, and n. 15; *Hodes*, 858 F. 2d, at 913. Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary

effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions. See *Stewart Organization*, 487 U. S., at 33 (concurring opinion). Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued. Cf. *Northwestern Nat. Ins. Co.* v. *Donovan*, 916 F. 2d 372, 378 (CA7 1990).

We also do not accept the Court of Appeals' "independent justification" for its conclusion that *The Bremen* dictates that the clause should not be enforced because "[t]here is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." 897 F. 2d, at 389. We do not defer to the Court of Appeals' findings of fact. In dismissing the case for lack of personal jurisdiction over petitioner, the District Court made no finding regarding the physical and financial impediments to the Shutes' pursuing their case in Florida. The Court of Appeals' conclusory reference to the record provides no basis for this Court to validate the finding of inconvenience. Furthermore, the Court of Appeals did not place in proper context this Court's statement in *The Bremen* that "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause." 407 U. S., at 17. The Court made this statement in evaluating a hypothetical "agreement between two Americans to resolve their essentially local disputes in a remote alien forum." *Ibid.* In the present case, Florida is not a "remote alien forum," nor—given the fact that Mrs. Shute's accident occurred off the coast of Mexico—is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida. In

light of these distinctions, and because respondents do not claim lack of notice of the forum clause, we conclude that they have not satisfied the "heavy burden of proof," *ibid.*, required to set aside the clause on grounds of inconvenience.

It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness. In this case, there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims. Any suggestion of such a bad-faith motive is belied by two facts: Petitioner has its principal place of business in Florida, and many of its cruises depart from and return to Florida ports. Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity. In the case before us, therefore, we conclude that the Court of Appeals erred in refusing to enforce the forum-selection clause.

B

Respondents also contend that the forum-selection clause at issue violates 46 U. S. C. App. § 183c. That statute, enacted in 1936, see ch. 521, 49 Stat. 1480, provides:

> "It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent

> jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect."

By its plain language, the forum-selection clause before us does not take away respondents' right to "a trial by [a] court of competent jurisdiction" and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought "if at all," in a court "located in the State of Florida," which, plainly, is a "court of competent jurisdiction" within the meaning of the statute.

Respondents appear to acknowledge this by asserting that although the forum clause does not directly prevent the determination of claims against the cruise line, it causes plaintiffs unreasonable hardship in asserting their rights and therefore violates Congress' intended goal in enacting § 183c. Significantly, however, respondents cite no authority for their contention that Congress' intent in enacting § 183c was to avoid having a plaintiff travel to a distant forum in order to litigate. The legislative history of § 183c suggests instead that this provision was enacted in response to passenger-ticket conditions purporting to limit the shipowner's liability for negligence or to remove the issue of liability from the scrutiny of any court by means of a clause providing that "the question of liability and the measure of damages shall be determined by arbitration." See S. Rep. No. 2061, 74th Cong., 2d Sess., 6 (1936); H. R. Rep. No. 2517, 74th Cong., 2d Sess., 6 (1936). See also Safety of Life and Property at Sea: Hearings before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess., pt. 4, pp. 20, 36–37, 57, 109–110, 119 (1936). There was no prohibition of a forum-selection clause. Because the clause before us allows for judicial resolution of claims against petitioner and does

not purport to limit petitioner's liability for negligence, it does not violate § 183c.

V

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court prefaces its legal analysis with a factual statement that implies that a purchaser of a Carnival Cruise Lines passenger ticket is fully and fairly notified about the existence of the choice of forum clause in the fine print on the back of the ticket. See *ante*, at 587–588. Even if this implication were accurate, I would disagree with the Court's analysis. But, given the Court's preface, I begin my dissent by noting that only the most meticulous passenger is likely to become aware of the forum-selection provision. I have therefore appended to this opinion a facsimile of the relevant text, using the type size that actually appears in the ticket itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs.

Of course, many passengers, like the respondents in this case, see *ante*, at 587, will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that "[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger." Not knowing whether or not that provision is legally enforceable, I assume that the average passenger would accept the risk of having to file suit in Florida in the event of an injury, rather than canceling—without a refund—a planned vacation at the last minute. The fact that the cruise line can reduce its litigation costs, and therefore its liability insurance premiums, by forcing this choice on its passengers does not, in my opinion, suffice to render the

provision reasonable. Cf. *Steven* v. *Fidelity & Casualty Co. of New York*, 58 Cal. 2d 862, 883, 377 P. 2d 284, 298 (1962) (refusing to enforce limitation on liability in insurance policy because insured "must purchase the policy before he even knows its provisions").

Even if passengers received prominent notice of the forum-selection clause before they committed the cost of the cruise, I would remain persuaded that the clause was unenforceable under traditional principles of federal admiralty law and is "null and void" under the terms of Limitation of Vessel Owner's Liability Act, ch. 521, 49 Stat. 1480, 46 U. S. C. App. § 183c, which was enacted in 1936 to invalidate expressly stipulations limiting shipowners' liability for negligence.

Exculpatory clauses in passenger tickets have been around for a long time. These clauses are typically the product of disparate bargaining power between the carrier and the passenger, and they undermine the strong public interest in deterring negligent conduct. For these reasons, courts long before the turn of the century consistently held such clauses unenforceable under federal admiralty law. Thus, in a case involving a ticket provision purporting to limit the shipowner's liability for the negligent handling of baggage, this Court wrote:

> "It is settled in the courts of the United States that exemptions limiting carriers from responsibility for the negligence of themselves or their servants are both unjust and unreasonable, and will be deemed as wanting in the element of voluntary assent; and, besides, that such conditions are in conflict with public policy. This doctrine was announced so long ago, and has been so frequently reiterated, that it is elementary. We content ourselves with referring to the cases of the *Baltimore & Ohio &c. Railway* v. *Voigt*, 176 U. S. 498, 505, 507, and *Knott* v. *Botany Mills*, 179 U. S. 69, 71, where the previously adjudged cases are referred to and the principles

by them expounded are restated." *The Kensington*, 183 U. S. 263, 268 (1902).

Clauses limiting a carrier's liability or weakening the passenger's right to recover for the negligence of the carrier's employees come in a variety of forms. Complete exemptions from liability for negligence or limitations on the amount of the potential damage recovery,[1] requirements that notice of claims be filed within an unreasonably short period of time,[2] provisions mandating a choice of law that is favorable to the defendant in negligence cases,[3] and forum-selection clauses are all similarly designed to put a thumb on the carrier's side of the scale of justice.[4]

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[1] See 46 U. S. C. App. § 183c:

"It shall be unlawful for the . . . owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner . . . from liability, or from liability beyond any stipulated amount, for such loss or injury . . . ."

[2] See 46 U. S. C. App. § 183b(a):

"It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred."

See also 49 U. S. C. § 11707(e) ("A carrier or freight forwarder may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section").

[3] See, *e. g.*, *The Kensington*, 183 U. S. 263, 269 (1902) (refusing to enforce clause requiring that all disputes under contract for passage be governed by Belgian law because such law would have favored the shipowner in violation of United States public policy).

[4] All these clauses will provide passengers who purchase tickets containing them with a "benefit in the form of reduced fares reflecting the sav-

Forum-selection clauses in passenger tickets involve the intersection of two strands of traditional contract law that qualify the general rule that courts will enforce the terms of a contract as written. Pursuant to the first strand, courts traditionally have reviewed with heightened scrutiny the terms of contracts of adhesion, form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power. Some commentators have questioned whether contracts of adhesion can justifiably be enforced at all under traditional contract theory because the adhering party generally enters into them without manifesting knowing and voluntary consent to all their terms. See, *e. g.*, Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173, 1179–1180 (1983); Slawson, Mass Contracts: Lawful Fraud in California, 48 S. Cal. L. Rev. 1, 12–13 (1974); K. Llewellyn, The Common Law Tradition 370–371 (1960).

The common law, recognizing that standardized form contracts account for a significant portion of all commercial agreements, has taken a less extreme position and instead subjects terms in contracts of adhesion to scrutiny for reasonableness. Judge J. Skelly Wright set out the state of the law succinctly in *Williams* v. *Walker-Thomas Furniture Co.*, 121 U. S. App. D. C. 315, 319–320, 350 F. 2d 445, 449–450 (1965) (footnotes omitted):

> "Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his

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ings that the cruise line enjoys by limiting [its exposure to liability]." See *ante*, at 594. Under the Court's reasoning, all these clauses, including a complete waiver of liability, would be enforceable, a result at odds with longstanding jurisprudence.

> consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."

See also *Steven*, 58 Cal. 2d, at 879–883, 377 P. 2d, at 295–297; *Henningsen* v. *Bloomfield Motors, Inc.*, 32 N. J. 358, 161 A. 2d 69 (1960).

The second doctrinal principle implicated by forum-selection clauses is the traditional rule that "contractual provisions, which seek to limit the place or court in which an action may . . . be brought, are invalid as contrary to public policy." See Dougherty, Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought, 31 A. L. R. 4th 404, 409, § 3 (1984). See also *Home Insurance Co.* v. *Morse*, 20 Wall. 445, 451 (1874). Although adherence to this general rule has declined in recent years, particularly following our decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1 (1972), the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party, or deny one party a remedy. See 31 A. L. R. 4th, at 409–438 (citing cases). A forum-selection clause in a standardized passenger ticket would clearly have been unenforceable under the common law before our decision in *The Bremen*, see 407 U. S., at 9, and n. 10, and, in my opinion, remains unenforceable under the prevailing rule today.

The Bremen, which the Court effectively treats as controlling this case, had nothing to say about stipulations printed on the back of passenger tickets. That case involved the enforceability of a forum-selection clause in a freely negotiated international agreement between two large corporations providing for the towage of a vessel from the Gulf of Mexico to the Adriatic Sea. The Court recognized that such towage agreements had generally been held unenforceable in Ameri-

can courts,[5] but held that the doctrine of those cases did not extend to commercial arrangements between parties with equal bargaining power.

The federal statute that should control the disposition of the case before us today was enacted in 1936 when the general rule denying enforcement of forum-selection clauses was indisputably widely accepted. The principal subject of the statute concerned the limitation of shipowner liability, but as the following excerpt from the House Report explains, the section that is relevant to this case was added as a direct response to shipowners' ticketing practices.

> "During the course of the hearings on the bill (H. R. 9969) there was also brought to the attention of the committee a practice of providing on the reverse side of steamship tickets that in the event of damage or injury caused by the negligence or fault of the owner or his servants, the liability of the owner shall be limited to a stipulated amount, in some cases $5,000, and in others substantially lower amounts, or that in such event the question of liability and the measure of damages *shall be determined by arbitration.* The amendment to chapter 6 of title 48 of the Revised Statutes proposed to be made by section 2 of the committee amendment is intended to, and in the opinion of the committee will, *put a stop to all such practices and practices of a like character.*" H. R. Rep. No. 2517, 74th Cong., 2d Sess., 6–7 (1936) (emphasis added); see also S. Rep. No. 2061, 74th Cong., 2d Sess., 6–7 (1936).

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[5] "In [*Carbon Black Export, Inc.* v. *The Monrosa*, 254 F. 2d 297 (CA5 1958), cert. dism'd, 359 U. S. 180 (1959),] the Court of Appeals had held a forum-selection clause unenforceable, reiterating the traditional view of many American courts that 'agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.' 254 F. 2d, at 300–301." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 6 (1972).

The intent to "put a stop to all such practices and practices of a like character" was effectuated in the second clause of the statute. It reads:

> "It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) *purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor.* All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect." 46 U. S. C. App. § 183c (emphasis added).

The stipulation in the ticket that Carnival Cruise sold to respondents certainly lessens or weakens their ability to recover for the slip and fall incident that occurred off the west coast of Mexico during the cruise that originated and terminated in Los Angeles, California. It is safe to assume that the witnesses—whether other passengers or members of the crew—can be assembled with less expense and inconvenience at a west coast forum than in a Florida court several thousand miles from the scene of the accident.

A liberal reading of the 1936 statute is supported by both its remedial purpose and by the legislative history's general condemnation of "all such practices." Although the statute does not specifically mention forum-selection clauses, its language is broad enough to encompass them. The absence of a

specific reference is adequately explained by the fact that such clauses were already unenforceable under common law and would not often have been used by carriers, which were relying on stipulations that purported to exonerate them from liability entirely. Cf. *Moskal* v. *United States*, 498 U. S. 103, 110–113 (1990).

The Courts of Appeals, construing an analogous provision of the Carriage of Goods by Sea Act, 46 U. S. C. App. § 1300 *et seq.*, have unanimously held invalid as limitations on liability forum-selection clauses requiring suit in foreign jurisdictions. See, *e. g.*, *Hughes Drilling Fluids* v. *M/V Luo Fu Shan*, 852 F. 2d 840 (CA5 1988), cert. denied, 489 U. S. 1033 (1989); *Union Ins. Soc. of Canton, Ltd.* v. *S. S. Elikon*, 642 F. 2d 721, 724–725 (CA4 1981); *Indussa Corp.* v. *S. S. Ranborg*, 377 F. 2d 200, 203–204 (CA2 1967). Commentators have also endorsed this view. See, *e. g.*, G. Gilmore & C. Black, The Law of Admiralty 145, and n. 23 (2d ed. 1975); Mendelsohn, Liberalism, Choice of Forum Clauses and the Hague Rules, 2 J. of Maritime Law & Comm. 661, 663–666 (1971). The forum-selection clause here does not mandate suit in a foreign jurisdiction, and therefore arguably might have less of an impact on a plaintiff's ability to recover. See *Fireman's Fund American Ins. Cos.* v. *Puerto Rican Forwarding Co.*, 492 F. 2d 1294 (CA1 1974). However, the plaintiffs in this case are not large corporations but individuals, and the added burden on them of conducting a trial at the opposite end of the country is likely proportional to the additional cost to a large corporation of conducting a trial overseas.[6]

Under these circumstances, the general prohibition against stipulations purporting "to lessen, weaken, or avoid" the passenger's right to a trial certainly should be construed to apply to the manifestly unreasonable stipulation in these passen-

[6] The Court does not make clear whether the result in this case would also apply if the clause required Carnival passengers to sue in Panama, the country in which Carnival is incorporated.

gers' tickets. Even without the benefit of the statute, I would continue to apply the general rule that prevailed prior to our decision in *The Bremen* to forum-selection clauses in passenger tickets.

I respectfully dissent.

Paster — #1 — Face — 298-077 (QL: 3)

[redacted]

P. O. Box 526170, Miami, Florida 33152-6170

Passenger Booking Number

SHIP

Booking No.	Sailing	Passenger	Adult	Child
Agent	Cabin No.			

S P E C I M E N

Fare

Port Charge

total fare

SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES 1, 2, 3

Passenger Ticket - To Be Presented For Passage

[redacted]

P. O. Box 526170, Miami, Florida 33152-6170

Passenger Booking Number

SHIP

Booking No.	Sailing	Passenger	Adult	Child
Agent	Cabin No.			

Fare

Port Charge

total fare

SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES

IMPORTANT! PLEASE READ CONTRACT ON LAST PAGES 1, 2, 3

The provisions on the reverse hereof are incorporated as though fully herein

Passenger's Copy - Not Good For Passage

PASSENGER TICKET

TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET

1. (a) Whenever the word "Carrier" is used in this Contract it shall mean and include, jointly and severally, the Vessel, its owners, operators, charterers and tenders. The term "Passenger" shall include, the plural where appropriate, and all persons engaging to and/or traveling under this Contract. The masculine includes the feminine.

   (b) The Master, Officers and Crew of the Vessel shall have the benefit of all of the terms and conditions of this contract.

2. This ticket is valid only for the person or persons named hereon as the passenger or passengers and cannot be transferred without the Carrier's consent written hereon. Passage money shall be deemed to be earned when paid and not refundable.

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

   (b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. The Vessel may or may not carry a ship's physician at the election of the Carrier. The fare includes full board, ordinary ship's food during the voyage, but no spirits, wine, beer or mineral waters.

4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of the Carrier or its servants or agents. No undertaking or warranty is given or shall be implied respecting the seaworthiness, fitness or condition of the Vessel. This exemption from liability shall extend to the employees, servants and agents of the Carrier and for this purpose this exemption shall be deemed to constitute a Contract entered into between the passenger and the Carrier on behalf of all persons who are or become from time to time its employees, servants or agents and all such persons shall to this extent be deemed to be parties to this Contract.

5. The Carrier shall not be liable for losses of valuables unless stored in the Vessel's safety depository and then not exceeding $500 in any event.

6. If the Vessel carries a surgeon, physician, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the passenger and any such person in dealing with the passenger is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the Carrier and the Carrier shall not be liable for any act or omission of such person or those under his orders or assisting him with respect to treatment, advice or care of any kind given to any passenger.

   The surgeon, physician, masseuse, barber, hair dresser or manicurist shall be entitled to make a proper charge for any service performed with respect to a passenger and the Carrier shall not be concerned in any way whatsoever in any such arrangement.

7. The Carrier shall not be liable for any claims whatsoever of the passenger unless full particulars thereof in writing be given to the Carrier or their agents within 185 days after the passenger shall be landed from the Vessel or in the case the voyage is abandoned within 185 days thereafter. Suit to recover any claim shall not be maintainable in any event unless commenced within one year after the date of the loss, injury or death.

8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

9. The Carrier, in arranging for the service called for by all shore feature coupons or shore excursion tickets, acts only as agent for the holder thereof and assumes no responsibility and in no event shall be liable for any loss, damage, injury or delay to or of said person and/or baggage, property or effects in connection with said services, nor does Carrier guarantee the performance of any such service.

10. Each fully paid adult passenger will be allowed an unlimited amount of baggage free of charge. Baggage means only trunks, valises, satchels, bags, hangers and bundles with their contents consisting of only such wearing apparel, toilet articles and similar personal effects as are necessary and appropriate for the station in life of the passenger and for the purpose of the journey.

11. No tools of trade, household goods, presents and/or property of others, jewelry, money, documents, valuables of any description including but not limited to such articles as are described in Section 4281 Revised Statute of the U.S.A. (46 USCA § 181) shall be carried except under and subject to the terms of a special written contract or Bill of Lading entered into with the Carrier prior to embarkation upon application of the passenger and the passenger hereby warrants that no such articles are contained in any receptacle or container presented by him as baggage hereunder, and if any such article or articles are shipped and the passenger's baggage in breach of this warranty no liability for negligence, gross or ordinary, shall attach to the Carrier for any loss or damage thereto.

12. It is stipulated and agreed that the aggregate value of each passenger's property under the Adult ticket does not exceed $100.00 (half ticket: $50.00) and any liability of the Carrier for any cause whatsoever with respect to said property shall not exceed such sum, unless the passenger shall in writing, delivered to the Carrier prior to embarkation, declare the true value thereof and pay to the Carrier prior to embarkation a sum (in U.S. Dollars) equal to 5% of the excess of such value, in which event the Carrier's liability shall be limited to the actual damages sustained to the property but not in excess of the declared value.

13. The Vessel shall be entitled to leave and enter ports with or without pilots or tugs, to tow and assist other vessels in any circumstances to return to or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course, all such deviations being considered as forming part of and included in the proposed voyage.

14. If the performance of the proposed voyage is hindered or prevented) or in the opinion of the Carrier or the Master is likely to be hindered or prevented) by war, hostilities, blockade, ice, labor conflicts, strikes on board or ashore, Restraint of Rulers or Princes, breakdown of the Vessel, congestion, docking difficulties, or any other cause whatsoever, or if the Carrier or the Master considers that for any reason whatsoever, proceeding to, attempting to enter, or entering or remaining at the port of passenger's destination may expose the Vessel to risk or loss or damage or be likely to delay her, the passenger and his baggage may be landed at the port of embarkation or at any port or place at which the Vessel may call when the responsibility of the Carrier shall cease and this contract shall be deemed to have been fully performed, or if the passenger has not embarked the Carrier may cancel the proposed voyage without liability to refund passage money or fares paid in advance.

15. The Carrier and the Master shall have liberty to comply with any orders, recommendations or directions whatsoever given by the Government of any nation or by any Department thereof or by any person acting or purporting to act with the authority of such Government or Department or by any Committee or person having under the terms of the War Risks Insuranace on the Vessel the right to give such orders, recommendations or directions, and if by reason of and in compliance with any such orders, recommendations or directions anything is done or is not done the same shall not be deemed a deviation or a breach of this Contract. Disembarkation of any passenger or discharge of his baggage in accordance with such orders, recommendations or directions shall constitute due and proper fulfillment of the obligations of the Carrier under this Contract.

16. (a) The Carrier shall not be liable to make any refund to passengers in respect of lost tickets or in respect of tickets wholly or partly not used by a passenger.

   (b) If for any reason whatsoever the passenger is refused permission to land at the port of disembarkation or such other ports as is provided for in Clauses 14 and 15 hereof, the passenger and his baggage may be landed at any port or place at which the Vessel calls or be carried back to the port of embarkation and shall pay the Carrier full fare according to its tariff in use at such time for such further carriage, which shall be upon the terms herein contained.

17. The Carrier and the Vessel shall have a lien upon all baggage, money, motor cars and other property whatsoever accompanying the passenger and the right to sell the same by public auction or otherwise for all sums whatsoever due from the passenger under this contract and for the costs and expenses of enforcing such lien and of such sale.

18. The passenger or if a minor his parent or guardian shall be liable to the Carrier and to the Master for any fines or penalties imposed on the Carrier by the authorities for his failure to observe or comply with local requirements in respect of immigration, Customs and Excise or any other Government regulations whatsoever.

19. No passenger shall be allowed to bring on board the Vessel Weapons, Firearms, Ammunition, Explosives or other dangerous goods without written permission from the Carrier.

20. The Carrier shall have liberty without previous notice to cancel at the port of embarkation or at any port this Contract and shall thereupon return to the passenger, if the Contract is cancelled at the port of embarkation, his passage money, or, if the Contract is cancelled later, a proportionate part thereof.

21. The passenger warrants that he and those traveling with him are physically fit at the time of embarkation. The Carrier and Master each reserves the right to refuse passage to anyone whose health or welfare would be considered a risk to his own well-being or that of any other passenger.

22. Should the Vessel deviate from its course due to passenger's negligence, said passenger or his estate shall be liable for any related costs incurred.

23. The Carrier reserves the right to increase published fares without prior notice. In the event of an increase, the passenger has the option of accepting the increased fare or cancelling reservations without penalty.

24. In addition to all of the restrictions and exemptions from liability provided in this Contract the Carrier shall have the benefit of all Statutes of the United States of America providing for limitation and exoneration from liability and the procedures provided thereby, including but not limited to Sections 4282, 4282A, 4283, 4284, 4285 and 4286 of the Revised Statues of the United States of America (46 USCA Sections 182, 183, 183b, 184, 185 and 186); nothing in this Contract is intended to nor shall it operate to limit or deprive the Carrier of any such statutory limitation of or exoneration from liability.

