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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1994

MARCH 1 THROUGH MAY 25, 1995

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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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.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, 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 September 30, 1994, 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, Ruth Bader Ginsburg, 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, Clarence Thomas, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Stephen Breyer, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

September 30, 1994.

(For next previous allotment, and modifications, see 502 U. S., p. vi, 509 U. S., p. v, and 512 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1994

ARIZONA *v.* EVANS

CERTIORARI TO THE SUPREME COURT OF ARIZONA

No. 93–1660. Argued December 7, 1994—Decided March 1, 1995

Respondent was arrested by Phoenix police during a routine traffic stop when a patrol car's computer indicated that there was an outstanding misdemeanor warrant for his arrest. A subsequent search of his car revealed a bag of marijuana, and he was charged with possession. Respondent moved to suppress the marijuana as the fruit of an unlawful arrest, since the misdemeanor warrant had been quashed before his arrest. The trial court granted the motion, but the Court of Appeals reversed on the ground that the exclusionary rule's purpose would not be served by excluding evidence obtained because of an error by employees not directly associated with the arresting officers or their police department. In reversing, the Arizona Supreme Court rejected the distinction between clerical errors committed by law enforcement personnel and similar mistakes by court employees and predicted that the exclusionary rule's application would serve to improve the efficiency of criminal justice system recordkeepers.

Held:

1. This Court has jurisdiction to review the State Supreme Court's decision. Under *Michigan* v. *Long,* 463 U. S. 1032, when a state-court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state-law ground is not clear from the opinion's face, this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. This standard for determining whether a

state-court decision rests upon an adequate and independent state ground was adopted (1) to obviate the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to this Court's satisfaction and (2) to provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference and yet preserve the federal law's integrity. *Michigan* properly serves its purpose and should not be disturbed. State courts are free both to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution and to serve as experimental laboratories. However, in cases where they interpret the United States Constitution, they are not free from the final authority of this Court. In this case, the State Supreme Court based its decision squarely upon its interpretation of federal law when it discussed the appropriateness of applying the exclusionary rule, and it offered no plain statement that its references to federal law were being used only for the purpose of guidance and did not compel the result reached. Pp. 6–10.

2. The exclusionary rule does not require suppression of evidence seized in violation of the Fourth Amendment where the erroneous information resulted from clerical errors of court employees. The exclusionary rule is a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through its deterrent effect. However, the issue of exclusion is separate from whether the Amendment has been violated. The Amendment does not expressly preclude the use of evidence obtained in violation of its commands, and exclusion is appropriate only where the rule's remedial objectives are thought most efficaciously served. The same framework that this Court used in *United States* v. *Leon*, 468 U. S. 897, to determine that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers responsible for issuing search warrants applies in this case. The exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. See *id.*, at 916. In addition, respondent offers no evidence that court employees are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See *ibid.* In fact, the Justice Court Clerk testified that this type of error occurred only once every three or four years. Finally, there is no basis for believing that application of the exclusionary rule will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Since they are not adjuncts to the law enforcement team engaged in ferreting out crime, they have no stake in the outcome of particular prosecutions. Application of the exclusionary rule also could not

be expected to alter an arresting officer's behavior, since there is no indication that the officer here was not acting reasonably when he relied upon the computer record. Pp. 10–16.

177 Ariz. 201, 866 P. 2d 869, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which SOUTER and BREYER, JJ., joined, *post*, p. 16. SOUTER, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 18. STEVENS, J., filed a dissenting opinion, *post*, p. 18. GINSBURG, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 23.

Gerald R. Grant argued the cause and filed briefs for petitioner.

Carol A. Carrigan argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether evidence seized in violation of the Fourth Amendment by an officer who

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Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro;* and for the National Association of Criminal Defense Lawyers by *Ephraim Margolin* and *Barry P. Helft*.

acted in reliance on a police record indicating the existence of an outstanding arrest warrant—a record that is later determined to be erroneous—must be suppressed by virtue of the exclusionary rule regardless of the source of the error. The Supreme Court of Arizona held that the exclusionary rule required suppression of evidence even if the erroneous information resulted from an error committed by an employee of the office of the Clerk of Court. We disagree.