25. Should any provision of this Contract be contrary to or invalid by virtue of the law of any jurisdiction or be so held by a Court of competent jurisdiction, such provision shall be deemed to be severed from the Contract and of no effect and all remaining provisions herein shall be in full force and effect and constitute the Contract of Carriage.

AMERICAN HOSPITAL ASSOCIATION *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 90–97. Argued February 25, 1991—Decided April 23, 1991

The National Labor Relations Board has promulgated a rule providing that, with exceptions for, *inter alia*, cases presenting "extraordinary circumstances," eight, and only eight, defined employee units are appropriate for collective bargaining in acute care hospitals. Petitioner, American Hospital Association, brought this action challenging the rule's facial validity on the grounds that (1) § 9(b) of the National Labor Relations Act (NLRA) requires the Board to make a separate bargaining unit determination "in each case" and therefore prohibits the Board from using general rules to define bargaining units; (2) the rule violates a congressional admonition to the Board to avoid the undue proliferation of bargaining units in the health care industry; and (3) the rule is arbitrary and capricious. The District Court agreed with petitioner's second argument and enjoined the rule's enforcement, but the Court of Appeals found no merit in any of the three arguments and reversed.

Held: The Board's rule is not facially invalid. Pp. 609–620.

(a) The Board's broad rulemaking powers under § 6 of the NLRA authorize the rule and are not limited by § 9(b)'s mandate that the Board decide the appropriate bargaining unit "in each case." Contrary to petitioner's reading, the clear and more natural meaning of the "in each case" requirement is simply to indicate that whenever there is a disagreement between employers and employees about the appropriateness of a bargaining unit, the Board shall resolve the dispute. In doing so, the Board is entitled to rely on rules that it has developed to resolve certain issues of general applicability. See, *e. g.*, *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205. The rule at issue does not differ significantly from the Board's many prior rules establishing general principles for the adjudication of bargaining unit disputes. This interpretation is reinforced by the NLRA's structure and policy. Nor is petitioner aided by § 9(b)'s sparse legislative history. Even if any ambiguity could be found in § 9(b) after application of the traditional tools of statutory construction, this Court would still defer to the Board's reasonable interpretation of the statutory text. Pp. 609–614.

(b) The rule is not rendered invalid by the admonition, contained in congressional Reports accompanying the 1974 extension of NLRA cover-

age to all acute care hospitals, that the Board should give "[d]ue consideration . . . to preventing proliferation of bargaining units in the health care industry." The argument that the admonition—when coupled with Congress' 1973 rejection of a bill that would have placed a general limit of five on the number of hospital bargaining units—evinces an intent to emphasize the importance of § 9(b)'s "in each case" requirement is no more persuasive than petitioner's reliance on § 9(b) itself. Moreover, even if this Court accepted petitioner's further suggestion that the admonition is an authoritative statement of what Congress intended by the 1974 legislation, the admonition must be read to express the desire that the Board consider the special problems that proliferation might create in acute care hospitals. An examination of the rulemaking record reveals that the Board gave extensive consideration to this very issue. In any event, the admonition is best understood as a congressional warning to the Board, and Congress is free to fashion a remedy for noncompliance if it believes that the Board has not given "due consideration" to the problem of proliferation in this industry. Pp. 614–617.

(c) The rule is not, as petitioner contends, arbitrary and capricious because it ignores critical differences among the many acute care hospitals in the country. The Board's conclusion that, absent extraordinary circumstances, such hospitals do not differ in substantial, significant ways relating to the appropriateness of units was based on a "reasoned analysis" of an extensive rulemaking record and on the Board's years of experience in the adjudication of health care cases. Pp. 617–619.

899 F. 2d 651, affirmed.

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

James D. Holzhauer argued the cause for petitioner. With him on the briefs were *Kenneth S. Geller*, *Arthur R. Miller*, and *Rhonda A. Rhodes*.

Deputy Solicitor General Shapiro argued the cause for respondents. With him on the brief for respondent National Labor Relations Board were *Solicitor General Starr*, *Stephen L. Nightingale*, *Robert E. Allen*, *Norton J. Come*, and *Linda Sher*. *Woody N. Peterson*, *David Silberman*, *Laurence Gold*, *Helen Morgan*, *Richard Griffin*, *Michael Fanning*, *Miriam Gafni*, *James Grady*, *Jonathan Hiatt*, *Richard Kirschner*,

Bruce Miller, *Patrick Scanlon*, and *George Murphy* filed a brief for respondents American Nurses Association et al.*

JUSTICE STEVENS delivered the opinion of the Court.

For the first time since the National Labor Relations Board (Board or NLRB) was established in 1935, the Board has promulgated a substantive rule defining the employee units appropriate for collective bargaining in a particular line of commerce. The rule is applicable to acute care hospitals and provides, with three exceptions, that eight, and only eight, units shall be appropriate in any such hospital. The three exceptions are for cases that present extraordinary circumstances, cases in which nonconforming units already exist, and cases in which labor organizations seek to combine two or more of the eight specified units. The extraordinary circumstances exception applies automatically to hospitals in which the eight-unit rule will produce a unit of five or fewer employees. See 29 CFR § 103.30 (1990).

Petitioner, American Hospital Association, brought this action challenging the facial validity of the rule on three grounds: First, petitioner argues that § 9(b) of the National Labor Relations Act (NLRA or Act) requires the Board to make a separate bargaining unit determination "in each case" and therefore prohibits the Board from using general rules to define bargaining units; second, petitioner contends that the

*Briefs of *amici curiae* urging reversal were filed for the Fairfax Hospital System, the Maryland Hospital Association, Inc., and the Virginia Hospital Association by *John G. Kruchko* and *Paul M. Lusky;* for the California Association of Hospitals and Health Systems et al. by *Robert M. Stone* and *Dana D. Howells;* for the Greater Cincinnati Hospital Council by *Lawrence J. Barty* and *Frank H. Stewart;* for the Hospital Association of Pennsylvania et al. by *John E. Lyncheski* and *Michael J. Reilly;* for the Society for Human Resource Management by *Glen D. Nager;* for the Missouri Hospital Association by *E. J. Holland, Jr.;* for St. Francis Hospital, Inc., of Memphis by *Jeff Weintraub;* and for William Beaumont Hospital et al. by *Theodore R. Opperwall.*

Lawrence Rosenzweig filed a brief for the Union of American Physicians and Dentists as *amicus curiae* urging affirmance.

rule that the Board has formulated violates a congressional admonition to the Board to avoid the undue proliferation of bargaining units in the health care industry; and, finally, petitioner maintains that the rule is arbitrary and capricious.

The United States District Court for the Northern District of Illinois agreed with petitioner's second argument and enjoined enforcement of the rule. 718 F. Supp. 704 (1989). The Court of Appeals found no merit in any of the three arguments and reversed. 899 F. 2d 651 (CA7 1990). Because of the importance of the case, we granted certiorari, 498 U. S. 894 (1990). We now affirm.

I

Petitioner's first argument is a general challenge to the Board's rulemaking authority in connection with bargaining unit determinations based on the terms of the NLRA, 49 Stat. 449, 29 U. S. C. § 151 *et seq.*, as originally enacted in 1935. In § 1 of the NLRA Congress made the legislative finding that the "inequality of bargaining power" between unorganized employees and corporate employers had adversely affected commerce and declared it to be the policy of the United States to mitigate or eliminate those adverse effects "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U. S. C. § 151. The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations.

Sections 3, 4, and 5 of the Act created the Board and generally described its powers. §§ 153–155. Section 6 granted the Board the "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions" of the Act. § 156. This

grant was unquestionably sufficient to authorize the rule at issue in this case unless limited by some other provision in the Act.

Petitioner argues that § 9(b) provides such a limitation because this section requires the Board to determine the appropriate bargaining unit "in each case." § 159(b). We are not persuaded. Petitioner would have us put more weight on these three words than they can reasonably carry.

Section 9(a) of the Act provides that the representative "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" shall be the exclusive bargaining representative for all the employees in that unit. § 159(a). This section, read in light of the policy of the Act, implies that the initiative in selecting an appropriate unit resides with the employees. Moreover, the language suggests that employees may seek to organize "a unit" that is "appropriate"—not necessarily *the* single most appropriate unit. See, *e. g.*, *Trustees of Masonic Hall and Asylum Fund* v. *NLRB*, 699 F. 2d 626, 634 (CA2 1983); *State Farm Mutual Automobile Ins. Co.* v. *NLRB*, 411 F. 2d 356, 358 (CA7) (en banc), cert. denied, 396 U. S. 832 (1969); *Friendly Ice Cream Corp.* v. *NLRB*, 705 F. 2d 570, 574 (CA1 1983); *Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 194 U. S. App. D. C. 37, 41, 595 F. 2d 844, 848 (1979); *NLRB* v. *Western & Southern Life Ins. Co.*, 391 F. 2d 119, 123 (CA3), cert. denied, 393 U. S. 978 (1968). Thus, one union might seek to represent all of the employees in a particular plant, those in a particular craft, or perhaps just a portion thereof.

Given the obvious potential for disagreement concerning the appropriateness of the unit selected by the union seeking recognition by the employer—disagreements that might involve rival unions claiming jurisdiction over contested segments of the work force as well as disagreements between management and labor—§ 9(b) authorizes the Board to decide whether the designated unit is appropriate. See Hearings

on S. 1958 before the Senate Committee on Education and Labor, p. 82 (1935) (hereinafter Hearings), 1 Legislative History of the National Labor Relations Act 1935, p. 1458 (hereinafter Legislative History) (testimony of Francis Biddle, Chairman of Board); H. R. Rep. No. 972, 74th Cong., 1st Sess., 20 (1935), 2 Legislative History 2976. Section 9(b) provides:

> "The Board shall decide *in each case* whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." (Emphasis added.)

Petitioner reads the emphasized phrase as a limitation on the Board's rulemaking powers. Although the contours of the restriction that petitioner ascribes to the phrase are murky, petitioner's reading of the language would prevent the Board from imposing any industry-wide rule delineating the appropriate bargaining units. We believe petitioner's reading is inconsistent with the natural meaning of the language read in the context of the statute as a whole.

The more natural reading of these three words is simply to indicate that whenever there is a disagreement about the appropriateness of a unit, the Board shall resolve the dispute. Under this reading, the words "in each case" are synonymous with "whenever necessary" or "in any case in which there is a dispute." Congress chose not to enact a general rule that would require plant unions, craft unions, or industry-wide unions for every employer in every line of commerce, but also chose not to leave the decision up to employees or employers alone. Instead, the decision "in each case" in which a dispute arises is to be made by the Board.

In resolving such a dispute, the Board's decision is presumably to be guided not simply by the basic policy of the Act but also by the rules that the Board develops to circumscribe and

to guide its discretion either in the process of case-by-case adjudication or by the exercise of its rulemaking authority. The requirement that the Board exercise its discretion in every disputed case cannot fairly or logically be read to command the Board to exercise standardless discretion in each case. As a noted scholar on administrative law has observed: "[T]he mandate to decide 'in each case' does not prevent the Board from supplanting the original discretionary chaos with some degree of order, and the principal instruments for regularizing the system of deciding 'in each case' are classifications, rules, principles, and precedents. Sensible men could not refuse to use such instruments and a sensible Congress would not expect them to." K. Davis, Administrative Law Text, § 6.04, p. 145 (3d ed. 1972).

This reading of the "in each case" requirement comports with our past interpretations of similar provisions in other regulatory statutes. See *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956); *FPC* v. *Texaco, Inc.*, 377 U. S. 33, 41–44 (1964); *Heckler* v. *Campbell*, 461 U. S. 458, 467 (1983). These decisions confirm that, even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.

Even petitioner acknowledges that "the Board could adopt rules establishing general principles to guide the required case-by-case bargaining unit determinations." Brief for Petitioner 19. Petitioner further acknowledges that the Board has created many such rules in the half-century during which it has adjudicated bargaining unit disputes. Reply Brief for Petitioner 8–11. Petitioner contends, however, that a rule delineating the appropriate bargaining unit for an entire industry is qualitatively different from these prior rules, which at most established rebuttable presumptions that certain units would be considered appropriate in certain circumstances.

We simply cannot find in the three words "in each case" any basis for the fine distinction that petitioner would have us draw. Contrary to petitioner's contention, the Board's rule is not an irrebuttable presumption; instead, it contains an exception for "extraordinary circumstances." Even if the rule did establish an irrebuttable presumption, it would not differ significantly from the prior rules adopted by the Board. As with its prior rules, the Board must still apply the rule "in each case." For example, the Board must decide in each case, among a host of other issues, whether a given facility is properly classified as an acute care hospital and whether particular employees are properly placed in particular units.

Our understanding that the ordinary meaning of the statutory language cannot support petitioner's construction is reinforced by the structure and the policy of the NLRA. As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority granted in § 6, we would have expected it to do so in language expressly describing an exception from that section or at least referring specifically to the section. And, in regard to the Act's underlying policy, the goal of facilitating the organization and recognition of unions is certainly served by rules that define in advance the portions of the work force in which organizing efforts may properly be conducted.

The sparse legislative history of the provision affords petitioner no assistance. That history reveals that the phrase was one of a group of "small amendments" suggested by the Secretary of Labor "for the sake of clarity." See Senate Committee on Education and Labor, Memorandum Comparing S. 2926 and S. 1958, 74th Cong., 1st Sess., 9 (Comm. Print 1935), 1 Legislative History 1332, Hearings, 1442, 1445; Hearings on H. R. 6288 before the House Committee on Labor, 74th Cong., 1st Sess., 283–284 (1935), 2 Legislative History 2757–2758. If this amendment had been intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would ex-

pect to find some expression of that intent in the legislative history. Cf. *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 600–601 (1980) (REHNQUIST, J., dissenting).

The only other relevant legislative history adds nothing to the meaning conveyed by the text that was enacted. Petitioner relies on a comment in the House Committee on Labor Report that the matter of the appropriate unit "is obviously one for determination in each individual case, and the only possible workable arrangement is to authorize the impartial government agency, the Board, to make that determination." H. R. Rep. No. 972, 74th Cong., 1st Sess., 20 (1935), 2 Legislative History 2976. This comment, however, simply restates our reading of the statute as requiring that the Board decide the appropriate unit in every case in which there is a dispute. The Report nowhere suggests that the Board cannot adopt generally applicable rules to guide its "determination in each individual case."

In sum, we believe that the meaning of § 9(b)'s mandate that the Board decide the appropriate bargaining unit "in each case" is clear and contrary to the meaning advanced by petitioner. Even if we could find any ambiguity in § 9(b) after employing the traditional tools of statutory construction, we would still defer to the Board's reasonable interpretation of the statutory text. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). We thus conclude that § 9(b) does not limit the Board's rulemaking authority under § 6.

II

Consideration of petitioner's second argument requires a brief historical review of the application of federal labor law to acute care hospitals. Hospitals were "employers" under the terms of the NLRA as enacted in 1935, but in 1947 Congress excepted not-for-profit hospitals from the coverage of the Act. See 29 U. S. C. § 152(2) (1970 ed.) (repealed, 1974). In 1960, the Board decided that proprietary hospitals

should also be excepted, see *Flatbush General Hospital*, 126 N. L. R. B. 144, 145, but this position was reversed in 1967, see *Butte Medical Properties*, 168 N. L. R. B. 266, 268.

In 1973, Congress addressed the issue and considered bills that would have extended the Act's coverage to all private health care institutions, including not-for-profit hospitals. The proposed legislation was highly controversial, largely because of the concern that labor unrest in the health care industry might be especially harmful to the public. Moreover, the fact that so many specialists are employed in the industry created the potential for a large number of bargaining units, in each of which separate union representation might multiply management's burden in negotiation and might also increase the risk of strikes. Motivated by these concerns, Senator Taft introduced a bill that would have repealed the exemption for hospitals, but also would have placed a limit of five on the number of bargaining units in nonprofit health care institutions. S. 2292, 93d Cong., 1st Sess. (1973). Senator Taft's bill did not pass.

In the second session of the same Congress, however, the National Labor Relations Act Amendments of 1974 were enacted. See 88 Stat. 395. These amendments subjected all acute care hospitals to the coverage of the Act but made no change in the Board's authority to determine the appropriate bargaining unit in each case. See *ibid.* Both the House and the Senate Committee Reports on the legislation contained this statement:

> "EFFECT ON EXISTING LAW
>
> "Bargaining Units
>
> "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No.

144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).*

"*By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision."

See S. Rep. No. 93–766, p. 5 (1974); H. R. Rep. No. 93–1051, pp. 6–7 (1974).

Petitioner does not—and obviously could not—contend that this statement in the Committee Reports has the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating. Nor, in view of the fact that Congress refused to enact the Taft bill that would have placed a limit of five on the number of hospital bargaining units, does petitioner argue that eight units necessarily constitute proliferation. Rather, petitioner's primary argument is that the admonition, when coupled with the rejection of a general rule imposing a five-unit limit, evinces Congress' intent to emphasize the importance of the "in each case" requirement in § 9(b).

We find this argument no more persuasive than petitioner's reliance on § 9(b) itself. Assuming that the admonition was designed to emphasize the requirement that the Board determine the appropriate bargaining unit in each case, we have already explained that the Board's rule does not contravene this mandate. See Part I, *supra*.

Petitioner also suggests that the admonition "is an authoritative statement of what Congress intended when it extended the Act's coverage to include nonproprietary hospitals." Brief for Petitioner 30. Even if we accepted this suggestion, we read the admonition as an expression by the Committees of their desire that the Board give "due consideration" to the special problems that "proliferation" might create in acute care hospitals. Examining the record of the Board's rulemaking proceeding, we find that it gave exten-

sive consideration to this very issue. See App. 20, 78–84, 114, 122, 131, 140, 158–159, 191–194, 246–254.*

In any event, we think that the admonition in the Committee Reports is best understood as a form of notice to the Board that if it did not give appropriate consideration to the problem of proliferation in this industry, Congress might respond with a legislative remedy. So read, the remedy for noncompliance with the admonition is in the hands of the body that issued it. Cf. *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 168 (1989) (legislative history that cannot be tied to the enactment of specific statutory language ordinarily carries little weight in judicial interpretation of the statute). If Congress believes that the Board has not given "due consideration" to the issue, Congress may fashion an appropriate response.

III

Petitioner's final argument is that the rule is arbitrary and capricious because "it ignores critical differences among the more than 4,000 acute-care hospitals in the United States, including differences in size, location, operations, and workforce organization." Brief for Petitioner 39. Petitioner supports this argument by noting that in at least one earlier unit determination, the Board had commented that the diverse character of the health care industry precluded generalizations about the appropriateness of any particular bargaining unit. See *St. Francis Hospital*, 271 N. L. R. B.

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*We further note that the Board's rule is fully consistent with the two NLRB case holdings expressly approved by the admonition. In one of those cases, the Board refused to approve a bargaining unit composed of only x-ray technicians and instead ruled that all technical workers should be grouped together. See *Woodland Park Hospital, Inc.*, 205 N. L. R. B. 888–889 (1973). In the other case, the Board refused to permit a unit of only two employees. See *Four Seasons Nursing Center of Joliet*, 208 N. L. R. B. 403 (1974). The current rule authorizes a single unit for all technical workers and prohibits units of fewer than five employees. See 29 CFR § 103.30(a) (1990).

948, 953, n. 39 (1984), remanded *sub nom. Electrical Workers* v. *NLRB*, 259 U. S. App. D. C. 168, 814 F. 2d 697 (1987).

The Board responds to this argument by relying on the extensive record developed during the rulemaking proceedings, as well as its experience in the adjudication of health care cases during the 13-year period between the enactment of the health care amendments and its notice of proposed rulemaking. Based on that experience, the Board formed the "considered judgment" that "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units." App. 188–189. Moreover, the Board argues, the exception for "extraordinary circumstances" is adequate to take care of the unusual case in which a particular application of the rule might be arbitrary.

We do not believe that the challenged rule is inconsistent with the Board's earlier comment on diversity in the health care industry. The comment related to the entire industry whereas the rule does not apply to many facilities, such as nursing homes, blood banks, and outpatient clinics. See *St. Francis*, 271 N. L. R. B., at 953, n. 39. Moreover, the Board's earlier discussion "anticipate[d] that after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate." See *ibid.*

Given the extensive notice and comment rulemaking conducted by the Board, its careful analysis of the comments that it received, and its well-reasoned justification for the new rule, we would not be troubled even if there were inconsistencies between the current rule and prior NLRB pronouncements. The statutory authorization "from time to time to make, amend, and rescind" rules and regulations expressly contemplates the possibility that the Board will reshape its policies on the basis of more information and experience in the administration of the Act. See 29 U. S. C. § 156. The question whether the Board has changed its view about

certain issues or certain industries does not undermine the validity of a rule that is based on substantial evidence and supported by a "reasoned analysis." See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 42, 57 (1983).

The Board's conclusion that, absent extraordinary circumstances, "acute care hospitals do not differ in substantial, significant ways relating to the appropriateness of units," App. 189, was based on a "reasoned analysis" of an extensive record. See 463 U. S., at 57. The Board explained that diversity among hospitals had not previously affected the results of bargaining unit determinations and that diversification did not make rulemaking inappropriate. See App. 55–59. The Board justified its selection of the individual bargaining units by detailing the factors that supported generalizations as to the appropriateness of those units. See, *e. g.*, *id.*, at 93–94, 97, 98, 101, 118–120, 123–129, 133–140.

The fact that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule "arbitrary or capricious." This case is a challenge to the validity of the entire rule in all its applications. We consider it likely that presented with the case of an acute care hospital to which its application would be arbitrary, the Board would conclude that "extraordinary circumstances" justified a departure from the rule. See 29 CFR §§ 103.30(a), (b) (1990). Even assuming, however, that the Board might decline to do so, we cannot conclude the the entire rule is invalid on its face. See *Illinois Commerce Commission* v. *Interstate Commerce Commission*, 249 U. S. App. D. C. 389, 393–394, 776 F. 2d 355, 359–360 (1985) (Scalia, J.); *Aberdeen & Rockfish R. Co.* v. *United States*, 682 F. 2d 1092, 1105 (CA5 1982); cf. *FDIC* v. *Mallen*, 486 U. S. 230, 247 (1988) ("A statute such as this is not to be held unconstitutional simply because it may be applied in an arbitrary or unfair way in some hypothetical case not before the Court").

In this opinion, we have deliberately avoided any extended comment on the wisdom of the rule, the propriety of the specific unit determinations, or the importance of avoiding work stoppages in acute care hospitals. We have pretermitted such discussion not because these matters are unimportant but because they primarily concern the Board's exercise of its authority rather than the limited scope of our review of the legal arguments presented by petitioner. Because we find no merit in any of these legal arguments, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CALIFORNIA *v.* HODARI D.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 89–1632. Argued January 14, 1991—Decided April 23, 1991

A group of youths, including respondent Hodari D., fled at the approach of an unmarked police car on an Oakland, California, street. Officer Pertoso, who was wearing a jacket with "Police" embossed on its front, left the car to give chase. Pertoso did not follow Hodari directly, but took a circuitous route that brought the two face to face on a parallel street. Hodari, however, was looking behind as he ran and did not turn to see Pertoso until the officer was almost upon him, whereupon Hodari tossed away a small rock. Pertoso tackled him, and the police recovered the rock, which proved to be crack cocaine. In the juvenile proceeding against Hodari, the court denied his motion to suppress the evidence relating to the cocaine. The State Court of Appeal reversed, holding that Hodari had been "seized" when he saw Pertoso running towards him; that this seizure was "unreasonable" under the Fourth Amendment, the State having conceded that Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari; and therefore that the evidence of cocaine had to be suppressed as the fruit of the illegal seizure.

Held: The only issue presented here—whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment—must be answered in the negative. To answer this question, this Court looks to the common law of arrest. To constitute a seizure of the person, just as to constitute an arrest—the quintessential "seizure of the person" under Fourth Amendment jurisprudence—there must be *either* the application of physical force, however slight, *or*, where that is absent, submission to an officer's "show of authority" to restrain the subject's liberty. No physical force was applied in this case, since Hodari was untouched by Pertoso before he dropped the drugs. Moreover, assuming that Pertoso's pursuit constituted a "show of authority" enjoining Hodari to halt, Hodari did not comply with that injunction and therefore was not seized until he was tackled. Thus, the cocaine abandoned while he was running was not the fruit of a seizure, cf. *Brower* v. *Inyo County*, 489 U. S. 593, 597; *Hester* v. *United States*, 265 U. S. 57, 58, and his motion to exclude evidence of it was properly denied. *United States* v. *Mendenhall*, 446 U. S. 544, 554 (opinion of Stewart, J.), and its progeny, distinguished. Pp. 623–629.

Reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 629.

Ronald E. Niver, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Clifford K. Thompson, Jr.*, and *Morris Beatus*, Deputy Attorneys General.

Clifford M. Sloan argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Paul J. Larkin, Jr.*

James L. Lozenski, by appointment of the Court, 498 U. S. 935, argued the cause for respondent. With him on the brief was *J. Bradley O'Connell.**

JUSTICE SCALIA delivered the opinion of the Court.

Late one evening in April 1988, Officers Brian McColgin and Jerry Pertoso were on patrol in a high-crime area of Oakland, California. They were dressed in street clothes but wearing jackets with "Police" embossed on both front and back. Their unmarked car proceeded west on Foothill Boulevard, and turned south onto 63rd Avenue. As they rounded the corner, they saw four or five youths huddled around a small red car parked at the curb. When the youths

*Briefs of *amici curiae* urging reversal were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the Wayne County Prosecuting Attorney by *John D. O'Hair, pro se*, and *Timothy A. Baughman.*

Briefs of *amici curiae* urging affirmance were filed for the California Attorneys for Criminal Justice by *Paul L. Gabbert;* and for the National Association of Criminal Defense Lawyers by *Paul Morris.*

Briefs of *amici curiae* were filed for the Appellate Committee of the California District Attorneys Association by *Ira Reiner* and *Harry B. Sondheim;* and for *Marvin Cahn, pro se.*

saw the officers' car approaching they apparently panicked, and took flight. The respondent here, Hodari D., and one companion ran west through an alley; the others fled south. The red car also headed south, at a high rate of speed.

The officers were suspicious and gave chase. McColgin remained in the car and continued south on 63rd Avenue; Pertoso left the car, ran back north along 63rd, then west on Foothill Boulevard, and turned south on 62nd Avenue. Hodari, meanwhile, emerged from the alley onto 62nd and ran north. Looking behind as he ran, he did not turn and see Pertoso until the officer was almost upon him, whereupon he tossed away what appeared to be a small rock. A moment later, Pertoso tackled Hodari, handcuffed him, and radioed for assistance. Hodari was found to be carrying $130 in cash and a pager; and the rock he had discarded was found to be crack cocaine.

In the juvenile proceeding brought against him, Hodari moved to suppress the evidence relating to the cocaine. The court denied the motion without opinion. The California Court of Appeal reversed, holding that Hodari had been "seized" when he saw Officer Pertoso running towards him, that this seizure was unreasonable under the Fourth Amendment, and that the evidence of cocaine had to be suppressed as the fruit of that illegal seizure. The California Supreme Court denied the State's application for review. We granted certiorari. 498 U. S. 807 (1990).

As this case comes to us, the only issue presented is whether, at the time he dropped the drugs, Hodari had been "seized" within the meaning of the Fourth Amendment.[1] If

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[1] California conceded below that Officer Pertoso did not have the "reasonable suspicion" required to justify stopping Hodari, see *Terry* v. *Ohio*, 392 U. S. 1 (1968). That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ("The wicked flee when no man pursueth"). We do not decide that point here, but rely entirely upon the State's concession.

so, respondent argues, the drugs were the fruit of that seizure and the evidence concerning them was properly excluded. If not, the drugs were abandoned by Hodari and lawfully recovered by the police, and the evidence should have been admitted. (In addition, of course, Pertoso's seeing the rock of cocaine, at least if he recognized it as such, would provide reasonable suspicion for the unquestioned seizure that occurred when he tackled Hodari. Cf. *Rios* v. *United States*, 364 U. S. 253 (1960).)

We have long understood that the Fourth Amendment's protection against "unreasonable . . . seizures" includes seizure of the person, see *Henry* v. *United States*, 361 U. S. 98, 100 (1959). From the time of the founding to the present, the word "seizure" has meant a "taking possession," 2 N. Webster, An American Dictionary of the English Language 67 (1828); 2 J. Bouvier, A Law Dictionary 510 (6th ed. 1856); Webster's Third New International Dictionary 2057 (1981). For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but actually bringing it within physical control. A ship still fleeing, even though under attack, would not be considered to have been seized as a war prize. Cf. *The Josefa Segunda*, 10 Wheat. 312, 325–326 (1825). A res capable of manual delivery was not seized until "tak[en] into custody." *Pelham* v. *Rose*, 9 Wall. 103, 106 (1870). To constitute an arrest, however—the quintessential "seizure of the person" under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient. See, *e. g.*, *Whitehead* v. *Keyes*, 85 Mass. 495, 501 (1862) ("[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him"); 1

Restatement of Torts § 41, Comment *h* (1934). As one commentator has described it:

> "There can be constructive detention, which will constitute an arrest, although the party is never actually brought within the physical control of the party making an arrest. This is accomplished by merely touching, however slightly, the body of the accused, by the party making the arrest and for that purpose, although he does not succeed in stopping or holding him even for an instant; as where the bailiff had tried to arrest one who fought him off by a fork, the court said, 'If the bailiff had touched him, that had been an arrest . . . .'" A. Cornelius, Search and Seizure 163–164 (2d ed. 1930) (footnote omitted).

To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest. Cf. *Thompson* v. *Whitman*, 18 Wall. 457, 471 (1874) ("A seizure is a single act, and not a continuous fact"). The present case, however, is even one step further removed. It does not involve the application of any physical force; Hodari was untouched by Officer Pertoso at the time he discarded the cocaine. His defense relies instead upon the proposition that a seizure occurs "when the officer, by means of physical force *or show of authority*, has in some way restrained the liberty of a citizen." *Terry* v. *Ohio*, 392 U. S. 1, 19, n. 16 (1968) (emphasis added). Hodari contends (and we accept as true for purposes of this decision) that Pertoso's pursuit qualified as a "show of au-

thority" calling upon Hodari to halt. The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

The language of the Fourth Amendment, of course, cannot sustain respondent's contention. The word "seizure" readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ("She seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "Stop, in the name of the law!" at a fleeing form that continues to flee. That is no seizure.[2] Nor can the result respondent wishes to achieve be produced—indirectly, as it were—by suggesting that Pertoso's uncomplied-with show of authority was a common-law arrest, and then appealing to the principle that all common-law arrests are seizures. An arrest requires *either* physical force (as described above) *or*, where that is absent, *submission* to the assertion of authority.

> "Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential. The apparent inconsistency in the two parts of this statement is explained by the fact that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes an arrest. There can be no arrest

[2] For this simple reason—which involves neither "logic-chopping," *post*, at 646, nor any arcane knowledge of legal history—it is irrelevant that English law proscribed "an unlawful *attempt* to take a presumptively innocent person into custody." *Post*, at 631. We have consulted the common law to explain the meaning of seizure—and, contrary to the dissent's portrayal, to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice). But neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

> without either touching or submission." Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940) (footnotes omitted).

We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest, as respondent urges.[3] Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.

Respondent contends that his position is sustained by the so-called *Mendenhall* test, formulated by Justice Stewart's opinion in *United States* v. *Mendenhall*, 446 U. S. 544, 554 (1980), and adopted by the Court in later cases, see *Michigan* v. *Chesternut*, 486 U. S. 567, 573 (1988); *INS* v. *Delgado*, 466 U. S. 210, 215 (1984): "[A] person has been 'seized' within the

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[3] Nor have we ever done so. The dissent is wrong in saying that *Terry* v. *Ohio*, 392 U. S. 1 (1968), "broadened the range of encounters . . . encompassed within the term 'seizure,'" *post*, at 635. *Terry* unquestionably involved conduct that would constitute a common-law seizure; its novelty (if any) was in expanding the acceptable *justification* for such a seizure, beyond probable cause. The dissent is correct that *Katz* v. *United States*, 389 U. S. 347 (1967), "unequivocally reject[s] the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment," *post*, at 637. But we do not assert that it defines the limits of the term "seizure"; only that it defines the limits of a *seizure of the person*. What *Katz* stands for is the proposition that items which could not be subject to seizure at common law (*e. g.*, telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed.

meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U. S., at 554. See also *Florida* v. *Royer*, 460 U. S. 491, 502 (1983) (opinion of WHITE, J.). In seeking to rely upon that test here, respondent fails to read it carefully. It says that a person has been seized "only if," not that he has been seized "whenever"; it states a *necessary*, but not a *sufficient*, condition for seizure—or, more precisely, for seizure effected through a "show of authority." *Mendenhall* establishes that the test for existence of a "show of authority" is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. Application of this objective test was the basis for our decision in the other case principally relied upon by respondent, *Chesternut*, *supra*, where we concluded that the police cruiser's slow following of the defendant did not convey the message that he was not free to disregard the police and go about his business. We did not address in *Chesternut*, however, the question whether, if the *Mendenhall* test was met—if the message that the defendant was not free to leave *had* been conveyed—a Fourth Amendment seizure would have occurred. See 486 U. S., at 577 (KENNEDY, J., concurring).

Quite relevant to the present case, however, was our decision in *Brower* v. *Inyo County*, 489 U. S. 593, 596 (1989). In that case, police cars with flashing lights had chased the decedent for 20 miles—surely an adequate "show of authority"—but he did not stop until his fatal crash into a police-erected blockade. The issue was whether his death could be held to be the consequence of an unreasonable seizure in violation of the Fourth Amendment. We did not even consider the possibility that a seizure could have occurred during the course of the chase because, as we explained, that "show of authority" did not produce his stop. *Id.*, at 597. And we dis-

cussed, *ibid.*, an opinion of Justice Holmes, involving a situation not much different from the present case, where revenue agents had picked up containers dropped by moonshiners whom they were pursuing without adequate warrant. The containers were not excluded as the product of an unlawful seizure because "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned." *Hester* v. *United States*, 265 U. S. 57, 58 (1924). The same is true here.

In sum, assuming that Pertoso's pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied. We reverse the decision of the California Court of Appeal, and remand for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The Court's narrow construction of the word "seizure" represents a significant, and in my view, unfortunate, departure from prior case law construing the Fourth Amendment.[1] Almost a quarter of a century ago, in two landmark cases—one broadening the protection of individual privacy,[2] and the other broadening the powers of law enforcement officers[3]—we rejected the method of Fourth Amendment analysis that

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[1] The Fourth Amendment to the Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."

[2] *Katz* v. *United States*, 389 U. S. 347 (1967).

[3] *Terry* v. *Ohio*, 392 U. S. 1 (1968).

today's majority endorses. In particular, the Court now adopts a definition of "seizure" that is unfaithful to a long line of Fourth Amendment cases. Even if the Court were defining seizure for the first time, which it is not, the definition that it chooses today is profoundly unwise. In its decision, the Court assumes, without acknowledging, that a police officer may now fire his weapon at an innocent citizen and not implicate the Fourth Amendment—as long as he misses his target.

For the purposes of decision, the following propositions are not in dispute. First, when Officer Pertoso began his pursuit of respondent,[4] the officer did not have a lawful basis for either stopping or arresting respondent. See App. 138–140; *ante*, at 623, n. 1. Second, the officer's chase amounted to a "show of authority" as soon as respondent saw the officer nearly upon him. See *ante*, at 625–626, 629. Third, the act of discarding the rock of cocaine was the direct consequence of the show of authority. See Pet. for Cert. 48–49, 52. Fourth, as the Court correctly demonstrates, no common-law arrest occurred until the officer tackled respondent. See *ante*, at 624–625. Thus, the Court is quite right in concluding that the abandonment of the rock was not the fruit of a common-law arrest.

It is equally clear, however, that if the officer had succeeded in touching respondent before he dropped the rock—

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[4] The Court's gratuitous quotation from Proverbs 28:1, see *ante*, at 623, n. 1, mistakenly assumes that innocent residents have no reason to fear the sudden approach of strangers. We have previously considered, and rejected, this ivory-towered analysis of the real world for it fails to describe the experience of many residents, particularly if they are members of a minority. See generally Johnson, Race and the Decision To Detain a Suspect, 93 Yale L. J. 214 (1983). It has long been "a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" *Alberty* v. *United States*, 162 U. S. 499, 511 (1896).

even if he did not subdue him—an arrest would have occurred.[5] See *ante*, at 624–625, 626. In that event (assuming the touching precipitated the abandonment), the evidence would have been the fruit of an unlawful common-law arrest. The distinction between the actual case and the hypothetical case is the same as the distinction between the common-law torts of assault and battery—a touching converts the former into the latter.[6] Although the distinction between assault and battery was important for pleading purposes, see 2 J. Chitty, Pleading *372–*376, the distinction should not take on constitutional dimensions. The Court mistakenly allows this common-law distinction to define its interpretation of the Fourth Amendment.

At the same time, the Court fails to recognize the existence of another, more telling, common-law distinction—the distinction between an arrest and an attempted arrest. As the Court teaches us, the distinction between battery and assault was critical to a correct understanding of the common law of arrest. See *ante*, at 626 ("An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority"). However, the facts of this case do not describe an actual arrest, but rather an unlawful *attempt* to take a presumptively innocent person into custody. Such an

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[5] "[I]f the officer pronounces words of arrest without an actual touching and the other immediately runs away, there is no escape (in the technical sense) because there was no arrest. It would be otherwise had the officer touched the arrestee for the purpose of apprehending him, because touching for the manifested purpose of arrest by one having lawful authority completes the apprehension, 'although he does not succeed in stopping or holding him even for an instant.'" Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 206 (1940) (footnotes omitted).

[6] "One who undertakes to make an arrest without lawful authority, or who attempts to do so in an unlawful manner, is guilty of an assault if the other is ordered to submit to the asserted authority, is guilty of battery if he lays hands on the other for this unlawful purpose . . . ." *Id.*, at 263 (footnotes omitted).

attempt was unlawful at common law.[7] Thus, if the Court wants to define the scope of the Fourth Amendment based on the common law, it should look, not to the common law of arrest, but to the common law of attempted arrest, according to the facts of this case.

The first question, then, is whether the common law should define the scope of the outer boundaries of the constitutional protection against unreasonable seizures. Even if, contrary to settled precedent, traditional common-law analysis were controlling, it would still be necessary to decide whether the unlawful attempt to make an arrest should be considered a seizure within the meaning of the Fourth Amendment, and whether the exclusionary rule should apply to unlawful attempts.

I

The Court today takes a narrow view of "seizure," which is at odds with the broader view adopted by this Court almost 25 years ago. In *Katz* v. *United States*, 389 U. S. 347 (1967), the Court considered whether electronic surveillance conducted "without any trespass and without the seizure of any material object fell outside the ambit of the Constitution." *Id.*, at 353. Over Justice Black's powerful dissent, we rejected that "narrow view" of the Fourth Amendment and held that electronic eavesdropping is a "search and seizure" within the meaning of the Amendment. *Id.*, at 353–354. We thus endorsed the position expounded by two of the dissenting Justices in *Olmstead* v. *United States*, 277 U. S. 438 (1928):

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[7] "[E]ven without touching the other, the officer may subject himself to liability if he undertakes to make an arrest without being privileged by law to do so.[3]

"[3] For example, an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other. Furthermore, if the other submitted to such an arrest without physical contact, the officer is liable for false imprisonment. Gold v. Bissell, 1 Wend. 210 (N. Y. Sup. Ct. 1828)." *Id.*, at 201.

"Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." *Id.*, at 476 (Brandeis, J., dissenting).

"The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words." *Id.*, at 488 (Butler, J., dissenting).

Writing for the Court in *Katz*, Justice Stewart explained:

"Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman* v. *United States*, 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

"We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone

> booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.
>
> "The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards." 389 U. S., at 353–354.

Significantly, in the *Katz* opinion, the Court repeatedly used the word "seizure" to describe the process of recording sounds that could not possibly have been the subject of a common-law seizure. See *id.*, at 356, 357.

Justice Black's reasoning, which was rejected by the Court in 1967, is remarkably similar to the reasoning adopted by the Court today. After criticizing "language-stretching judges," *id.*, at 366, Justice Black wrote:

> "I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction. This principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the 'seizure' of conversations." *Id.*, at 366–367.
>
> "Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to 'keep the Constitution up to date' or 'to bring it into harmony with the times.' It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention." *Id.*, at 373.

The expansive construction of the word "seizure" in the *Katz* case provided an appropriate predicate for the Court's holding in *Terry* v. *Ohio*, 392 U. S. 1 (1968), the following year.[8] Prior to *Terry*, the Fourth Amendment proscribed any seizure of the person that was not supported by the same probable-cause showing that would justify a custodial arrest.[9] See *Dunaway* v. *New York*, 442 U. S. 200, 207–209 (1979). Given the fact that street encounters between citizens and police officers "are incredibly rich in diversity," *Terry*, 392 U. S., at 13, the Court recognized the need for flexibility and held that "reasonable" suspicion—a quantum of proof less demanding than probable cause—was adequate to justify a stop for investigatory purposes. *Id.*, at 21–22. As a corollary to the lesser justification for the stop, the Court necessarily concluded that the word "seizure" in the Fourth Amendment encompasses official restraints on individual freedom that fall short of a common-law arrest. Thus, *Terry* broadened the range of encounters between the police and the citizen encompassed within the term "seizure," while at the same time, lowering the standard of proof necessary to justify a "stop" in the newly expanded category of sei-

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[8] "We have recently held that 'the Fourth Amendment protects people, not places,' *Katz* v. *United States*, 389 U. S. 347, 351 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' *id.*, at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' *Elkins* v. *United States*, 364 U. S. 206, 222 (1960)." *Terry* v. *Ohio*, 392 U. S., at 9.

[9] *Hester* v. *United States*, 265 U. S. 57 (1924), the case on which the majority largely relies, was decided over 40 years before *Terry*. In that case, the defendant did not even argue that there was a seizure of his person. The Court's holding in *Hester* that the abandoned moonshine whiskey had not been seized simply did not address the question whether it would have been the fruit of a constitutional violation if there had been a seizure of the person before the whiskey was abandoned.

zures now covered by the Fourth Amendment.[10] The Court explained:

> "Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden 'seized' Terry and whether and when he conducted a 'search.' There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.*, at 16 (footnote omitted).
>
> "The distinctions of classical 'stop-and-frisk' theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. 'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" *Id.*, at 19.

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[10] The Court applied this principle in *Brown* v. *Texas*, 443 U. S. 47 (1979):

"We have recognized that in some circumstances an officer may detain a suspect briefly for questioning, although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Id.*, at 51 (citations omitted).

The decisions in *Katz* and *Terry* unequivocally reject the notion that the common law of arrest defines the limits of the term "seizure" in the Fourth Amendment. In *Katz*, the Court abandoned the narrow view that would have limited a seizure to a material object, and, instead, held that the Fourth Amendment extended to the recording of oral statements. And in *Terry*, the Court abandoned its traditional view that a seizure under the Fourth Amendment required probable cause, and, instead, expanded the definition of a seizure to include an investigative stop made on less than probable cause. Thus, the major premise underpinning the majority's entire analysis today—that the common law of arrest should define the term "seizure" for Fourth Amendment purposes, see *ante*, at 624–625—is seriously flawed. The Court mistakenly hearkens back to common law, while ignoring the expansive approach that the Court has taken in Fourth Amendment analysis since *Katz* and *Terry*.[11]

II

The Court fares no better when it tries to explain why the proper definition of the term "seizure" has been an open question until today. In *Terry*, in addition to stating that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away," 392 U. S., at 16, the Court noted that a seizure occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . ." *Id.*, at 19, n. 16. The touchstone of a seizure is the restraint of an individual's personal liberty "*in some way*." *Ibid.* (emphasis added).[12] Today the Court's reaction to respondent's reliance on *Terry*

[11] It is noteworthy that the Court has relied so heavily on cases and commentary that antedated *Katz* and *Terry*.

[12] "The essential teaching of the Court's decision in *Terry*—that an individual's right to personal security and freedom must be respected even in encounters with the police that fall short of full arrest—has been consistently reaffirmed." *INS* v. *Delgado*, 466 U. S. 210, 227 (1984) (Brennan, J., concurring in part and dissenting in part).

is to demonstrate that in "show of force" cases no common-law arrest occurs unless the arrestee *submits*. See *ante*, at 626–627. That answer, however, is plainly insufficient given the holding in *Terry* that the Fourth Amendment applies to stops that need not be justified by probable cause in the absence of a full-blown arrest.

In *United States* v. *Mendenhall*, 446 U. S. 544 (1980), the Court "adhere[d] to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.*, at 553. The Court looked to whether the citizen who is questioned "remains free to disregard the questions and walk away," and if he or she is able to do so, then "there has been no intrusion upon that person's liberty or privacy" that would require some "particularized and objective justification" under the Constitution. *Id.*, at 554. The test for a "seizure," as formulated by the Court in *Mendenhall*, was whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ibid.* Examples of seizures include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Ibid.* The Court's unwillingness today to adhere to the "reasonable person" standard, as formulated by Justice Stewart in *Mendenhall*, marks an unnecessary departure from Fourth Amendment case law.