In January 1991, Phoenix police officer Bryan Sargent observed respondent Isaac Evans driving the wrong way on a one-way street in front of the police station. The officer stopped respondent and asked to see his driver's license. After respondent told him that his license had been suspended, the officer entered respondent's name into a computer data terminal located in his patrol car. The computer inquiry confirmed that respondent's license had been suspended and also indicated that there was an outstanding misdemeanor warrant for his arrest. Based upon the outstanding warrant, Officer Sargent placed respondent under arrest. While being handcuffed, respondent dropped a hand-rolled cigarette that the officers determined smelled of marijuana. Officers proceeded to search his car and discovered a bag of marijuana under the passenger's seat.

The State charged respondent with possession of marijuana. When the police notified the Justice Court that they had arrested him, the Justice Court discovered that the arrest warrant previously had been quashed and so advised the police. Respondent argued that because his arrest was based on a warrant that had been quashed 17 days prior to his arrest, the marijuana seized incident to the arrest should be suppressed as the fruit of an unlawful arrest. Respondent also argued that "[t]he 'good faith' exception to the exclusionary rule [was] inapplicable . . . because it was police error, not judicial error, which caused the invalid arrest." App. 5.

At the suppression hearing, the Chief Clerk of the Justice Court testified that a Justice of the Peace had issued the

arrest warrant on December 13, 1990, because respondent had failed to appear to answer for several traffic violations. On December 19, 1990, respondent appeared before a *pro tem* Justice of the Peace who entered a notation in respondent's file to "quash warrant." *Id.*, at 13.

The Chief Clerk also testified regarding the standard court procedure for quashing a warrant. Under that procedure a justice court clerk calls and informs the warrant section of the Sheriff's Office when a warrant has been quashed. The Sheriff's Office then removes the warrant from its computer records. After calling the Sheriff's Office, the clerk makes a note in the individual's file indicating the clerk who made the phone call and the person at the Sheriff's Office to whom the clerk spoke. The Chief Clerk testified that there was no indication in respondent's file that a clerk had called and notified the Sheriff's Office that his arrest warrant had been quashed. A records clerk from the Sheriff's Office also testified that the Sheriff's Office had no record of a telephone call informing it that respondent's arrest warrant had been quashed. *Id.*, at 42–43.

At the close of testimony, respondent argued that the evidence obtained as a result of the arrest should be suppressed because "the purposes of the exclusionary rule would be served here by making the clerks for the court, or the clerk for the Sheriff's office, whoever is responsible for this mistake, to be more careful about making sure that warrants are removed from the records." *Id.*, at 47. The trial court granted the motion to suppress because it concluded that the State had been at fault for failing to quash the warrant. Presumably because it could find no "distinction between State action, whether it happens to be the police department or not," *id.*, at 52, the trial court made no factual finding as to whether the Justice Court or Sheriff's Office was responsible for the continued presence of the quashed warrant in the police records.

A divided panel of the Arizona Court of Appeals reversed because it "believe[d] that the exclusionary rule [was] not intended to deter justice court employees or Sheriff's Office employees who are not directly associated with the arresting officers or the arresting officers' police department." 172 Ariz. 314, 317, 836 P. 2d 1024, 1027 (1992). Therefore, it concluded, "the purpose of the exclusionary rule would not be served by excluding the evidence obtained in this case." *Ibid.*

The Arizona Supreme Court reversed. 177 Ariz. 201, 866 P. 2d 869 (1994). The court rejected the "distinction drawn by the court of appeals . . . between clerical errors committed by law enforcement personnel and similar mistakes by court employees." *Id.*, at 203, 866 P. 2d, at 871. The court predicted that application of the exclusionary rule would "hopefully serve to improve the efficiency of those who keep records in our criminal justice system." *Id.*, at 204, 866 P. 2d, at 872. Finally, the court concluded that "[e]ven assuming that deterrence is the principal reason for application of the exclusionary rule, we disagree with the court of appeals that such a purpose would not be served where carelessness by a court clerk results in an unlawful arrest." *Ibid.*

We granted certiorari to determine whether the exclusionary rule requires suppression of evidence seized incident to an arrest resulting from an inaccurate computer record, regardless of whether police personnel or court personnel were responsible for the record's continued presence in the police computer. 511 U. S. 1126 (1994).[1] We now reverse.