The Court today draws the novel conclusion that even though no seizure can occur *unless* the *Mendenhall* reasonable person standard is met, see *ante*, at 628, the fact that the standard has been met does not necessarily mean that a seizure has occurred. See *ibid.* (*Mendenhall* "states a *necessary*, but not a *sufficient* condition for seizure . . . effected

through a 'show of authority' "). If it were true that a seizure requires more than whether a reasonable person felt free to leave, then the following passage from the Court's opinion in *INS* v. *Delgado*, 466 U. S. 210 (1984), is at best, seriously misleading:

> "As we have noted elsewhere: 'Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' *Terry* v. *Ohio*, *supra*, at 19, n. 16. While applying such a test is relatively straightforward in a situation resembling a traditional arrest, see *Dunaway* v. *New York*, 442 U. S. 200, 212–216 (1979), the protection against unreasonable seizures also extends to 'seizures that involve only a brief detention short of traditional arrest.' *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975). What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' *Mendenhall*, *supra*, at 554 (footnote omitted); see *Florida* v. *Royer*, 460 U. S. 491, 502 (1983) (plurality opinion)." *Id.*, at 215.

More importantly, in *Florida* v. *Royer*, 460 U. S. 491 (1983), a plurality of the Court adopted Justice Stewart's formulation in *Mendenhall* as the appropriate standard for determining when police questioning crosses the threshold from a consensual encounter to a forcible stop. In *Royer*, the Court held that an illegal seizure had occurred. As a

predicate for that holding, JUSTICE WHITE, in his opinion for the plurality, explained that the citizen "may not be detained *even momentarily* without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. *United States* v. *Mendenhall*, *supra*, at 556 (opinion of Stewart, J.)." 460 U. S., at 498 (emphasis added). The rule looks, not to the subjective perceptions of the person questioned, but rather, to the objective characteristics of the encounter that may suggest whether a reasonable person would have felt free to leave.

Even though momentary, a seizure occurs whenever an objective evaluation of a police officer's show of force conveys the message that the citizen is not entirely free to leave—in other words, that his or her liberty is being restrained in a significant way. That the Court understood the *Mendenhall* definition as both necessary and sufficient to describe a Fourth Amendment seizure is evident from this passage in our opinion in *United States* v. *Jacobsen*, 466 U. S. 109 (1984):

> "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.[5]
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> "[5] See *United States* v. *Place*, 462 U. S. 696 (1983); *id.*, at 716 (BRENNAN, J., concurring in result); *Texas* v. *Brown*, 460 U. S. 730, 747–748 (1983) (STEVENS, J., concurring in judgment); see also *United States* v. *Chadwick*, 433 U. S. 1, 13–14, n. 8 (1977); *Hale* v. *Henkel*, 201 U. S. 43, 76 (1906). While the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment—meaningful interference, however brief, with an individual's freedom of movement. See *Michigan* v. *Summers*, 452 U. S. 692, 696 (1981); *Reid* v. *Georgia*, 448 U. S. 438, 440, n. (1980) *(per curiam)*; *United States* v. *Mendenhall*, 446 U. S. 544, 551–554 (1980) (opinion of Stewart, J.); *Brown* v. *Texas*, 443 U. S. 47, 50 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *Cupp* v. *Murphy*, 412 U. S. 291, 294–295 (1973); *Davis* v. *Mississippi*,

394 U. S. 721, 726–727 (1969); *Terry* v. *Ohio*, 392 U. S., at 16, 19, n. 16." *Id.*, at 113, and n. 5.

Finally, it is noteworthy that in *Michigan* v. *Chesternut*, 486 U. S. 567 (1988), the State asked us to repudiate the reasonable person standard developed in *Terry*, *Mendenhall*, *Delgado*, and *Royer*.[13] We decided, however, to "adhere to our traditional contextual approach," 486 U. S., at 573. In our opinion, we described Justice Stewart's analysis in *Mendenhall* as "a test to be applied in determining whether 'a person has been "seized" within the meaning of the Fourth Amendment'" and noted that "[t]he Court has since embraced this test." 486 U. S., at 573. Moreover, in commenting on the virtues of the test, we explained that it focused on the police officer's conduct:

> "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Id.*, at 574.

Expressing his approval of the Court's rejection of Michigan's argument in *Chesternut*, Professor LaFave observed:

> "The 'free to leave' concept, in other words, has nothing to do with a particular suspect's choice to flee rather than submit or with his assessment of the probability of successful flight. Were it otherwise, police would be encouraged to utilize a very threatening but sufficiently slow chase as an evidence-gathering technique whenever they lack even the reasonable suspicion needed for a *Terry* stop." 3 W. LaFave, Search and Seizure § 9.2, p. 61 (2d ed. 1987, Supp. 1991).

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[13] "Petitioner argues that the Fourth Amendment is never implicated until an individual stops in response to the police's show of authority. Thus, petitioner would have us rule that a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." *Michigan* v. *Chesternut*, 486 U. S., at 572.

Whatever else one may think of today's decision, it unquestionably represents a departure from earlier Fourth Amendment case law. The notion that our prior cases contemplated a distinction between seizures effected by a touching on the one hand, and those effected by a show of force on the other hand, and that all of our repeated descriptions of the *Mendenhall* test stated only a necessary, but not a sufficient, condition for finding seizures in the latter category, is nothing if not creative lawmaking. Moreover, by narrowing the definition of the term seizure, instead of enlarging the scope of reasonable justifications for seizures, the Court has significantly limited the protection provided to the ordinary citizen by the Fourth Amendment. As we explained in *Terry:*

> "The danger in the logic which proceeds upon distinctions between a 'stop' and an 'arrest,' or 'seizure' of the person, and between a 'frisk' and a 'search' is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation." *Terry* v. *Ohio*, 392 U. S., at 17.

III

In this case the officer's show of force—taking the form of a head-on chase—adequately conveyed the message that respondent was not free to leave.[14] Whereas in *Mendenhall*, there was "nothing in the record [to] sugges[t] that the re-

[14] The California Court of Appeal noted:

"This case involves more than a pursuit, as Officer Pertoso did not pursue [respondent], but ran in such a fashion as to cut him off and confront him head on. Under the rationale of *Chesternut*, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or 'otherwise control the direction or speed' of one's movement." App. A to Pet. for Cert. 9.

spondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way," 446 U. S., at 555, here, respondent attempted to end "the conversation" before it began and soon found himself literally "not free to leave" when confronted by an officer running toward him head-on who eventually tackled him to the ground. There was an interval of time between the moment that respondent saw the officer fast approaching and the moment when he was tackled, and thus brought under the control of the officer. The question is whether the Fourth Amendment was implicated at the earlier or the later moment.

Because the facts of this case are somewhat unusual, it is appropriate to note that the same issue would arise if the show of force took the form of a command to "freeze," a warning shot, or the sound of sirens accompanied by a patrol car's flashing lights. In any of these situations, there may be a significant time interval between the initiation of the officer's show of force and the complete submission by the citizen. At least on the facts of this case, the Court concludes that the timing of the seizure is governed by the citizen's reaction, rather than by the officer's conduct. See *ante*, at 626–627. One consequence of this conclusion is that the point at which the interaction between citizen and police officer becomes a seizure occurs, not when a reasonable citizen believes he or she is no longer free to go, but, rather, only after the officer exercises control over the citizen.

In my view, our interests in effective law enforcement and in personal liberty[15] would be better served by adhering to a standard that "allows the police to determine in advance whether the conduct contemplated will implicate the Fourth

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[15] "To determine the constitutionality of a seizure '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tennessee* v. *Garner*, 471 U. S. 1, 8 (1985) (citation omitted).

Amendment." *Chesternut*, 486 U. S., at 574. The range of possible responses to a police show of force, and the multitude of problems that may arise in determining whether, and at which moment, there has been "submission," can only create uncertainty and generate litigation.

In some cases, of course, it is immediately apparent at which moment the suspect submitted to an officer's show of force. For example, if the victim is killed by an officer's gunshot,[16] as in *Tennessee* v. *Garner*, 471 U. S. 1, 11 (1985) ("A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"),[17] or by a hidden roadblock, as in *Brower* v. *Inyo County*, 489 U. S. 593 (1989), the submission is unquestionably complete. But what if, for example, William James Caldwell (Brower) had just been wounded before being apprehended? Would it be correct to say that no seizure had occurred and therefore the Fourth Amendment was not implicated even if the pursuing officer had no justification whatsoever for initiating the chase? The Court's opinion in *Brower* suggests that the officer's responsibility should not depend on the character of the victim's evasive action. The Court wrote:

> "Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." *Id.*, at 595.

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[16] Even under the common law, "If an officer shoots at an arrestee when he is not privileged to do so, he is guilty of an aggravated assault. And if death results from an arrest, or attempted arrest, which was not authorized at all, . . . the arrester is guilty of manslaughter or, in extreme cases, of murder." Perkins, 25 Iowa L. Rev., at 263–264.

[17] In *Tennessee* v. *Garner*, even the dissent agreed with the majority that the police officer who shot at a fleeing suspect had "'seized' [the suspect] by shooting him." 471 U. S., at 25 (O'CONNOR, J., dissenting).

It seems equally clear to me that the constitutionality of a police officer's show of force should be measured by the conditions that exist at the time of the officer's action. A search must be justified on the basis of the facts available at the time it is initiated; the subsequent discovery of evidence does not retroactively validate an unconstitutional search. The same approach should apply to seizures; the character of the citizen's response should not govern the constitutionality of the officer's conduct.

If an officer effects an arrest by touching a citizen, apparently the Court would accept the fact that a seizure occurred, even if the arrestee should thereafter break loose and flee. In such a case, the constitutionality of the seizure would be evaluated as of the time the officer acted. That category of seizures would then be analyzed in the same way as searches, namely, was the police action justified when it took place? It is anomalous, at best, to fashion a different rule for the subcategory of "show of force" arrests.

In cases within this new subcategory, there will be a period of time during which the citizen's liberty has been restrained, but he or she has not yet completely submitted to the show of force. A motorist pulled over by a highway patrol car cannot come to an immediate stop, even if the motorist intends to obey the patrol car's signal. If an officer decides to make the kind of random stop forbidden by *Delaware* v. *Prouse*, 440 U. S. 648 (1979), and, after flashing his lights, but before the vehicle comes to a complete stop, sees that the license plate has expired, can he justify his action on the ground that the seizure became lawful after it was initiated but before it was completed? In an airport setting, may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a "baggage search," and rely on the passengers' reactions to justify his investigative stops? The holding of today's majority fails to recognize the coercive and intimidating nature of such behavior and creates a rule that may allow such behavior to go unchecked.

The deterrent purposes of the exclusionary rule focus on the conduct of law enforcement officers and on discouraging improper behavior on their part,[18] and not on the reaction of the citizen to the show of force. In the present case, if Officer Pertoso had succeeded in tackling respondent before he dropped the rock of cocaine, the rock unquestionably would have been excluded as the fruit of the officer's unlawful seizure. Instead, under the Court's logic-chopping analysis, the exclusionary rule has no application because an attempt to make an unconstitutional seizure is beyond the coverage of the Fourth Amendment, no matter how outrageous or unreasonable the officer's conduct may be.

It is too early to know the consequences of the Court's holding. If carried to its logical conclusion, it will encourage unlawful displays of force that will frighten countless innocent citizens into surrendering whatever privacy rights they

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[18] The purpose of the Fourth Amendment is "'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *INS* v. *Delgado*, 466 U. S., at 215 (quoting *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976)); see *Mendenhall*, 446 U. S., at 553–554 (same); *Terry* v. *Ohio*, 392 U. S., at 12 ("Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct"); 4 W. LaFave, Search and Seizure § 11.4(j), pp. 459–460 (2d ed. 1987) ("Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases").

Justice Brandeis wrote eloquently about the overarching purpose of the Fourth Amendment:

"The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (dissenting opinion).

Today's opinion has lost sight of these purposes.

may still have. It is not too soon, however, to note the irony in the fact that the Court's own justification for its result is its analysis of the rules of the common law of arrest that antedated our decisions in *Katz* and *Terry*. Yet, even in those days the common law provided the citizen with protection against an attempt to make an unlawful arrest. See nn. 5 and 7, *supra*. The central message of *Katz* and *Terry* was that the protection the Fourth Amendment provides to the average citizen is not rigidly confined by ancient common-law precept. The message that today's literal-minded majority conveys is that the common law, rather than our understanding of the Fourth Amendment as it has developed over the last quarter of a century, defines, and limits, the scope of a seizure. The Court today defines a seizure as commencing, not with egregious police conduct, but rather with submission by the citizen. Thus, it both delays the point at which "the Fourth Amendment becomes relevant" [19] to an encounter and limits the range of encounters that will come under the heading of "seizure." Today's qualification of the Fourth Amendment means that innocent citizens may remain "secure in their persons . . . against unreasonable searches and seizures" only at the discretion of the police.[20]

Some sacrifice of freedom always accompanies an expansion in the Executive's unreviewable [21] law enforcement pow-

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[19] *Terry* v. *Ohio*, 392 U. S., at 16.

[20] Justice Jackson presaged this development when he wrote:

"[A]n illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. . . . The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Brinegar* v. *United States*, 338 U. S. 160, 182 (1949) (dissenting opinion).

[21] "[T]he right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court. . . . There may be, and I am convinced that there are, many unlawful searches of homes and automo-

ers. A court more sensitive to the purposes of the Fourth Amendment would insist on greater rewards to society before decreeing the sacrifice it makes today. Alexander Bickel presciently wrote that "many actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest."[22] The Court's immediate concern with containing criminal activity poses a substantial, though unintended, threat to values that are fundamental and enduring.

I respectfully dissent.

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biles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Id.*, at 181 (Jackson, J., dissenting).

[22] The Least Dangerous Branch 24 (1962).

Reporter's Note

The next page is purposely numbered 901. The numbers between 648 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 4 THROUGH APRIL 23, 1991

MARCH 4, 1991

Certiorari Granted—Vacated and Remanded

No. 89–609. PUCKETT ET AL. *v.* NATIVE VILLAGE OF TYONEK ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991). Reported below: 883 F. 2d 1024.

No. 89–6932. MULLIS *v.* UNITED STATES; and HOMICH *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Gozlon-Peretz* v. *United States*, 498 U. S. 395 (1991). Reported below: 887 F. 2d 1091 (first case); 888 F. 2d 1395 (second case).

No. 90–892. CITY OF SEATTLE *v.* FIRST COVENANT CHURCH OF SEATTLE, WASHINGTON. Sup. Ct. Wash. Motions of National Trust for Historic Preservation in the United States and Municipal Art Society of New York, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). Reported below: 114 Wash. 2d 392, 787 P. 2d 1352.

Miscellaneous Orders

No. D–948. IN RE DISBARMENT OF PERLOW. Disbarment entered. [For earlier order herein, see 498 U. S. 956.]

No. D–952. IN RE DISBARMENT OF PORTER. Disbarment entered. [For earlier order herein, see 498 U. S. 978.]

No. D–953. IN RE DISBARMENT OF KANAREK. Disbarment entered. [For earlier order herein, see 498 U. S. 978.]

No. D–972. IN RE DISBARMENT OF PENNELL. It is ordered that Edwin Adam Pennell, of Dunnellon, 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–973. IN RE DISBARMENT OF SHANZER. It is ordered that Neil Arthur Shanzer, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–974. IN RE DISBARMENT OF BOWERS. It is ordered that Charles B. Bowers, 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. D–975. IN RE DISBARMENT OF HEIDECKE. It is ordered that Richard A. Heidecke, Jr., of Oak Brook, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–976. IN RE DISBARMENT OF HESS. It is ordered that David Alan Hess, of Lubbock, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–977. IN RE DISBARMENT OF ZAHARIA. It is ordered that Paul Zaharia, of Venice, 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–978. IN RE DISBARMENT OF MCCLURE. It is ordered that Corrine Anderson McClure, of Bradenton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–979. IN RE DISBARMENT OF MCSHIRLEY. It is ordered that Donald Kent McShirley, 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–980. IN RE DISBARMENT OF MILLER. It is ordered that Randy Lamar Miller, of Raleigh, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–981. IN RE DISBARMENT OF LOVING. It is ordered that David L. Loving III, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 112, Orig. WYOMING *v.* OKLAHOMA. Briefing schedule proposed by the Attorney General of Wyoming adopted. Wyoming may file its brief on or before April 2, 1991. Oklahoma may file its brief on or before May 17, 1991. A reply brief may be filed on or before June 6, 1991. [For earlier order herein, see, *e. g.*, 498 U. S. 893.]

No. 90–516. KAMEN *v.* KEMPER FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 498 U. S. 997.] Motions of Business Roundtable and Investment Company Institute for leave to file briefs as *amici curiae* granted.

No. 90–1102. GIBSON *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Motion of Joseph W. Little for leave to file a brief as *amicus curiae* denied.

No. 90–1280. INSURANCE COMPANY OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. Motion of the Solicitor General to expedite consideration of petition for writ of certiorari denied.

No. 90–6669. ZINK *v.* CALIFORNIA STATE BOARD OF EQUALIZATION. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 25, 1991, 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 MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–6351. IN RE BAUER. Petition for writ of mandamus denied.

No. 90–6694. IN RE SASSOWER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 90–1141. ARDESTANI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. Certiorari granted. Reported below: 904 F. 2d 1505.

No. 90–747. UNITED STATES DEPARTMENT OF STATE *v.* RAY ET AL. C. A. 11th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 908 F. 2d 1549.

No. 90–913. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM *v.* MCORP FINANCIAL, INC., ET AL.; and

No. 90–914. MCORP ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 900 F. 2d 852.

Certiorari Denied

No. 90–450. JACKSON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 90–464. BITUMINOUS COAL OPERATORS' ASSN., INC. *v.* UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, BY RABBIT, TRUSTEE AD LITEM, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1558.

No. 90–785. SIMON *v.* UNITED STATES;

No. 90–931. BIAGGI *v.* UNITED STATES; and

No. 90–937. BIAGGI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 662.

No. 90–803. DOE *v.* GARRETT, SECRETARY OF THE NAVY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 1455.

No. 90–825. LYNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 90–853. BANK OF BOULDER *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 2d 1466.

No. 90–859. BROWER'S MOVING & STORAGE, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 239.

No. 90–894. LEONE, ADMINISTRATOR OF THE ESTATE OF LEONE, AKA HELD, DECEASED, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 910 F. 2d 46.

No. 90–899. COMMITTEE TO OPPOSE THE SALE OF ST. BARTHOLOMEW'S CHURCH, INC., ET AL. *v.* RECTOR, WARDENS, AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH ET AL.; and

No. 90–900. RECTOR, WARDENS, AND MEMBERS OF THE VESTRY OF ST. BARTHOLOMEW'S CHURCH *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 348.

No. 90–905. FRIEDMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 974.

No. 90–909. DIAL CORP. *v.* WILLIS DAY PROPERTIES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 258.

No. 90–911. INTERSTATE BRANDS CORP., BUTTERNUT BREAD DIVISION *v.* CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 135. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 885.

No. 90–921. DORFMONT *v.* BROWN, DIRECTOR FOR INDUSTRIAL SECURITY CLEARANCE REVIEW, DEFENSE LEGAL SERVICES AGENCY, DEPARTMENT OF DEFENSE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 1399.

No. 90–926. MICHIGAN ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL.; and

No. 90–966. ALLIED DELIVERY SYSTEM, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 972.

No. 90–980. FEDERAL KEMPER LIFE ASSURANCE CO. *v.* BODINE; and

No. 90–1114. BODINE *v.* FEDERAL KEMPER LIFE ASSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1373.

No. 90–990. WEST TEXAS TRANSMISSION, L. P. *v.* ENRON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 1554.

No. 90–992. NEVADA ET AL. *v.* WATKINS, SECRETARY OF ENERGY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1545.

No. 90–998. DEAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 196.

No. 90–1062. RAINBOW NAVIGATION, INC., ET AL. *v.* DEPARTMENT OF THE NAVY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 55, 911 F. 2d 797.

No. 90–1071. BUFFINGTON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BUFFINGTON, DECEASED, ET AL. *v.* BALTIMORE COUNTY, MARYLAND, ET AL.; and

No. 90–1123. GAIGALAS ET AL. *v.* BUFFINGTON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BUFFINGTON, DECEASED, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 913 F. 2d 113.

No. 90–1096. MERRIWEATHER *v.* INTERNATIONAL BUSINESS MACHINES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 973.

No. 90–1098. BUSWELL *v.* MINNESOTA; and

No. 90–1099. SCHWARTZMAN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 460 N. W. 2d 614.

No. 90–1105. BRADSHAW ET AL. *v.* PANTRY PRIDE ENTERPRISES, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 566 So. 2d 1306.

No. 90–1107. MCGUIRE *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 58 Wash. App. 195, 791 P. 2d 929.

No. 90–1109. SMITH *v.* HARBOR TOWING & FLEETING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 312.

No. 90–1111. ROBINSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 199 Ill. App. 3d 1102, 585 N. E. 2d 649.

No. 90–1115. STEVENS, DISTRICT ATTORNEY OF LUZERNE COUNTY, PENNSYLVANIA *v.* BUCHANAN. Sup. Ct. Pa. Certiorari denied. Reported below: 525 Pa. 413, 581 A. 2d 172.

No. 90–1117. METROPOLITAN DADE COUNTY, FLORIDA, ET AL. *v.* MEEK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 1540.

No. 90–1128. KIRBY, PERSONAL REPRESENTATIVE OF THE ESTATE OF KIRBY, DECEASED *v.* OMI CORP. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 561 So. 2d 666.

No. 90–1132. COOKSEY *v.* ABRAMS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–1133. WYATT *v.* THOMAS ET AL. Sup. Ct. Va. Certiorari denied.

No. 90–1140. GARRIE *v.* JAMES L. GRAY, INC. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 808.

No. 90–1144. SHARMA ET AL. *v.* SKAARUP SHIP MANAGEMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 820.

No. 90–1155. FROMSON *v.* WESTERN LITHO PLATE & SUPPLY CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 909 F. 2d 1495.

No. 90–1171. COMMUNITY NATIONAL BANK *v.* SHERK. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 560.

No. 90–1233. KEOHANE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 273.

No. 90–5405. BRUNDAGE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 219, 903 F. 2d 837.

No. 90–5962. CARTER *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 90–6185. CORTES *v.* BELASKI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6241. PARIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 90–6252. GALLMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 639.

No. 90–6391. WOODY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1485.

No. 90–6453. DURDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–6465. BOYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 144.

No. 90–6470. TORRES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 568.

No. 90–6473. REYES-RESENDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 2d 281.

No. 90–6486. GUIANG *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 907 F. 2d 159.

No. 90–6499. HERNANDEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 913 F. 2d 1506.

No. 90–6513. WALKER *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 907 F. 2d 159.

No. 90–6532. SULLIVAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1493.

No. 90–6647. WASHINGTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 244, 899 F. 2d 52.

No. 90–6691. SMITH *v.* SCOTT, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 569.

No. 90–6692. ROYAL *v.* EXXON CHEMICAL U. S. A., CHEMICAL DEPARTMENT. C. A. 5th Cir. Certiorari denied.

No. 90–6693. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6696. SMITH *v.* PETROVSKY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–6697. SHERRILLS *v.* ALDRICH ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6714. MOORE *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–6720. ESPARZA *v.* WOODS. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 929.

No. 90–6721. EVANS *v.* MECUM. C. A. 11th Cir. Certiorari denied.

No. 90–6724. TURNER *v.* FALK, DIRECTOR, HAWAII DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–6728. DIXON *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 1306.

No. 90–6729. MILLER *v.* SAYLIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 145.

No. 90–6732. LEPISCOPO *v.* TANSY ET AL. Sup. Ct. N. M. Certiorari denied.

No. 90–6736. JONES *v.* ERVIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1301.

No. 90–6742. MACKEY *v.* MACKEY. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 1494.

No. 90–6748. DAVIDSON *v.* BENDIXEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 709.

No. 90–6753. TURNPAUGH *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–6755. GILBERT *v.* BODOVITZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1578.

No. 90–6765. BROWN *v.* KOEHLER. C. A. 6th Cir. Certiorari denied.

No. 90–6768. MOYE *v.* CIGNA CORP. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–6774. GARCIA *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 461 N. W. 2d 460.

No. 90–6781. FELTON *v.* LYNN, SECRETARY, DEPARTMENT OF CORRECTIONS, LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–6782. GRUBB *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 90–6788. BYRD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–6800. SMITH *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–6813. LEONARD *v.* ABC UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–6814. KAWANO, AKA SAI, ET AL. *v.* COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 379.

No. 90–6826. CHAMBERS *v.* MAHER. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 2d 1141.

No. 90–6852. SMITH *v.* BINGHAM ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 740.

No. 90–6866. WOODARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 29.

No. 90–6873. CLAPPER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–6876. WINTERS *v.* FIRST FEDERAL SAVINGS & LOAN OF RALEIGH. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6895. SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 29.

No. 90–6909. NORRIS *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 263.

No. 90–6916. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 174.

No. 90–6921. BECKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 568.

No. 90–6937. KUNZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–6947. SCHOLES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 564.

No. 90–6955. BROXTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 288 U. S. App. D. C. 307, 926 F. 2d 1180.

No. 90–6956. MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 156.

No. 90–6960. COLEMAN *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 2d 447.

No. 90–6963. MCGIRR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 176.

No. 90–6964. CAMPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 741.

No. 90–6966. MCDOUGHERTY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 569.

No. 90–6968. BOUT *v.* MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1570.

No. 90–6971. RHINEHART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–6980. REINA-HERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 90–6981. SINGLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 956.

No. 90–6985. AGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 848.

No. 90–6988. MCCRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1497.

No. 90–6990. MULLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–6998. ENGLEBRECHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 917 F. 2d 376.

No. 90–7005. GLASCO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 797.

No. 90–7008. WRIGHT *v.* SULLIVAN, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7010. MONTES-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 736.

No. 90–7011. HAGOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7014. HICKS *v.* KENTUCKY. Cir. Ct. Ky., McCracken County. Certiorari denied.

No. 90–7015. OLSVIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 470.

No. 90–7026. LOUIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 572 So. 2d 916.

No. 90–7036. WELKY *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–7049. SAMEL *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 89–2026. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 899 F. 2d 1315.

No. 90–944. ROLAND M. ET UX. *v.* CONCORD SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 910 F. 2d 983.

No. 90–1104. NAACP, DETROIT BRANCH, ET AL. *v.* DETROIT POLICE OFFICERS ASSN. ET AL. C. A. 6th Cir. Motion of Society of American Law Teachers et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 914 F. 2d 1494.

No. 90–1121. GODLOVE *v.* BAMBERGER, FOREMAN, OSWALD & HAHN ET AL. C. A. 7th Cir. Motion of petitioner to file corrected petition for writ of certiorari granted. Certiorari denied. Reported below: 903 F. 2d 1145.

No. 90–6383. GORDON *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 90–6540. CLOZZA *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir.; and

No. 90–6628. WAINWRIGHT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 90–6383, 50 Cal. 3d 1223, 792 P. 2d 251; No. 90–6540, 913 F. 2d 1092; No. 90–6628, 302 Ark. 371, 790 S. W. 2d 420.

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 certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 90–5701. ARNOLIE *v.* SECRETARY OF THE NAVY, 498 U. S. 1049;

No. 90–5961. PLETTEN *v.* MERIT SYSTEMS PROTECTION BOARD ET AL., 498 U. S. 1053;

No. 90–6189. SRUBAR *v.* UNITED STATES, 498 U. S. 1049;

No. 90–6205. SCOTT *v.* CALIFORNIA, 498 U. S. 1050;

No. 90–6215. STEWARD *v.* GARRETT, SECRETARY OF THE NAVY, ET AL., 498 U. S. 1035;

No. 90–6285. FROST *v.* CALIFORNIA ET AL., 498 U. S. 1051;

No. 90–6341. GALLARDO *v.* UNITED STATES, 498 U. S. 1038;

No. 90–6359. MUTH *v.* CENTRAL BUCKS SCHOOL DISTRICT ET AL., 498 U. S. 1052;

No. 90–6373. RICHARDS ET AL. *v.* MEDICAL CENTER OF DELAWARE, INC., ET AL., 498 U. S. 1072; and

No. 90–6395. WRIGHT *v.* NEW YORK, 498 U. S. 1073. Petitions for rehearing denied.

No. 89–1363. UNITED STATES *v.* FRANCE, 498 U. S. 335. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

MARCH 18, 1991

Certiorari Granted—Vacated and Remanded

No. 88–1483. CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. *v.* JORDAN. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 861 F. 2d 172.

No. 89–1303. RESERVE LIFE INSURANCE CO. *v.* EICHENSEER. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 881 F. 2d 1355.

No. 89–1315. HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, INDIVIDUALLY AND DBA GWINNETT AMBULANCE SERVICES *v.* JONES, ADMINISTRATOR OF THE ESTATE OF O'KELLEY. Sup. Ct. Ga. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 259 Ga. 759, 386 S. E. 2d 120.

No. 89–1361. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* WOLLERSHEIM. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 212 Cal. App. 3d 872, 260 Cal. Rptr. 331.

No. 89–1399. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA ET AL. *v.* GEORGE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1.

No. 90–324. BROWN GROUP, INC., DBA BROWN SHOE CO., INC. *v.* HICKS. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals for further con-

sideration in light of that court's en banc opinion to be filed in *Taggart* v. *Jefferson County Child Support Enforcement Unit*, No. 89–2429EA, rehearing en banc granted December 11, 1990.* Reported below: 902 F. 2d 630.

No. 90–626. PACIFIC LIGHTING CORP. ET AL. *v.* MGW, INC. Ct. App. Cal., 4th App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1.

No. 90–827. PORTEC, INC. *v.* THE POST OFFICE. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 913 F. 2d 802.

No. 90–953. CITY GAS COMPANY OF FLORIDA *v.* CONSOLIDATED GAS COMPANY OF FLORIDA, INC. C. A. 11th Cir. Motions of Florida Public Service Commission, Edison Electric Institute, American Gas Association, and National Association of Regulatory Utility Commissioners for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 912 F. 2d 1262.

Miscellaneous Orders

No. — — ——. BARRITT *v.* ADAMS TV OF WHEELING, INC., ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–632. IN RE SLAUGHTER. Sup. Ct. Ky. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–680 (90–7246). MALDONADO-RIVERA *v.* UNITED STATES. Application for further stay of mandate of the United States Court of Appeals for the Second Circuit, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–915. IN RE DISBARMENT OF KOKERNAK. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. D–924. IN RE DISBARMENT OF PARKER. Disbarment entered. [For earlier order herein, see 497 U. S. 1055.]

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*[REPORTER'S NOTE: The en banc opinion was subsequently reported at 935 F. 2d 947 (1991).]

No. D–925. IN RE DISBARMENT OF MELARO. Disbarment entered. [For earlier order herein, see 497 U. S. 1055.]

No. D–949. IN RE DISBARMENT OF WILSON. Disbarment entered. [For earlier order herein, see 498 U. S. 956.]

No. D–960. IN RE DISBARMENT OF BROADHURST. Disbarment entered. [For earlier order herein, see 498 U. S. 1044.]

No. D–961. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see 498 U. S. 1044.]

No. D–982. IN RE DISBARMENT OF PEARSON. It is ordered that Alfonso Nathaniel Pearson, of Burnwell, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–983. IN RE DISBARMENT OF STITT. It is ordered that Clyde W. Stitt, 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. 117, Orig. MISSISSIPPI *v.* UNITED STATES ET AL. Motion for leave to file bill of complaint denied.

No. 89–1895. ASTORIA FEDERAL SAVINGS & LOAN ASSN. *v.* SOLIMINO. C. A. 2d Cir. [Certiorari granted, 498 U. S. 1023.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1905. WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL. Sup. Ct. Wis. [Certiorari granted, 498 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–34. EXXON CORP. *v.* CENTRAL GULF LINES, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 498 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–368. TOIBB *v.* RADLOFF. C. A. 8th Cir. [Certiorari granted, 498 U. S. 1060.] Motion of the Solicitor General for divided argument granted.

No. 90–659. GOLLUST ET AL. *v.* MENDELL ET AL. C. A. 2d Cir. [Certiorari granted, 498 U. S. 1023.] Motion of the Acting

Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–769. RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL. *v.* GEARY ET AL. C. A. 9th Cir. [Certiorari granted, 498 U. S. 1046.] Motion of California Judges Association for leave to file a brief as *amicus curiae* granted.

No. 90–889. KING *v.* ST. VINCENT'S HOSPITAL. C. A. 11th Cir. [Certiorari granted, 498 U. S. 1081.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 90–906. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY ET AL. *v.* CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 498 U. S. 1045.] Motion of the Acting Solicitor General for divided argument granted.

No. 90–984. KANSAS GAS & ELECTRIC CO. *v.* KANSAS STATE CORPORATION COMMISSION ET AL. Ct. App. Kan.;

No. 90–1189. TROJAN TECHNOLOGIES, INC., ET AL. *v.* PENNSYLVANIA ET AL. C. A. 3d Cir.; and

No. 90–1194. MAINE PUBLIC UTILITIES COMMISSION *v.* MAINE YANKEE ATOMIC POWER CO. Sup. Jud. Ct. Me. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–1074. ESTELLE, WARDEN *v.* MCGUIRE. C. A. 9th Cir. [Certiorari granted, 498 U. S. 1119.] Motion for appointment of counsel granted, and it is ordered that Ann Hardgrove Voris, Esq., of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 90–6352. GRIFFIN *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 498 U. S. 1082.] Motion for appointment of counsel granted, and it is ordered that Michael G. Logan, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 90–6986. KUNEK *v.* COFFMAN ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 8, 1991, 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 MARSHALL and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–6891. IN RE MASON. Ct. App. Cal., 2d App. Dist. Petition for writ of common-law certiorari denied.

No. 90–6924. IN RE BOSA. Petition for writ of mandamus denied.

No. 90–6920. IN RE GILLISPIE. Petition for writ of prohibition denied.

Certiorari Granted

No. 90–838. MOLZOF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MOLZOF *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 911 F. 2d 18.

No. 90–970. LECHMERE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari granted. Reported below: 914 F. 2d 313.

No. 90–1014. LEE ET AL. *v.* WEISMAN, PERSONALLY AND AS NEXT FRIEND OF WEISMAN. C. A. 1st Cir. Certiorari granted. Reported below: 908 F. 2d 1090.

No. 90–1102. GIBSON *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 906 F. 2d 624.

No. 90–6297. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 910 F. 2d 1574.

Certiorari Denied. (See also No. 90–6891, *supra.*)

No. 90–73. GENERAL AMERICAN LIFE INSURANCE CO. *v.* SIMMONS. Sup. Ct. Ala. Certiorari denied. Reported below: 562 So. 2d 140.

No. 90–244. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. *v.* COLLINS. Sup. Ct. Ala. Certiorari denied. Reported below: 575 So. 2d 1005.

No. 90–728. SYRE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 400 Pa. Super. 625, 576 A. 2d 1139.

No. 90–756. McKNIGHT *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 104.

No. 90–795. TORO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 268.

No. 90–808. PLESINSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1033.

No. 90–811. STILES *v.* BLUNT, SECRETARY OF STATE OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 912 F. 2d 260.

No. 90–818. RICHTER, DBA THE BODY SHOP *v.* SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–841. TAXACHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 867.

No. 90–858. PITTMAN ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 42.

No. 90–863. CANDELARIO *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 906 F. 2d 798.

No. 90–877. DEE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 741.

No. 90–935. CENVILL INVESTORS, INC., FKA CENTURY VILLAGE EAST, INC., ET AL. *v.* CONDOMINIUM OWNERS ORGANIZATION OF CENTURY VILLAGE EAST ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 556 So. 2d 1197.

No. 90–959. SIMMONS ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 186 (first case); 900 F. 2d 1023 (second case).

No. 90–964. SEABOARD LUMBER CO. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 903 F. 2d 1560.

No. 90–965. McQUEEN *v.* COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 1544.

No. 90–971. AVESTA AB ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 914 F. 2d 233.

No. 90–972. JONES ET AL. *v.* DERWINSKI, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1496.

No. 90–978. PERKINS *v.* GENERAL MOTORS CORPORATION OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 22.

No. 90–983. IRON WORKERS LOCAL 118, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 977.

No. 90–987. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1344.

No. 90–1002. KASCHAK *v.* SUPERIOR COURT OF CALIFORNIA, KERN COUNTY. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 90–1006. BERGER ET AL. *v.* EDGEWATER STEEL CO. C. A. 3d Cir. Certiorari denied. Reported below: 911 F. 2d 911.

No. 90–1008. CONNECTICUT OFFICE OF CONSUMER COUNSEL ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 75.

No. 90–1012. WOODS *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–1019. IMCO, INC., ET AL. *v.* MORTON, COMMANDER, UNITED STATES DEFENSE CONTRACTS, ADMINISTRATION SERVICES MANAGEMENT AREA-BIRMINGHAM, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 744.

No. 90–1020. COUNTY OF WAYNE, MICHIGAN *v.* RUSHING. Sup. Ct. Mich. Certiorari denied. Reported below: 436 Mich. 247, 462 N. W. 2d 23.

No. 90–1043. W. F. DEVELOPMENT CORP. ET AL. *v.* OFFICE OF THE UNITED STATES TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 883.

No. 90–1083. VILLAGE OF WILMETTE ET AL. *v.* NATIONAL PEOPLES ACTION. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 1008.

No. 90–1088. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL.; and

No. 90–6388. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 466.

No. 90–1097. DOLENZ *v.* STUART YACHT BUILDERS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 268.

No. 90–1112. TOTAL CONDO CONCEPTS, INC., ET AL. *v.* COUNTY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–1119. LEBLANC *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 2d 17.

No. 90–1120. GARMON *v.* ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. Reported below: 570 So. 2d 633.

No. 90–1131. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHESAPEAKE WESTERN RAILWAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 116.

No. 90–1148. RODGERS, SHERIFF, GILCHRIST COUNTY, FLORIDA *v.* HUFFORD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1338.

No. 90–1149. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) *v.* MACK TRUCKS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 917 F. 2d 107.

No. 90–1154. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 1289.

No. 90–1158. SERV-A-PORTION, INC., ET AL. *v.* J. F. FEESER INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1524.

No. 90–1159. BLY ET UX. *v.* KINLEIN. Ct. Sp. App. Md. Certiorari denied. Reported below: 83 Md. App. 704.

No. 90–1160. EVONUK *v.* OREGON. C. A. 9th Cir. Certiorari denied.

No. 90–1162. CROSS ET AL. *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 341.

No. 90–1163. PALOMO *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 90–1166. LONG ISLAND TYPOGRAPHICAL UNION NO. 915, CWA, AFL–CIO *v.* NEWSDAY, INC. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 840.

No. 90–1177. CITY OF NEW ORLEANS ET AL. *v.* DUBOUE. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 129.

No. 90–1181. CAMPBELL ET UX., CO-ADMINISTRATORS OF ESTATE OF CAMPBELL, DECEASED *v.* WHITE. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 421.

No. 90–1182. SAINT THOMAS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 914 F. 2d 271.

No. 90–1185. CONNECTICUT *v.* NELSON. App. Ct. Conn. Certiorari denied. Reported below: 23 Conn. App. 215, 579 A. 2d 1104.

No. 90–1186. JOHNSON GAS APPLIANCE CO. *v.* VE HOLDING CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 917 F. 2d 1574.

No. 90–1188. TEETER *v.* SHAMBAUGH, ACTING DIRECTOR OF SUPPORT SERVICES, FAIRVIEW TRAINING CENTER, DEPARTMENT OF HUMAN RESOURCES OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–1193. HUMAN, SUPERINTENDENT OF GRAVETTE PUBLIC SCHOOL DISTRICT, ET AL. *v.* DOE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 857.

No. 90–1198. BATOR *v.* WASHOE COUNTY BUILDING DEPARTMENT ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1015, 835 P. 2d 27.

No. 90–1199. LUMPKIN *v.* LUMPKIN. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 175.

No. 90–1200. UNITED STATES FIRE INSURANCE CO. *v.* RIVERSIDE VENTURES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–1203. MURRAY *v.* OHIO ADULT PAROLE AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 713.

No. 90–1204. ECCLI *v.* VON KLEMPERER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1560.

No. 90–1206. VILLARREAL *v.* HARTE-HANKS COMMUNICATIONS, INC., ET AL. Ct. App. Tex., 13th Dist. Certiorari denied. Reported below: 787 S. W. 2d 131.

No. 90–1207. TAYLOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1579.

No. 90–1209. BALZER *v.* MEIER ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 196 Ill. App. 3d 1104, 582 N. E. 2d 773.

No. 90–1210. CHESTER UPLAND SCHOOL DISTRICT *v.* LESTER H., A MINOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 916 F. 2d 865.

No. 90–1239. UNITED ASSOCIATION OF BLACK LANDSCAPERS ET AL. *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 1261.

No. 90–1292. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1574.

No. 90–1313. ROBIN ET AL. *v.* ARTHUR YOUNG & CO. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 2d 1120.

No. 90–6059. STEINES *v.* ADMINISTRATOR OF VETERANS AFFAIRS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 192 Ill. App. 3d 1109, 577 N. E. 2d 203.

No. 90–6137. MORA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–6218. FREEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1109.

No. 90–6309. ARANGO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 2d 441.

No. 90–6317. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–6356. MEJIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 470.

No. 90–6367. TURNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 974.

No. 90–6402. ROGERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 165.

No. 90–6451. HARRIS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 793 S. W. 2d 802.

No. 90–6517. PAIZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1014.

No. 90–6537. JAMES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 436 Mich. 851, 460 N. W. 2d 557.

No. 90–6542. SIMMONS *v.* BILLINGTON. Ct. App. D. C. Certiorari denied.

No. 90–6556. BAKHTIARI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 913 F. 2d 1053.

No. 90–6620. DAY *v.* GAF CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6624. STRATTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1578.

No. 90–6652. GELIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–6661. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–6672. MANCARI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 1014.

No. 90–6757. MELENDEZ LIRANZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–6772. ROSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–6775. PULIDO-GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 494.

No. 90–6786. SPARKMAN *v.* COLER. C. A. 11th Cir. Certiorari denied.

No. 90–6789. RUIZ *v.* EARLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6791. PETERSON *v.* GRANNIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 724.

No. 90–6792. GANEY *v.* OUTLAW ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 22.

No. 90–6793. BARNES *v.* NORRIS ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6802. SAVAGE-EL *v.* RISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 977.

No. 90–6807. MITCHELL *v.* JONES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1483.

No. 90–6812. LEPISCOPO *v.* CONWAY. Sup. Ct. N. M. Certiorari denied.

No. 90–6815. MORRISON *v.* OXENDINE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–6817. QUINTERO *v.* TORVALD KLAVENESS & CO. A/S ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 717.

No. 90–6821. WILLIS *v.* CITY OF CLEVELAND, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 714.

No. 90–6822. BARNES *v.* HENDERSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–6824. BRENNAN *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 712.

No. 90–6832. D'AMARIO *v.* WEST PUBLISHING CO. ET AL. C. A. 1st Cir. Certiorari denied.

No. 90–6837. PEHRINGER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6838. TYLER ET AL. *v.* MISSOURI DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6840. HUMPHREY *v.* SOUTHERN OHIO CORRECTIONAL FACILITY. Ct. Cl. Ohio. Certiorari denied.

No. 90–6842. RICHARDS *v.* COMMITTEE OF BAR EXAMINERS. Sup. Ct. Cal. Certiorari denied.

No. 90–6844. WINGO *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 90–6847. EHRSAM *v.* RUBENSTEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 917 F. 2d 764.

No. 90–6848. DAY *v.* BARKETT, JUSTICE, FLORIDA SUPREME COURT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–6857. PARKER *v.* JOHNSON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 744.

No. 90–6860. HERRERA *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–6863. MUSTOPHER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6865. MITCHELL *v.* STANTON. Sup. Ct. Tenn. Certiorari denied.

No. 90–6867. RESETAR *v.* EISLEY ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 598, 568 A. 2d 1248.

No. 90–6868. CORBIT *v.* DRAKE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–6875. COCKRUM *v.* MILLS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–6877. TILLMAN *v.* DUCKWORTH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 920 F. 2d 935.

No. 90–6880. PRESTWOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–6882. BROWN *v.* ADMINISTRATIVE LAW JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 247.

No. 90–6883. FROST *v.* GEERNAERT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 200 Cal. App. 3d 1104, 246 Cal. Rptr. 440.

No. 90–6893. HANSON *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 185.

No. 90–6900. THOMPSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 394 Pa. Super. 634, 569 A. 2d 1386.

No. 90–6902. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 907 F. 2d 155.

No. 90–6904. JEFFRIES *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 912 F. 2d 982.

No. 90–6912. MANDOLPH-GREENE *v.* SAINAS. Sup. Ct. Haw. Certiorari denied. Reported below: 71 Haw. 653, 798 P. 2d 446.

No. 90–6914. MARTIN *v.* PENNSYLVANIA REAL ESTATE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6918. BUTLER ET AL. *v.* GREENPOINT SAVINGS BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–6919. STAFFORD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 800 P. 2d 738.

No. 90–6922. CARTER *v.* MEAD PAPER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 24.

No. 90–6925. BOSA *v.* BOSA. Super. Ct. Pa. Certiorari denied. Reported below: 398 Pa. Super. 641, 573 A. 2d 617.

No. 90–6927. ELAM *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 738.

No. 90–6930. GRAHAM *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 90–6931. RAEL *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 918 F. 2d 874.

No. 90–6933. MATHIS *v.* WAYNE COUNTY FRIEND OF THE COURT ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6934. MORRIS *v.* PULEO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 731.

No. 90–6935. MOORE *v.* MASCHNER ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6936. METOYER *v.* KAISER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6938. GRIFFIN *v.* LANE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 1486.

No. 90–6942. WILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 564.

No. 90–6944. FULLER *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1491.

No. 90–6950. WATTS *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1493.

No. 90–6952. VARNER *v.* MORRISON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–6961. BURNLEY *v.* KENNON. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 848.

No. 90–6962. KARIM-PANAHI *v.* REAGAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 469.

No. 90–6965. MCDONALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–6970. SANDERS *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 141.

No. 90–6973. SCANLAN *v.* SAN FRANCISCO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6977. GLOVER *v.* MARSH, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 557.

No. 90–6982. WILLIAMS ET UX. *v.* KANSTOROOM ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 82 Md. App. 774.

No. 90–6995. CROSS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 622.

No. 90–7003. PETERS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 90–7004. PIERCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 934.

No. 90–7007. WAGSTAFF-EL *v.* CARLTON PRESS CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 913 F. 2d 56.

No. 90–7021. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 174.

No. 90–7028. KEITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7029. JOSEPH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 282.

No. 90–7035. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7037. CAMPOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 929.

No. 90–7041. TRAVERS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 19, 918 F. 2d 225.

No. 90–7047. STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 839.

No. 90–7052. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 10.

No. 90–7053. FORTENBERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 671.

No. 90–7057. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 956.

No. 90–7059. LINDSAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 839.

No. 90–7060. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7061. MARTINEZ-CABRE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7066. DEAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 12.

No. 90–7071. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 860.

No. 90–7072. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 563.

No. 90–7078. UPSHAW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 789.

No. 90–7086. COLEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7089. RAMOS CARRASCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 175.

No. 90–7092. CORPUS-BARAJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 736.

No. 90–7098. PABLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7102. MARTIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 383, 917 F. 2d 1313.

No. 90–7114. CARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–7122. COZAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7125. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–7147. HAMPTON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1024, 835 P. 2d 41.

No. 90–1142. NEW JERSEY *v.* HARVEY. Sup. Ct. N. J. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 121 N. J. 407, 581 A. 2d 483.

No. 90–1231. CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. *v.* WALTON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 916 F. 2d 1352.

No. 90–1168. TOWN OF CONCORD, MASSACHUSETTS, ET AL. *v.* BOSTON EDISON CO. C. A. 1st Cir. Motions of American Public Power Association et al. and National Association of Gas Consumers for leave to file briefs as *amici curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 915 F. 2d 17.

No. 90–1191. OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE & JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND ET AL. *v.* WEISS BROS. CONSTRUCTION CO., DBA WEISSCAL, ET AL. Ct. App. Cal., 3d App. Dist. Motions of Carpenters Joint Apprenticeship and Training Committee Fund for Southern California and Electrical Joint Apprenticeship et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 221 Cal. App. 3d 867, 270 Cal. Rptr. 786.

No. 90–6086. BELYEU *v.* TEXAS. Ct. Crim. App. Tex.;

No. 90–6101. JOUBERT *v.* NEBRASKA. Sup. Ct. Neb.;

No. 90–6291. ORNDORFF ET AL. *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir.;

No. 90–6325. HENRY *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 90–6541. BEAN *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–6816. VAN POYCK *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–6818. SWEET *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–6850. GATES *v.* WARDEN AT SAN QUENTIN. C. A. 9th Cir.; and
No. 90–6855. SPENCE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 90–6086, 791 S. W. 2d 66; No. 90–6101, 235 Neb. 230, 455 N. W. 2d 117; No. 90–6291, 906 F. 2d 1230; No. 90–6325, 524 Pa. 135, 569 A. 2d 929; No. 90–6541, 137 Ill. 2d 65, 560 N. E. 2d 258; No. 90–6816, 564 So. 2d 1066; No. 90–6818, 796 S. W. 2d 607; No. 90–6855, 795 S. W. 2d 743.

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 certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 89–5961. PARKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 498 U. S. 308;
No. 90–752. WINCHESTER *v.* COUNTY OF SAN DIEGO ET AL., 498 U. S. 1047;
No. 90–839. COUNTY OF KERN, CALIFORNIA *v.* ABSHIRE ET AL., 498 U. S. 1068;
No. 90–1013. STEM *v.* AHEARN ET AL., 498 U. S. 1069;
No. 90–5851. TRUESDALE *v.* SOUTH CAROLINA, 498 U. S. 1074;
No. 90–6050. PAYNE *v.* MIDDLETON ET AL., 498 U. S. 1070;
No. 90–6289. ARMSTRONG *v.* FRANK, POSTMASTER GENERAL, 498 U. S. 1071;
No. 90–6302. SANDLIN *v.* ELLIS, 498 U. S. 1071;
No. 90–6323. DIAZ *v.* MILES, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY, ET AL., 498 U. S. 1071;
No. 90–6326. HENTHORN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 498 U. S. 1071;
No. 90–6336. VEALE ET AL. *v.* NEW HAMPSHIRE, 498 U. S. 1071;
No. 90–6354. IN RE MULVILLE, 498 U. S. 1065;
No. 90–6355. IN RE MULVILLE, 498 U. S. 1066;
No. 90–6357. SANDLIN *v.* ALLEN ET AL., 498 U. S. 1072; and

No. 90–6385. ABIFF *v.* GEORGIA, 498 U. S. 1072. Petitions for rehearing denied.

MARCH 21, 1991

Miscellaneous Order

No. 90–967. WOODDELL *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 71, ET AL. C. A. 6th Cir. The order entered February 19, 1991 [498 U. S. 1082], is modified to read as follows: Certiorari granted limited to Question I presented by the petition. In addition, the parties are directed to brief and argue the following question: "Does § 301 of the Labor Management Relations Act create a federal cause of action under which a union member may sue his union for violation of the union constitution?"

MARCH 25, 1991

Vacated and Remanded on Appeal

No. 90–1244. STATE DEMOCRATIC EXECUTIVE COMMITTEE OF ALABAMA *v.* HAWTHORNE ET AL. Appeal from D. C. M. D. Ala. Judgment vacated and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 750 F. Supp. 1090.

Certiorari Granted—Vacated and Remanded

No. 89–1230. CITY OF CHICAGO ET AL. *v.* FRIEDRICH. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *West Virginia Univ. Hospitals, Inc.* v. *Casey*, *ante*, p. 83. Reported below: 888 F. 2d 511.

No. 90–400. LE'MON *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Air Line Pilots* v. *O'Neill*, *ante*, p. 65, and *Steelworkers* v. *Rawson*, 495 U. S. 362 (1990). Reported below: 902 F. 2d 810.

No. 90–1010. DILLON, COMMISSIONER, INDIANA DEPARTMENT OF INSURANCE, ET AL. *v.* ALLEGHANY CORP. ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Miscellaneous Orders

No. A–421 (90–7201). BORROTO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–930. IN RE DISBARMENT OF HOBSON. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D–932. IN RE DISBARMENT OF BUSSEY. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D–984. IN RE DISBARMENT OF FLINN. It is ordered that Gene Flinn, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–985. IN RE DISBARMENT OF ROGERS. It is ordered that Michael J. Rogers, of Burleson, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–986. IN RE DISBARMENT OF ZAUBER. It is ordered that Kenneth Paul Zauber, of North Brunswick, 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–987. IN RE DISBARMENT OF BALLARD. It is ordered that F. Michael Ballard, of Fairfax, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1905. WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL. Sup. Ct. Wis. [Certiorari granted, 498 U. S. 1045.] Motion of respondents to permit California to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 90–622. FLORIDA *v.* JIMENO ET AL. Sup. Ct. Fla. [Certiorari granted, 498 U. S. 997.] Motion of National Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* out of time denied. Motion of National Association of Crimi-

nal Defense Lawyers for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 90–757. CHISOM ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL.; and

No. 90–1032. UNITED STATES *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. [Certiorari granted, 498 U. S. 1060.] Motion of the Solicitor General for divided argument granted.

No. 90–813. HOUSTON LAWYERS' ASSN. ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL.; and

No. 90–974. LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 498 U. S. 1060.] Motion of respondent Sharolyn Wood for divided argument denied. Motion of respondent F. Harold Entz for divided argument denied.

No. 90–952. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. D. C. M. D. La. [Probable jurisdiction noted, 498 U. S. 1060.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–5721. PAYNE *v.* TENNESSEE. Sup. Ct. Tenn. [Certiorari granted, 498 U. S. 1076 and 1080.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–7228. IN RE ROSS. Petition for writ of habeas corpus denied.

No. 90–1152. IN RE STUBBLEFIELD; and

No. 90–7094. IN RE JACKSON. Petitions for writs of mandamus denied.

No. 90–6974. IN RE SASSOWER; and

No. 90–7000. IN RE SASSOWER. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 90–1038. CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CIPOLLONE *v.* LIGGETT GROUP, INC., ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 893 F. 2d 541.

Certiorari Denied

No. 90–695. HUFF, TRUSTEE *v.* STANDARD LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 1072.

No. 90–764. FISCHER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 90–782. ODOM ET AL. *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 1273.

No. 90–810. DART ET AL. *v.* FORRESTER. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 976.

No. 90–878. JOHNSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 564 So. 2d 108.

No. 90–996. COLORADO INTERSTATE GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 1456.

No. 90–1025. MMAHAT ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 546.

No. 90–1037. MOORE *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 51 Cal. 3d 120, 793 P. 2d 479.

No. 90–1046. ZAMLEN ET AL. *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 906 F. 2d 209.

No. 90–1049. BAKER ET AL. *v.* FEDERAL AVIATION ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 318.

No. 90–1063. HAULAWAY INC. ET AL. *v.* MARTIN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 242.

No. 90–1064. RUTLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 489.

No. 90–1069. SOUTH HALF OF LOT 7 AND LOT 8, BLOCK 14, KOUNTZE'S 3RD ADDITION TO THE CITY OF OMAHA, ET AL. *v.*

UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 910 F. 2d 488.

No. 90–1214. WILLIAMSON *v.* ABILENE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 561.

No. 90–1216. TRANSPORTATION•COMMUNICATIONS INTERNATIONAL UNION *v.* MT PROPERTIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1083.

No. 90–1219. TOCCO *v.* NEW JERSEY COUNCIL ON AFFORDABLE HOUSING ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 242 N. J. Super. 218, 576 A. 2d 328.

No. 90–1220. POLUR *v.* RAFFE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 912 F. 2d 52.

No. 90–1221. LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., ET AL. *v.* GENERAL ELECTRIC CO. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 1415.

No. 90–1224. CONTRERAS ET AL. *v.* CITIBANK (SOUTH DAKOTA) ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 198 Ill. App. 3d 1059, 556 N. E. 2d 751.

No. 90–1227. DELGAUDIO ET AL. *v.* KENDRICK, JUDGE, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 90–1228. FYKE *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 1113, 582 N. E. 2d 329.

No. 90–1235. JET CHARTER SERVICE, INC. *v.* BANQUE PARIBAS (SUISSE), S. A. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1110.

No. 90–1236. PHELPS *v.* MATTHEWS, AKA JOHNSON, ET AL. Ct. App. Colo. Certiorari denied.

No. 90–1238. DERSTEIN *v.* BENSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 1410.

No. 90–1245. KOLLER *v.* RICHARDSON-MERRELL, INC. C. A. D. C. Cir. Certiorari denied.

No. 90–1248. CORDREY, A MINOR, ET AL. *v.* EUCKERT, SUPERINTENDENT, EVERGREEN LOCAL SCHOOL DISTRICT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1460.

No. 90–1277. CRAMER ET AL. *v.* ASSOCIATION LIFE INSURANCE CO., INC. Sup. Ct. La. Certiorari denied. Reported below: 569 So. 2d 533.

No. 90–1310. KARNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–1316. PERRY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1466.

No. 90–1327. PALM COURT, INC., ET AL. *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 574 So. 2d 142.

No. 90–1336. BENNETT *v.* GRAHAM, FORMER GOVERNOR OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–6457. HAGLUND *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1024, 835 P. 2d 41.

No. 90–6461. MCCLENDON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 197 Ill. App. 3d 472, 554 N. E. 2d 791.

No. 90–6497. JAMES *v.* DROPSIE COLLEGE, AKA ANNENBERG RESEARCH INSTITUTE. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 243.

No. 90–6549. HALPIN *v.* MARTINEZ ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 601 So. 2d 552.

No. 90–6603. NORI *v.* MALONEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–6685. MUNIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 2d 436.

No. 90–6712. MCCONNELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 566.

No. 90–6778. SHULMAN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 239.

No. 90–6898. GRANADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–6908. STRINGER *v.* JOHNSON. Sup. Ct. Cal. Certiorari denied.

No. 90–6945. VINSON *v.* COOPER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 921 F. 2d 274.

No. 90–6948. ROBINSON *v.* SAWYER, MAYOR, CITY OF CHICAGO, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–6953. BAUGH *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 12.

No. 90–6954. FRANCIS *v.* HOKE, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–6958. OATESS *v.* DRAGOVICH ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6972. WHITE *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 179.

No. 90–6975. KIM *v.* PRINTEMPS. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–6976. KIM *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–6979. BROWN *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 557.

No. 90–6983. WILLIAMS ET UX. *v.* KANSTOROOM ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 82 Md. App. 774.

No. 90–6987. KUNZ *v.* ALASKA. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1578.

No. 90–6993. RODRIGUEZ *v.* HOKE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–6996. BOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 852.

No. 90–7002. VAN DER JAGT *v.* SIB INTERNATIONAL BANCORP, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 252.

No. 90–7006. PHILLIPS *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7009. ALLEN *v.* DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–7012. MARTIN *v.* FARNAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7017. MARYLAND *v.* JARVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1491.

No. 90–7022. ALEJOS-PEREZ ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7032. PAUL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 1306.

No. 90–7034. ROLDAN-ZAPATA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 795.

No. 90–7044. DELBRIDGE ET AL. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–7045. COHEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–7050. PONCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 841.

No. 90–7055. BROM *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 463 N. W. 2d 758.

No. 90–7064. DOGANIERE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 165.

No. 90–7068. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–7079. YBABEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 919 F. 2d 508.

No. 90–7088. ZANI *v.* WALDRON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–7095. CRAGO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 3d 243, 559 N. E. 2d 1353.

No. 90–7099. JOHNSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 175.

No. 90–7100. MAMMOLITO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1576.

No. 90–7111. LAWRENCE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 918 F. 2d 68.

No. 90–7119. WATSON *v.* UNITED STATES; and JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 702 (first case) and 701 (second case).

No. 90–7129. ALVARADO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7130. FRONDLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 918 F. 2d 62.

No. 90–7133. CASAL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1225.

No. 90–7138. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–7142. SIGGERS *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 141.

No. 90–7150. ROSENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7162. LANDA-VEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 930.

No. 90–7165. MCCRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1497.

No. 90–7166. HOWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 144.

No. 90–7168. MATHNAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1418.

No. 90–7171. TAMAYO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–7175. KOULIZOS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 933.

No. 90–7176. LILLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7178. NOLAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1553.

No. 90–7181. EDWARDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–7182. REYNOLDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 435.

No. 90–7188. ALVARADO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 470.

No. 90–7191. BURNS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 732.

No. 90–7192. WHIGHAM *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–7207. MCCLINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1458.

No. 90–7208. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1471.

No. 90–7211. MCCLURE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 956.

No. 90–7220. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 212.

No. 90–968. NORTH CAROLINA *v.* MCNEIL. Sup. Ct. N. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 327 N. C. 388, 395 S. E. 2d 106.

No. 90–1130. KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY *v.* HARPER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 916 F. 2d 54.

No. 90–1146. FMC *v.* SHOSHONE-BANNOCK TRIBES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 905 F. 2d 1311.

No. 90–1212. TAHOE-SIERRA PRESERVATION COUNCIL, INC., ET AL. *v.* TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 911 F. 2d 1331.

No. 90–1333. BOBAL *v.* RENSSELAER POLYTECHNIC INSTITUTE ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 916 F. 2d 759.

No. 90–6193. MCSHERRY *v.* BLOCK ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 880 F. 2d 1049.

No. 90–6951. COMER *v.* ARIZONA. Sup. Ct. Ariz.; and
No. 90–7193. HOWARD *v.* ROWLAND ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: No. 90–6951, 165 Ariz. 413, 799 P. 2d 333.

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 certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 90–835. SMITH, ADMINISTRATRIX OF THE ESTATE OF SMITH, DECEASED *v.* CITY OF BERKELEY ET AL., 498 U. S. 1068;
No. 90–1054. IN RE MCDONALD, 498 U. S. 1081;
No. 90–5783. CALLIS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL., 498 U. S. 1091; and
No. 90–6411. SINDRAM *v.* MCKENNA ET AL., 498 U. S. 1096. Petitions for rehearing denied.

MARCH 28, 1991

Dismissal Under Rule 46

No. 88–1938. TOWNSLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 856 F. 2d 1189.

APRIL 1, 1991

Certiorari Granted—Vacated and Remanded

No. 90–404. ILLINOIS STATE LABOR RELATIONS BOARD ET AL. *v.* ILLINOIS NURSES ASSN. ET AL. App. Ct. Ill., 1st Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the advisory opinion of the National Labor Relations Board in *Correctional Medical Systems, Inc.*, 299 N. L. R. B. 654 (1990). JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari and set case for oral argument. Reported below: 196 Ill. App. 3d 576, 554 N. E. 2d 404.

No. 90–731. HAINES & CO., INC., ET AL. *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Feist Publications, Inc.* v. *Rural Telephone Service Co.*, *ante*, p. 340. Reported below: 905 F. 2d 1081.

No. 90–1251. PENNSYLVANIA *v.* OGBORNE. Super. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Alabama* v. *White*, 496 U. S. 325 (1990). Reported below: 384 Pa. Super. 604, 559 A. 2d 931.

No. 90–6766. BLACKMER *v.* UNITED STATES. C. A. 2d 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 *Gozlon-Peretz* v. *United States*, 498 U. S. 395 (1991). Reported below: 909 F. 2d 66.

Miscellaneous Orders

No. — — ——. AYSISAYH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE ESTATE OF MILAM *v.*

GIBSON & CUSHMAN OF NEW YORK, INC. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–707. RICHARDS, GOVERNOR OF TEXAS, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (SHERIFF OF HARRIS COUNTY ET AL., REAL PARTIES IN INTEREST). Application for stay of a portion of the judgment of the United States District Court for the Southern District of Texas filed February 7, 1991, presented to JUSTICE SCALIA, and by him referred to the Court, denied, and the order heretofore entered by JUSTICE SCALIA on March 20, 1991, is vacated.

No. A–712. CITY OF YONKERS *v.* UNITED STATES ET AL. D. C. S. D. N. Y. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–716. WILLIAMS ET AL. *v.* CITY OF DALLAS. Application to vacate a stay order entered by the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. D–947. IN RE DISBARMENT OF PATTISON. Disbarment entered. [For earlier order herein, see 498 U. S. 956.]

No. D–962. IN RE DISBARMENT OF RUBIN. Disbarment entered. [For earlier order herein, see 498 U. S. 1044.]

No. D–967. IN RE DISBARMENT OF COSTIGAN. Disbarment entered. [For earlier order herein, see 498 U. S. 1065.]

No. D–988. IN RE DISBARMENT OF ANDERSON. It is ordered that Loretta B. Anderson, of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–989. IN RE DISBARMENT OF MACH. It is ordered that William C. Mach, of Tucson, Ariz., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–990. IN RE DISBARMENT OF MILLER. It is ordered that John Ross Miller, of Salem, 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. 118, Orig. UNITED STATES *v.* ALASKA. Motion for leave to file bill of complaint granted, and defendant is allowed 60 days within which to file an answer.

No. 89–1895. ASTORIA FEDERAL SAVINGS & LOAN ASSN. *v.* SOLIMINO. C. A. 2d Cir. [Certiorari granted, 498 U. S. 1023.] Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* granted.

No. 90–769. RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL. *v.* GEARY ET AL. C. A. 9th Cir. [Certiorari granted, 498 U. S. 1046.] Motion of California Democratic Party et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 90–1270. ALABAMA *v.* BROWN. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted.

Certiorari Granted

No. 90–1090. IMMIGRATION AND NATURALIZATION SERVICE ET AL. *v.* NATIONAL CENTER FOR IMMIGRANTS' RIGHTS, INC., ET AL. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 913 F. 2d 1350.

No. 90–1262. ARKANSAS ET AL. *v.* OKLAHOMA ET AL.; and

No. 90–1266. ENVIRONMENTAL PROTECTION AGENCY *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 908 F. 2d 595.

No. 90–5844. FOUCHA *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 563 So. 2d 1138.

No. 90–6704. DAWSON *v.* DELAWARE. Sup. Ct. Del. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 581 A. 2d 1078.

Certiorari Denied

No. 90–321. CLARK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 156.

No. 90–719. IANNACONE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–733. HAMM *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 121 N. J. 109, 577 A. 2d 1259.

No. 90–893. NEW MEXICO *v.* WORK. Sup. Ct. N. M. Certiorari denied. Reported below: 111 N. M. 145, 803 P. 2d 234.

No. 90–1058. HARTMAN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 854.

No. 90–1072. RAMEY *v.* UNITED STATES GENERAL ACCOUNTING OFFICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 288, 915 F. 2d 731.

No. 90–1081. CUTTER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 775.

No. 90–1087. EASLEY *v.* UNIVERSITY OF MICHIGAN BOARD OF REGENTS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 906 F. 2d 1143.

No. 90–1093. MARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 910 F. 2d 343.

No. 90–1108. KAISER DEVELOPMENT CO., AKA KACOR DEVELOPMENT CO., ET AL. *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 112 and 913 F. 2d 573.

No. 90–1129. SUMITOMO TRUST & BANKING CO. (U. S. A.) *v.* EDEN HANNON & CO. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 556.

No. 90–1179. STATE FARM GENERAL INSURANCE CO. ET AL. *v.* KRASZEWSKI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1182.

No. 90–1196. SIMNICK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 90–1243. HUMPHREYS (CAYMAN) LTD. *v.* WILSON ET VIR. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 1239.

No. 90–1249. R. R. DONNELLEY & SONS CO. *v.* PREVOST ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 787.

No. 90–1250. BURLINGTON NORTHERN RAILROAD CO. ET AL. *v.* WHITT, ADMINISTRATRIX OF THE ESTATE OF WHITT, DECEASED. Sup. Ct. Ala. Certiorari denied. Reported below: 575 So. 2d 1011.

No. 90–1253. FASSE ET AL. *v.* HODGSON. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. XXIX, 397 S. E. 2d 710.

No. 90–1257. CLEVELAND *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 58 Wash. App. 634, 794 P. 2d 546.

No. 90–1259. REDMOND *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 196 Ill. App. 3d 1109, 582 N. E. 2d 776.

No. 90–1263. YASKO *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 55 Wash. App. 1044.

No. 90–1267. GENERAL MOTORS CORP. *v.* DUERR. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 732.

No. 90–1268. SECORD *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 90–1274. WIELAND *v.* BROWN, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–1275. SCOVEL *v.* NORFOLK SHIPBUILDING & DRYDOCK CO., INC. Sup. Ct. Va. Certiorari denied. Reported below: 240 Va. 472, 397 S. E. 2d 884.

No. 90–1296. REMINGTON ARMS CO., INC. *v.* KING. Ct. App. Ky. Certiorari denied.

No. 90–1300. DEAN WITTER REYNOLDS INC. ET AL. *v.* STROTZ. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 223 Cal. App. 3d 208, 272 Cal. Rptr. 680.

No. 90–1307. TOMCSIK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 564.

No. 90–1308. WATTS *v.* STONE, SECRETARY OF THE ARMY. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 979.

No. 90–1323. AGNIHOTRI ET AL. *v.* ARENSON. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 1124.

No. 90–1345. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 179.

No. 90–1346. KING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–1347. BABER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 176.

No. 90–1349. WEBB *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1493.

No. 90–1350. BEN-PORAT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 976.

No. 90–1363. LABORERS' LOCAL 332 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 732.

No. 90–1364. MANNA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–1375. KASPAROFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–5204. CAMPANERIA *v.* REID, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 1014.

No. 90–6303. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6409. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6432. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6433. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6456. WASHINGTON *v.* RUCKER. C. A. 11th Cir. Certiorari denied.

No. 90–6505. SILVERBURG *v.* STEWART ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 179.

No. 90–6581. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–6582. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6583. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–6613. STOTT *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1578.

No. 90–6664. VALDES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 138.

No. 90–6698. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6719. OSPINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 741.

No. 90–6727. CHOTAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 913 F. 2d 897.

No. 90–6759. MAGUIRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 254.

No. 90–6761. GRIFFITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–6790. ZATKO *v.* SUPERIOR COURT OF CALIFORNIA, DEL NORTE COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6796. WENDT *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 157 Wis. 2d 815, 461 N. W. 2d 449.

No. 90–6878. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–6917. PANDA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied.

No. 90–6969. GRIDLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 1486.

No. 90–6978. CORIA *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 907 F. 2d 158.

No. 90–6997. ALLEN *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 187.

No. 90–6999. SIMMONS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–7019. CHILDS *v.* LISKEY. C. A. 10th Cir. Certiorari denied.

No. 90–7024. ORSO *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 789 S. W. 2d 177.

No. 90–7025. KELLER *v.* PETSOCK, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7027. MARTIN *v.* HUYETT. C. A. 3d Cir. Certiorari denied.

No. 90–7031. FISHER *v.* CHICAGO TRANSIT AUTHORITY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 90–7033. SHERRILLS *v.* GOLDBERGER ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–7038. BRAGG *v.* COLUMBUS CITY POLICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 465.

No. 90–7039. CROSS *v.* SAN MATEO COUNTY TRANSIT DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7056. SCOTT *v.* BUEHLER FOOD MARKETS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 141.

No. 90–7058. BENTLEY *v.* NEW YORK ET AL. (two cases). C. A. 2d Cir. Certiorari denied.

No. 90–7062. CHRISTIAN *v.* PACIFIC GAS & ELECTRIC CO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7063. BARELA *v.* ARIZONA. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 27.

No. 90–7075. NEAL *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–7077. BROWNE *v.* ROBB. Sup. Ct. Del. Certiorari denied. Reported below: 583 A. 2d 949.

No. 90–7081. GRANT *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7082. LIGHTS *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7083. MARTIN *v.* FISHER ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7085. CUMMINGS *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTION CENTER. C. A. 8th Cir. Certiorari denied.

No. 90–7110. MCDANIEL *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 280 and 966.

No. 90–7115. GILLIAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–7123. CAMMACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 737.

No. 90–7126. BIGGS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7148. GRAVES *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 957.

No. 90–7149. RUSSELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 512.

No. 90–7157. CASELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–7161. JEFFERS *v.* CLARK, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7172. CATAULIN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1584.

No. 90–7180. NAPOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–7189. HENRY *v.* UNITED STATES DEPARTMENT OF THE INTERIOR. C. A. Fed. Cir. Certiorari denied. Reported below: 923 F. 2d 869.

No. 90–7215. LEIBOWITZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 482.

No. 90–7222. JORDAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 245, 920 F. 2d 1039.

No. 90–7224. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 1377.

No. 90–7235. BIRCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1473.

No. 90–7236. DELGADO-SERRANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 252.

No. 90–7237. LAYTON *v.* SOUTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 918 F. 2d 739.

No. 90–7238. KIDD *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 836.

No. 90–7239. LOWE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7240. DEPARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 568.

No. 90–7241. BALLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 255.

No. 90–7242. VANDERLAAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 257.

No. 90–7244. WEEKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 248.

No. 90–7247. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 147.

No. 90–7291. CHARLESTON *v.* MANN, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 594.

No. 89–6482. COOEY *v.* OHIO. Sup. Ct. Ohio;

No. 90–5414. LEE *v.* LOUISIANA. Sup. Ct. La.;

No. 90–6444. BEASLEY *v.* PENNSYLVANIA. Super. Ct. Pa.;

No. 90–6913. JONES *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir.;

No. 90–7016. HIGH *v.* ZANT, WARDEN. C. A. 11th Cir.;

No. 90–7134. STANKEWITZ *v.* CALIFORNIA. Sup. Ct. Cal.; and

No. 90–7199. MADDEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 89–6482, 46 Ohio St. 3d 20, 544 N. E. 2d 895; No. 90–5414, 559 So. 2d 1310; No. 90–6444, 395 Pa. Super. 649, 570 A. 2d 585; No. 90–6913, 923 F. 2d 860; No. 90–7016, 916 F. 2d 1507; No. 90–7134, 51 Cal. 3d 72, 793 P. 2d 23; No. 90–7199, 799 S. W. 2d 683.

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 certiorari and vacate the death sentences in these cases.

No. 90–1078. LYMAN ET AL. *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 898 F. 2d 112 and 913 F. 2d 573.

No. 90–1242. BRIGNOLI & CURLEY, INC., ET AL. *v.* CURLEY ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 915 F. 2d 81.

No. 90–1269. FUNCTION JUNCTION, INC., ET AL. *v.* CROWE ET AL. C. A. 11th Cir. Motion of respondents for damages pursuant to this Court's Rule 42.2 denied. Certiorari denied. Reported below: 911 F. 2d 579.

Rehearing Denied

No. 90–5806. PARKER *v.* PARSONS, WARDEN, ET AL., 498 U. S. 1121;

No. 90–6229. MARTIN *v.* SUPREME COURT OF DELAWARE, 498 U. S. 1094;

No. 90–6301. SHAW *v.* PETERS, WARDEN, 498 U. S. 1071;

No. 90–6420. HUNZIKER ET AL. *v.* GERMAN-AMERICAN STATE BANK ET AL., 498 U. S. 1073;

No. 90–6421. IN RE HUNZIKER ET AL., 498 U. S. 1065; and

No. 90–6478. CRUICKSHANK *v.* AMERICAN HONDA, 498 U. S. 1097. Petitions for rehearing denied.

No. 90–815. BLAINE *v.* MARMOR ET UX., 498 U. S. 1067. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

APRIL 3, 1991

Dismissal Under Rule 46

No. 90–1052. GENENTECH, INC., ET AL. *v.* HORMONE RESEARCH FOUNDATION ET AL. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 904 F. 2d 1558.

APRIL 12, 1991

Miscellaneous Order

No. A–770 (90–89). INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL. *v.* ADMINISTRATORS OF TULANE EDUCATIONAL FUND ET AL. C. A. 5th Cir. [Certiorari granted, 498 U. S. 980.] Application to recall and stay the mandate of the United States Court of Appeals for the Fifth Circuit and to reinstate the injunction of the United States District Court for the Eastern Dis-

trict of Louisiana, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. The order heretofore entered April 10, 1991, by JUSTICE KENNEDY is vacated. JUSTICE SCALIA took no part in the consideration or decision of this application.

APRIL 15, 1991

Appointment Order

It is ordered that William V. Gullickson be, and he is hereby, appointed Deputy Clerk of this Court, effective April 15, 1991.

Certiorari Granted—Vacated and Remanded

No. 90–1284. INTERCONTINENTAL LIFE INSURANCE CO. *v.* LINDBLOM. Sup. Ct. Ala. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1. Reported below: 571 So. 2d 1092.

No. 90–6553. WOOD *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89 (1990). Reported below: 873 F. 2d 295.

Miscellaneous Orders

No. — — ——. GRANDISON *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–747. KIDDER, PEABODY & CO., INC. *v.* MAXUS ENERGY CORP. ET AL. C. A. 2d Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–750 (90–1485). IN RE PERALES. Application for preliminary injunction and expedited hearing, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–933. IN RE DISBARMENT OF ROSS. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D–935. IN RE DISBARMENT OF ANTICO. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D–945. IN RE DISBARMENT OF HEAVY. Disbarment entered. [For earlier order herein, see 498 U. S. 918.]

No. D–958. IN RE DISBARMENT OF NOBLE. Disbarment entered. [For earlier order herein, see 498 U. S. 1020.]

No. D–969. IN RE DISBARMENT OF FINKELSTEIN. Joseph J. Finkelstein, of Miami, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 25, 1991 [498 U. S. 1117], is hereby discharged.

No. D–974. IN RE DISBARMENT OF BOWERS. Disbarment entered. [For earlier order herein, see *ante*, p. 902.]

No. D–991. IN RE DISBARMENT OF LELOUIS. It is ordered that Edward C. LeLouis, of Bakersfield, 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–992. IN RE DISBARMENT OF CROWLEY. It is ordered that Dennis D. Crowley, of Rye, 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–993. IN RE DISBARMENT OF BERGER. It is ordered that Murray Berger, of Great Neck, 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–994. IN RE DISBARMENT OF CROSLEY. It is ordered that John Stephen Crosley, of La Selva Beach, 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. 90–813. HOUSTON LAWYERS' ASSN. ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL.; and

No. 90–974. LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL. C. A. 5th Cir. [Certiorari granted, 498 U. S. 1060.] Motion of Florida Conference of Circuit Judges et al. for leave to file a brief as *amici curiae* granted. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* in No. 90–974 granted.

No. 90–848. HILTON *v.* SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION. Sup. Ct. S. C. [Certiorari granted, 498 U. S. 1081.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–7160. MILLS *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until May 6, 1991, 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 MARSHALL and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–7386. IN RE GAMBLE. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 90–1056. BURSON, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE *v.* FREEMAN. Sup. Ct. Tenn. Certiorari granted. Reported below: 802 S. W. 2d 210.

No. 90–1279. COLLINS *v.* CITY OF HARKER HEIGHTS, TEXAS. C. A. 5th Cir. Certiorari granted. Reported below: 916 F. 2d 284.

No. 90–1205. UNITED STATES *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 90–6588. AYERS ET AL. *v.* MABUS, GOVERNOR OF MISSISSIPPI, ET AL. C. A. 5th Cir. Motions of NAACP Legal Defense and Educational Fund, Inc., and 17 Afro-American students who formerly attended University of Mississippi for leave to file briefs as *amici curiae* granted. Motion of petitioners in No. 90–6588 for leave to proceed *in forma pauperis* granted. Certiorari granted in No. 90–1205. Certiorari granted in No. 90–6588 limited to Questions 1 and 2 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 914 F. 2d 676.

No. 90–6531. HUDSON *v.* MCMILLIAN ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 929 F. 2d 1014.

Certiorari Denied

No. 90–910. WHITCOMBE *v.* WEYERHAEUSER CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 907 F. 2d 155.

No. 90–976. ANCLOTE MANOR HOSPITAL, INC., ET AL. *v.* LEWIS. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–1068. NATIONAL RIFLE ASSN. ET AL. *v.* BRADY, SECRETARY OF TREASURY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 475.

No. 90–1073. MCMAHON *v.* TRUMP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 248.

No. 90–1076. CHAMBERS *v.* UNITED STATES DEPARTMENT OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 525.

No. 90–1080. BRADAC ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 439.

No. 90–1106. DEGEURIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 913 F. 2d 1118.

No. 90–1127. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. (two cases). C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 220, 914 F. 2d 276 (first case); 286 U. S. App. D. C. 348, 917 F. 2d 62 (second case).

No. 90–1143. PRECISE CASTINGS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 2d 1160.

No. 90–1151. VEST ET AL. *v.* ZIAEE ET AL.; and
No. 90–1331. ZIAEE ET AL. *v.* VEST ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 1204.

No. 90–1157. TODD PACIFIC SHIPYARDS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 247.

No. 90–1197. FITZ *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 348, 917 F. 2d 62.

No. 90–1217. KEARING *v.* TEEL, JUDGE, UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–1286. JENKINS, AKA MCGANN *v.* BARNETT BANK OF PENSACOLA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–1288. THOMANN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 197 Ill. App. 3d 516, 554 N. E. 2d 755.

No. 90–1289. THOMANN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 197 Ill. App. 3d 488, 554 N. E. 2d 748.

No. 90–1294. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* BYRON, JUDGE, CIRCUIT COURT OF MADISON COUNTY, ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 90–1295. COHN *v.* SHANKMAN. Ct. App. Tenn. Certiorari denied.

No. 90–1298. AL-ZUBAIDI *v.* IJAZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1347.

No. 90–1299. CITY OF MILWAUKEE *v.* CEMENT DIVISION, NATIONAL GYPSUM CO., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 915 F. 2d 1154.

No. 90–1301. HADGES *v.* YONKERS RACING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 1079.

No. 90–1302. COLORADO *v.* IDARADO MINING CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 916 F. 2d 1486.

No. 90–1303. MASSEY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 60 Wash. App. 131, 803 P. 2d 340.

No. 90–1304. CORIZ, BY AND THROUGH NEXT FRIENDS, CORIZ ET UX. *v.* MARTINEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 1469.

No. 90–1305. BERGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF BERGER *v.* PERSONAL PRODUCTS, INC., AKA OR MERGED WITH JOHNSON & JOHNSON BABY PRODUCTS, ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 115 Wash. 2d 267, 797 P. 2d 1148.

No. 90–1309. GENERAL ELECTRIC CO. ET AL. *v.* KNIGHT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 916 F. 2d 829.

No. 90–1314. WARNER *v.* OHIO; and SCHIEBEL *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 55 Ohio St. 3d 31, 564 N. E. 2d 18 (first case); 55 Ohio St. 3d 71, 564 N. E. 2d 54 (second case).

No. 90–1315. FLETCHER ET UX. *v.* DISTRICT BOARD, UNITED PENTECOSTAL CHURCH-TEXAS DISTRICT, ET AL. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 90–1317. HOPE EVANGELICAL LUTHERAN CHURCH *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE. Sup. Ct. Iowa. Certiorari denied. Reported below: 463 N. W. 2d 76.

No. 90–1318. HOOVER *v.* ARMCO, INC. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 355.

No. 90–1319. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* QUALLS. Sup. Ct. Mo. Certiorari denied. Reported below: 799 S. W. 2d 84.

No. 90–1322. SNOW MOUNTAIN PINE CO. *v.* PUBLIC UTILITY COMMISSION OF OREGON ET AL. Ct. App. Ore. Certiorari denied. Reported below: 102 Ore. App. 687, 795 P. 2d 611.

No. 90–1325. UNELKO CORP. ET AL. *v.* ROONEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1049.

No. 90–1326. WASHBURN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 197 Ill. App. 3d 655, 554 N. E. 2d 973.

No. 90–1328. GRAFF TRUCKING CO., INC. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 256.

No. 90–1329. HANJIN CONTAINER LINES, INC. *v.* TOKIO MARINE & FIRE INSURANCE CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 601.

No. 90–1332. COHEN *v.* BERGER. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 971, 565 N. E. 2d 514.

No. 90–1334. WALSH *v.* VIRGINIA (two cases). Ct. App. Va. Certiorari denied.

No. 90–1335. NOLAN, ADMINISTRATOR OF THE ESTATE OF JOHNSON, ET AL. *v.* BOEING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 1058.

No. 90–1339. VULCAN EQUIPMENT CO. LTD. *v.* CENTURY WRECKER CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 923 F. 2d 870.

No. 90–1343. BOND *v.* ST. JOSEPH'S HOSPITAL, INC., ET AL. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 90–1348. SMITH *v.* TOWN OF EATON, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1469.

No. 90–1358. ODEN ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 857.

No. 90–1374. TRESHMAN *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 90–1383. VERDUGO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–1392. CURRIER ET AL. *v.* BALDRIDGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 993.

No. 90–1393. KUNTZ *v.* CITY OF DAYTON, OHIO, ET AL. (two cases). Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 90–1426. TURNAGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–1439. DIMYAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–1453. DESCISCIO *v.* UNITED STATES; DERRICO *v.* UNITED STATES; and DANIELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–5946. HINCHEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 165 Ariz. 432, 799 P. 2d 352.

No. 90–6179. CANDELAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–6328. LEIBOWITZ *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 256.

No. 90–6406. PUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 1499.

No. 90–6423. MOORE *v.* UNITED STATES; and
No. 90–6460. MORSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 215.

No. 90–6463. MABERY *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 22.

No. 90–6511. TATE *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1485.

No. 90–6615. SHERMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 744.

No. 90–6655. DEMOS *v.* GARDNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–6674. MILLER *v.* VASQUEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 469.

No. 90–6749. ELLERY *v.* GROSSMONT UNION HIGH SCHOOL DISTRICT ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–6769. MOODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 90–6803. CROSSFIELD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 258, 904 F. 2d 78.

No. 90–6849. SAHHAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 1197.

No. 90–7043. FORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90–7051. LJACHIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–7090. WEATHERFORD *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–7101. LUCARELLI *v.* SINICROPI ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7103. WATTS *v.* WILDER, GOVERNOR OF VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–7105. STEVENS ET AL. *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–7107. READ ET UX. *v.* DUCK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–7108. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–7112. LASKARIS *v.* MORGAN, ACTING SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7113. BROOKS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 835.

No. 90–7118. THOMAS *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–7121. SPICY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 90–7127. ENGLAND *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 90–7136. FORD *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 916 F. 2d 457.

No. 90–7137. PACULA *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 90–7139. SCOTT *v.* DAHLBERG, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 713.

No. 90–7141. SILVERBRAND *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 220 Cal. App. 3d 1621, 270 Cal. Rptr. 261.

No. 90–7143. WILSON *v.* CLARKE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 90–7145. BETTISTEA *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 181 Mich. App. 194, 448 N. W. 2d 781.

No. 90–7146. CHANDLER *v.* CHANDLER ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 923 F. 2d 869.

No. 90–7153. SHEMONSKY *v.* CAMDEN COUNTY PROBATION. C. A. 3d Cir. Certiorari denied.

No. 90–7154. SHEMONSKY *v.* OFFICE OF THRIFT SUPERVISION. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 833.

No. 90–7156. VENKATESAN *v.* WHITE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 846.

No. 90–7158. ANDREWS *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–7164. LYONS *v.* HOLMES INTERNATIONAL, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 257.

No. 90–7169. GRIMM *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Va. Certiorari denied.

No. 90–7170. ABDULRAHMAN *v.* WARNSLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–7174. HOFF *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7177. HENDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 938.

No. 90–7184. CLAYTON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7186. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–7194. SMITH *v.* CALGON CARBON CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 917 F. 2d 1338.

No. 90–7195. SAKSEK *v.* CLYMER, DEPUTY COMMISSIONER, EASTERN REGION, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7196. SASSOWER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 90–7201. BORROTO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–7202. BLAKE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 90–7205. CREEL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7206. MAHAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 90–7209. SOUTHERLAND *v.* CROCKER. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 739.

No. 90–7212. LANE *v.* SUPREME COURT OF TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 90–7213. HAMPTON *v.* DAVIES ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7223. BARELA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 90–7230. WAGNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 90–7231. ELRICH *v.* UNION DIME SAVINGS BANK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 178.

No. 90–7234. VETERE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 174.

No. 90–7250. RUSSELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 140.

No. 90–7251. STUART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 607.

No. 90–7257. CARTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 95, 566 N. E. 2d 119.

No. 90–7260. BALL *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 90–7262. SIMMONS *v.* MARSH, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–7263. CULLIVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–7265. WAYNO *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 181.

No. 90–7266. GONZALEZ-FERNANDEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–7267. SAVAGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 938.

No. 90–7270. PAYTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 738.

No. 90–7271. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–7274. MELTON *v.* UNITED STATES POSTAL SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7277. HAYES *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 139 Ill. 2d 89, 564 N. E. 2d 803.

No. 90–7278. GARCIA-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7280. ESPERIQUETA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 921 F. 2d 274.

No. 90–7285. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 734.

No. 90–7300. CORREA DE JESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 923 F. 2d 840.

No. 90–7301. CUETO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 284.

No. 90–7302. GROSS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–7307. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 1293.

No. 90–7308. THORNTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 284.

No. 90–7311. DELGADILLO *v.* BUNTING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1055.

No. 90–7313. GILLIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–7314. MCGEE *v.* REDMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 257.

No. 90–7316. GONGORA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 90–7326. PROVOST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 921 F. 2d 163.

No. 90–7328. ZUNIGA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 284.

No. 90–7329. BOWMAN *v.* HARLESTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 926.

No. 90–7335. CASAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–7341. TELESFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 928 F. 2d 398.

No. 90–7342. WHITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 853.

No. 90–7346. VASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 918 F. 2d 1129.

No. 90–7352. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 919 F. 2d 1451.

No. 90–7354. WILLIAMS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7357. COELLO-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7359. DIAZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 741.

No. 90–7363. HANCOCK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7364. KICKLIGHTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 864.

No. 90–7366. HOGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7369. CECIL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 855.

No. 90–7379. DEMPSEY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 30 Mass. App. 1102, 566 N. E. 2d 117.

No. 90–7383. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 90–7387. MICHEL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7388. HUBBARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 734.

No. 90–7391. KHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 920 F. 2d 1100.

No. 90–7402. MCQUARIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–802. KUNSTLER *v.* BRITT ET AL.;
No. 90–807. PITTS *v.* BRITT ET AL.; and
No. 90–1094. NAKELL *v.* BRITT ET AL. C. A. 4th Cir. Motions of Washington Legal Foundation et al. and North Carolina

Trial Lawyers for leave to file briefs as *amici curiae* granted. Motions of Benjamin R. Civiletti et al. and Louis Nizer et al. for leave to file briefs as *amici curiae* in No. 90–802 granted. Motion of National Council of Churches of Christ et al. for leave to file a brief as *amici curiae* in No. 90–807 granted. Certiorari denied. Reported below: 914 F. 2d 505.

No. 90–1282. AMER ET VIR *v.* DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. Mich. Motion of respondent minor children for leave to proceed *in forma pauperis* without an affidavit of indigency granted. Certiorari denied.

No. 90–1293. SCROGGY, WARDEN *v.* KORDENBROCK. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 919 F. 2d 1091.

No. 90–6614. RODDEN *v.* MISSOURI. Sup. Ct. Mo.; and

No. 90–7116. ROBINS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 90–6614, 795 S. W. 2d 393; No. 90–7116, 106 Nev. 611, 798 P. 2d 558.

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 certiorari and vacate the death sentences in these cases.

No. 90–7080. HUMMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 916 F. 2d 186.

Rehearing Denied

No. 90–901. ALEXANDER *v.* EVANS & DIXON LAW FIRM ET AL., 498 U. S. 1086;

No. 90–1057. MCINTIRE *v.* MINNESOTA ET AL., 498 U. S. 1090;

No. 90–1085. GIUFFRIDA *v.* UNITED STATES, 498 U. S. 1090;

No. 90–1103. BEAUCOUDRAY ET VIR, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, KELTY *v.* GREEN ET AL., 498 U. S. 1090;

No. 90–6012. DOLPHIN *v.* PHIPPS ET AL., 498 U. S. 1031;

No. 90–6048. WARE *v.* MISSOURI, 498 U. S. 1092;

No. 90–6120. MARYLAND *v.* HUFFMAN, WARDEN, ET AL., 498 U. S. 1093;

No. 90–6127. TAYLOR *v.* T. K. INTERNATIONAL, INC., ET AL., 498 U. S. 1033;

No. 90–6128. WORD *v.* UNITED STATES, 498 U. S. 1121;

No. 90–6266. MARSHALL *v.* CALIFORNIA, 498 U. S. 1110;

No. 90–6515. STEVENSON *v.* MARYLAND, 498 U. S. 1098;

No. 90–6544. PETERSON *v.* NORTH CAROLINA PAROLE COMMISSION ET AL., 498 U. S. 1100;

No. 90–6593. COWART *v.* TEXAS, 498 U. S. 1102;

No. 90–6605. MACKEY *v.* MICHIGAN ET AL., 498 U. S. 1102;

No. 90–6634. IN RE KLEINSCHMIDT, 498 U. S. 1081;

No. 90–6663. RAMIREZ *v.* CALIFORNIA, 498 U. S. 1110;

No. 90–6668. ROBINSON *v.* ARIZONA, 498 U. S. 1110;

No. 90–6686. HAWKINS *v.* COLUMBIA FIRST FEDERAL SAVINGS & LOAN ASSN., 498 U. S. 1105;

No. 90–6711. LANDRUM *v.* OHIO, 498 U. S. 1127;

No. 90–6722. BYRNE *v.* UNITED STATES, 498 U. S. 1106;

No. 90–6724. TURNER *v.* FALK, DIRECTOR, HAWAII DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 909;

No. 90–6765. BROWN *v.* KOEHLER, *ante*, p. 909;

No. 90–6801. ARIGBEDE *v.* UNITED STATES, 498 U. S. 1124;

No. 90–6884. CLEMONS *v.* ARVONIO, 498 U. S. 1125;

No. 90–6944. FULLER *v.* WARDEN, MARYLAND PENITENTIARY, *ante*, p. 928; and

No. 90–7036. WELKY *v.* PRELESNIK, WARDEN, *ante*, p. 912. Petitions for rehearing denied.

APRIL 22, 1991

Certiorari Granted—Vacated and Remanded

No. 88–7301. GORMAN *v.* MARYLAND. Ct. App. Md. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Powers* v. *Ohio*, *ante*, p. 400. Reported below: 315 Md. 402, 554 A. 2d 1203.

No. 89–6271. BUI *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Powers* v. *Ohio*, *ante*, p. 400. Reported below: 551 So. 2d 1125.

No. 90–213. LaRaia *v.* Pennsylvania. Super. Ct. Pa. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Powers* v. *Ohio*, *ante*, p. 400. Reported below: 387 Pa. Super. 649, 559 A. 2d 963.

No. 90–904. Miami Herald Publishing Co. et al. *v.* Department of Revenue et al. Sup. Ct. Fla. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Leathers* v. *Medlock*, *ante*, p. 439. Reported below: 565 So. 2d 1304.

No. 90–1222. Carnival Cruise Lines, Inc. *v.* Superior Court of California, County of Los Angeles (Williams et al., Real Parties in Interest). Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carnival Cruise Lines, Inc.* v. *Shute*, *ante*, p. 585. Reported below: 222 Cal. App. 3d 1548, 272 Cal. Rptr. 515.

No. 90–1369. AMCA International Finance Co. et al. *v.* Hilgedick et al. Ct. App. Cal., 1st App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, *ante*, p. 1.

No. 90–1371. Stephenson *v.* McLean Contracting Co., Inc. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337 (1991). Reported below: 919 F. 2d 139.

No. 90–5491. Congdon *v.* Georgia. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Powers* v. *Ohio*, *ante*, p. 400. Reported below: 260 Ga. 173, 391 S. E. 2d 402.

Miscellaneous Orders

No. A–751. Georgiou *v.* Gauthier. Sup. Ct. Ill. Application for stay, addressed to Justice Blackmun and referred to the Court, denied.

No. A–771. Joubert *v.* McKernan, Governor of Maine, et al. Application for stay of mandate of the Supreme Judicial Court of Maine, addressed to Justice Marshall and referred to the Court, denied.

No. D–964. IN RE DISBARMENT OF LEVINE. Disbarment entered. [For earlier order herein, see 498 U. S. 1044.]

No. D–968. IN RE DISBARMENT OF CANNON. Disbarment entered. [For earlier order herein, see 498 U. S. 1065.]

No. D–995. IN RE DISBARMENT OF TUCKER. It is ordered that James Russell Tucker, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–996. IN RE DISBARMENT OF BERGMANN. It is ordered that Glenn Arnold Bergmann, of Denver, Colo., 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. 90–456. REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* DELANEY ET AL., 498 U. S. 998. Motion of respondents for attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit.

No. 90–516. KAMEN *v.* KEMPER FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, 498 U. S. 997.] Motion of respondent Kemper Financial Services, Inc., for leave to file a supplemental brief after argument granted.

No. 90–681. HAFER *v.* MELO ET AL. C. A. 3d Cir. [Certiorari granted, 498 U. S. 1118.] Motion of National Association of Counties et al. for leave to file a brief as *amici curiae* granted.

No. 90–1167. BOARD OF PUBLIC EDUCATION AND ORPHANAGE FOR BIBB COUNTY ET AL. *v.* LUCAS ET AL. C. A. 11th Cir.; and

No. 90–1173. PUBLIC SERVICE COMPANY OF COLORADO ET AL. *v.* THOMPSON. Sup. Ct. Colo. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–6297. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 918.] Motion for appointment of counsel granted, and it is ordered that Kenneth H. Hanson, Esq., of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 90–6669. ZINK *v.* CALIFORNIA STATE BOARD OF EQUALIZATION. Ct. App. Cal., 2d App. Dist. Motion of petitioner for reconsideration of denial of motion for leave to proceed *in forma pauperis* [*ante*, p. 903] denied.

No. 90–7536. IN RE ADAMS. Petition for writ of habeas corpus denied.

No. 90–6890. IN RE LOPEZ; and
No. 90–7128. IN RE BROWN. Petitions for writs of mandamus denied.

No. 90–7117. IN RE SILVERBURG. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 90–1156. NEW ORLEANS PUBLIC SERVICE INC. *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 911 F. 2d 993.

No. 90–727. HOLMES *v.* SECURITIES INVESTOR PROTECTION CORPORATION ET AL. C. A. 9th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 908 F. 2d 1461.

No. 90–1124. JACOBSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 916 F. 2d 467.

No. 90–6861. MCCARTHY *v.* MADIGAN ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 914 F. 2d 1411.

Certiorari Denied

No. 89–1927. UNITED STATES *v.* RESOLUTION TRUST CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 593.

No. 89–1928. COMMISSIONER OF INTERNAL REVENUE *v.* SAN ANTONIO SAVINGS ASSN. ET AL. (RESOLUTION TRUST CORPORATION, RECEIVER). C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 577.

No. 89–1987. COMMISSIONER OF INTERNAL REVENUE *v.* FEDERAL NATIONAL MORTGAGE ASSN. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 53, 896 F. 2d 580.

No. 89–7588. KAMEKONA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–582. BENTON, BENTON & BENTON *v.* LOUISIANA PUBLIC FACILITIES AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 198.

No. 90–726. MITCHELL'S FORMAL WEAR, INC. *v.* KENTUCKY OAKS MALL CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 3d 73, 559 N. E. 2d 477.

No. 90–829. CITY OF FAITH MEDICAL AND RESEARCH CENTER *v.* CREECH. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 75.

No. 90–871. CONNECTICUT ET AL. *v.* MASHANTUCKET PEQUOT TRIBE. C. A. 2d Cir. Certiorari denied. Reported below: 913 F. 2d 1024.

No. 90–1011. NEVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 470.

No. 90–1055. BORUFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 111.

No. 90–1086. CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1540.

No. 90–1174. STOSSIER *v.* STOSSIER. Ct. App. Va. Certiorari denied.

No. 90–1213. MCMAHON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* GRIMESY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 876 F. 2d 738.

No. 90–1215. HEINEMEYER *v.* O'DONNELL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–1218. BAILEY ET AL. *v.* MARTIN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied.

No. 90–1229. ENVIRONMENTAL WASTE CONTROL, INC., DBA FOUR COUNTY LANDFILL, ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 327.

No. 90–1273. TITAN CAPITAL CORP. *v.* HOLLINGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1564.

No. 90–1351. JUDICE ET UX. *v.* PARICH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 906.

No. 90–1353. SWEPTSON ET AL. *v.* SNELL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 920 F. 2d 673.

No. 90–1354. E. W. SCRIPPS CO. ET AL. *v.* BALL. Sup. Ct. Ky. Certiorari denied. Reported below: 801 S. W. 2d 684.

No. 90–1359. GOODACRE ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 166 App. Div. 2d 264, 560 N. Y. S. 2d 639.

No. 90–1366. WALLACE INTERNATIONAL SILVERSMITHS, INC. *v.* GODINGER SILVER ART CO., INC. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 76.

No. 90–1367. KAISER CEMENT CORP. *v.* LAKE ASBESTOS OF QUEBEC, LTD., ET AL.;

No. 90–1368. W. R. GRACE & CO. ET AL. *v.* BARNWELL SCHOOL DISTRICT NO. 45 ET AL.; and

No. 90–1378. UNITED STATES GYPSUM CO. ET AL. *v.* BARNWELL SCHOOL DISTRICT NO. 45 ET AL.; and UNITED STATES GYPSUM CO. ET AL. *v.* SCHOOL DISTRICT OF LANCASTER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: No. 90–1367, 921 F. 2d 1330; No. 90–1368, 921 F. 2d 1338; No. 90–1378, 921 F. 2d 1310 (first case) and 1330 (second case).

No. 90–1373. CITY OF ALBUQUERQUE ET AL. *v.* RIGGS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 916 F. 2d 582.

No. 90–1376. ST. JOHN'S HOSPITAL ET AL. *v.* HENRY, BY HER MOTHER AND NEXT FRIEND, HENRY. Sup. Ct. Ill. Certiorari denied. Reported below: 138 Ill. 2d 533, 563 N. E. 2d 410.

No. 90–1377. HALVORSEN *v.* HALVORSEN. Sup. Ct. Wash. Certiorari denied.

No. 90–1381. FINNEGAN *v.* CAMPEAU CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 824.

No. 90–1387. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES AND CANADA ET AL. *v.* ST. SAVA MISSION CORP. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 223 Cal. App. 3d 1354, 273 Cal. Rptr. 340.

No. 90–1404. SCOTT *v.* ESTATE OF BARNETT ET AL. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 90–1411. BIBBS ET AL. *v.* MATANUSKA-SUSITNA BOROUGH, INC., ET AL. Sup. Ct. Alaska. Certiorari denied.

No. 90–1452. LEAR SIEGLER, INC. *v.* KIRBY. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–1455. CITY OF BRIDGE CITY, TEXAS *v.* CITY OF PORT ARTHUR, TEXAS, ET AL. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 792 S. W. 2d 217.

No. 90–1459. WRENN *v.* SECRETARY, DEPARTMENT OF VETERANS AFFAIRS, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 1073.

No. 90–1481. SANCHEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 917 F. 2d 607.

No. 90–1495. CAMERON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1489 and 1490.

No. 90–5987. CARTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6471. VILLEGAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 623.

No. 90–6508. TORRES-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1541.

No. 90–6559. AUSTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 363.

No. 90–6562. FEBLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 727.

No. 90–6609. CRUZ-ROSARIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 914 F. 2d 20.

No. 90–6610. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1355.

No. 90–6705. SCOTT *v.* JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1188.

No. 90–6756. SCEIFERS *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–6806. KOVANKIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1469.

No. 90–6825. PAREZ *v.* GENERAL ATOMICS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 280.

No. 90–6839. LASKARIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 525 Pa. 663, 583 A. 2d 792.

No. 90–6896. JV–108162 *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 90–6899. WALKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6901. SMITH *v.* UNITED STATES; and
No. 90–7013. KELLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 628.

No. 90–6907. CARTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1524.

No. 90–6984. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 720.

No. 90–7048. SANCHEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 558.

No. 90–7065. TILLMAN *v.* SHARP, CHIEF JUDGE, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 922 F. 2d 843.

No. 90–7120. POPE *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 923 F. 2d 870.

No. 90–7140. SILVERBURG *v.* CORDERY ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–7152. PINTO VELASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 175.

No. 90–7214. JORDAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 622.

No. 90–7219. WILLIAMS *v.* WEST VIRGINIA. Cir. Ct. Greenbrier County, W. Va. Certiorari denied.

No. 90–7232. DEAN *v.* KAISER, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7233. FLEMING *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 90–7243. BETTS *v.* ALLIED CEMENTING CO., INC., ET AL.; and BETTS *v.* AGRI TECH SERVICES, INC. C. A. 10th Cir. Certiorari denied.

No. 90–7245. WILLIAMS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 139 Ill. 2d 1, 563 N. E. 2d 431.

No. 90–7248. OLIM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 90–7249. COOPER *v.* HESS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 568.

No. 90–7252. TERROVONA *v.* KINCHELOE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1176.

No. 90–7253. SERNA ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 196 Ill. App. 3d 1103, 582 N. E. 2d 772.

No. 90–7254. KUKES *v.* RAMSEY ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–7256. SCHELTZER *v.* WORKERS' COMPENSATION BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 90–7268. CORRELL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–7281. KINNELL *v.* MILLER, CHIEF JUSTICE, SUPREME COURT OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7292. CUMBER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–7330. BROWN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–7333. THAKKAR *v.* DEBEVOISE. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 420.

No. 90–7349. SCOTT *v.* FRANK, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 189.

No. 90–7355. ZERVAS *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 379, 923 F. 2d 202.

No. 90–7361. HARRISON *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 135.

No. 90–7376. MIERES-BORGES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 652.

No. 90–7380. DIGREGORIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–7390. MYERS *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 927.

No. 90–7401. FRYE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 934.

No. 90–7406. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 450.

No. 90–7412. CATCHINGS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 777.

No. 90–7415. CURTIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 281.

No. 90–7417. NG WAH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 245, 920 F. 2d 1039.

No. 90–7420. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–7423. MOSBY *v.* MATTHEWS. C. A. 8th Cir. Certiorari denied.

No. 90–7433. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 12.

No. 90–7434. TATE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 282.

No. 90–7437. BASCARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 830.

No. 90–7445. FRYAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 252.

No. 90–7448. EVANS *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 925 F. 2d 1468.

No. 90–7451. AZAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 732.

No. 90–7454. NELSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 311.

No. 90–7455. KELLY *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 23 Conn. App. 160, 580 A. 2d 520.

No. 90–7459. OCHOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 284.

No. 90–7466. WOLLMAN ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–7468. SAVINOVICH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 147.

No. 90–7475. BUNN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 863.

No. 90–7479. RUDDOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 834.

No. 90–7481. WEBBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1472.

No. 90–7482. ROGAT ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 924 F. 2d 983.

No. 90–7487. SNEAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 733.

No. 90–7492. ESTUPINAN-PAREDES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 979.

No. 90–7505. TOPPI, AKA FISKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 11.

No. 90–7511. GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 918 F. 2d 1129.

No. 90–7514. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 922 F. 2d 578.

No. 90–7521. HENDERSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 928 F. 2d 397.

No. 90–7533. SHEPARD *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1465.

No. 88–1037. ARIZONA *v.* NASTRO, JUDGE, SUPERIOR COURT OF ARIZONA, COUNTY OF MARICOPA. Sup. Ct. Ariz. Motion of respondent Elden Gardner for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 157 Ariz. 541, 760 P. 2d 541.

No. 88–6833. MOON *v.* GEORGIA. Sup. Ct. Ga.;

No. 90–7093. MOORE *v.* CALIFORNIA. Sup. Ct. Cal.;

No. 90–7155. BASSETTE *v.* THOMPSON, WARDEN. C. A. 4th Cir.; and

No. 90–7411. COLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 88–6833, 258 Ga. 748, 375 S. E. 2d 442; No. 90–7155, 915 F. 2d 932; No. 90–7411, 795 S. W. 2d 207.

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 certiorari and vacate the death sentences in these cases.

No. 90–273. COMMISSIONER OF REVENUE OF TENNESSEE *v.* NEWSWEEK, INC.; and COMMISSIONER OF REVENUE OF TENNESSEE *v.* SOUTHERN LIVING, INC., ET AL. Sup. Ct. Tenn. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 789 S. W. 2d 247 (first case) and 251 (second case).

No. 90–1118. HEARST CORP. *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE. Sup. Ct. Iowa. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 461 N. W. 2d 295.

No. 90–1192. CITY OF LOCKPORT, NEW YORK, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 916 F. 2d 890.

No. 90–1255. NUTRASWEET CO. *v.* STADT CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 917 F. 2d 1024.

No. 90–1226. HOPE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 906 F. 2d 254.

No. 90–6595. SEIDEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 914 F. 2d 1493.

No. 90–6829. MELENDEZ *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari.

No. 90–1338. GULF STATES UTILITIES CO. *v.* COALITION OF CITIES FOR AFFORDABLE UTILITY RATES ET AL. Sup. Ct. Tex. Motion of Edison Electric Institute for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 798 S. W. 2d 560.

No. 90–1398. XEROX CORP. *v.* TOLLIVER ET AL. C. A. 2d Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 918 F. 2d 1052.

No. 90–1405. ALABAMA *v.* HARRELL. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 571 So. 2d 1269.

No. 90–1425. TEXAS *v.* REEVES. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 806 S. W. 2d 540.

Rehearing Denied

No. 90–787. FARR *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL., 498 U. S. 1119;

No. 90–1040. PENA ET AL. *v.* TEXAS, 498 U. S. 1120;

No. 90–1178. OYOLA *v.* UNITED STATES, 498 U. S. 1121;

No. 90–6445. SILAGY *v.* PETERS, WARDEN, 498 U. S. 1110;

No. 90–6578. WASHINGTON *v.* ARIZONA, 498 U. S. 1127;

No. 90–6620. DAY *v.* GAF CORP. ET AL., *ante*, p. 924;

No. 90–6682. THOMAS *v.* ILLINOIS, 498 U. S. 1127;

No. 90–6723. SWEATT *v.* NEWS WORLD COMMUNICATIONS, INC., 498 U. S. 1106;

No. 90–6728. DIXON *v.* DUCKWORTH, WARDEN, *ante*, p. 909;

No. 90–6742. MACKEY *v.* MACKEY, *ante*, p. 909;

No. 90–6791. PETERSON *v.* GRANNIS ET AL., *ante*, p. 925;

No. 90–6848. DAY *v.* BARKETT, JUSTICE, FLORIDA SUPREME COURT, ET AL., *ante*, p. 926;

No. 90–6872. TAMAYO-CARIBALLO *v.* UNITED STATES, 498 U. S. 1125;

No. 90–6877. TILLMAN *v.* DUCKWORTH ET AL., *ante*, p. 927;

No. 90–6891. IN RE MASON, *ante*, p. 918;

No. 90–6909. NORRIS *v.* FEDERAL BUREAU OF INVESTIGATION, *ante*, p. 910; and

No. 90–6936. METOYER *v.* KAISER, WARDEN, ET AL., *ante*, p. 928. Petitions for rehearing denied.

No. 87–746. MICHAEL H. ET AL. *v.* GERALD D., 491 U. S. 110 and 492 U. S. 937. Motion of appellants for leave to file second petition for rehearing denied. JUSTICE SCALIA and JUSTICE SOUTER took no part in the consideration or decision of this motion.

APRIL 23, 1991

Certiorari Denied

No. 90–7785 (A–799). HARICH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Applica-

tion for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him 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.

No. 90–7789 (A–801). HARICH *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 573 So. 2d 303.

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.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 985 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

COLE *v.* TEXAS

ON APPLICATION FOR STAY OF EXECUTION OF SENTENCE OF DEATH

No. A–704 (90–7411). Decided March 18, 1991

JUSTICE SCALIA will, in this and every capital case on direct review, grant an application for a stay of execution pending disposition of a timely petition for writ of certiorari.

JUSTICE SCALIA, Circuit Justice.

I have before me an application for a stay of execution pending disposition of a petition for writ of certiorari to the Court of Criminal Appeals of Texas. The petitioner seeks direct review of the judgment of the Texas courts affirming his death sentence.

I will in this case, and in every capital case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari. While I will not extend the time for filing a petition beyond an established execution date, see *Madden* v. *Texas*, 498 U. S. 1301 (1991) (SCALIA, J., in chambers), neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.

It is so ordered.

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