We first must consider whether we have jurisdiction to review the Arizona Supreme Court's decision. Respondent argues that we lack jurisdiction under 28 U. S. C. § 1257 because the Arizona Supreme Court never passed upon the

[1] Petitioner has conceded that respondent's arrest violated the Fourth Amendment. Brief for Petitioner 10. We decline to review that determination. Cf. *United States* v. *Leon*, 468 U. S. 897, 905 (1984); *Illinois* v. *Krull*, 480 U. S. 340, 357, n. 13 (1987).

Fourth Amendment issue and instead based its decision on the Arizona good-faith statute, Ariz. Rev. Stat. Ann. § 13–3925 (1993), an adequate and independent state ground. In the alternative, respondent asks that we remand to the Arizona Supreme Court for clarification.

In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we adopted a standard for determining whether a state-court decision rested upon an adequate and independent state ground. When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040–1041. We adopted this practice, in part, to obviate the "unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court." *Id.*, at 1041. We also concluded that this approach would "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law." *Ibid.*

JUSTICE GINSBURG would overrule *Michigan* v. *Long*, *supra*, because she believes that the rule of that case "impedes the States' ability to serve as laboratories for testing solutions to novel legal problems." *Post*, at 24.[2] The opin-

[2] JUSTICE GINSBURG certainly is correct when she notes that "'[s]ince *Long*, we repeatedly have followed [its] "plain statement" requirement.'" *Post*, at 33 (quoting *Harris* v. *Reed*, 489 U. S. 255, 261, n. 7 (1989) (opinion of Blackmun, J.)); see also *Illinois* v. *Rodriguez*, 497 U. S. 177, 182 (1990) (opinion of SCALIA, J.); *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (opinion of Brennan, J.); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987) (opinion of STEVENS, J.); *Caldwell* v. *Mississippi*, 472 U. S. 320, 327–328 (1985) (opinion of Marshall, J.); *California* v. *Carney*, 471 U. S. 386, 389, n. 1 (1985) (opinion of Burger, C. J.); *Ohio* v. *Johnson*, 467 U. S. 493, 497–498, n. 7 (1984) (opinion of REHNQUIST, J.); *Oliver* v. *United States*, 466 U. S. 170, 175–176, n. 5 (1984) (opinion of Powell, J.); cf. *Coleman*

ion in *Long* describes the 60-year history of the Court's differing approaches to the determination whether the judgment of the highest court of a State rested on federal or nonfederal grounds. 463 U. S., at 1038–1040. When we were in doubt, on some occasions we dismissed the writ of certiorari; on other occasions we vacated the judgment of the state court and remanded so that it might clarify the basis for its decision. See *ibid.* The latter approach did not always achieve the desired result and burdened the state courts with additional work. *Ibid.*

We believe that *Michigan* v. *Long* properly serves its purpose and should not be disturbed. Under it, state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution. They also are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in his dissenting opinion in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (urging that the Court not impose federal constitutional restraints on the efforts of a State to "serve as a laboratory"). Under our decision today, the State of Arizona remains free to seek whatever solutions it chooses to problems of law enforcement posed by the advent of computerization.[3] Indeed, it is freer to do so because it is disabused of its erroneous view of what the United States Constitution requires.

State courts, in appropriate cases, are not merely free to—they are bound to—interpret the United States Constitution. In doing so, they are *not* free from the final authority of this

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v. *Thompson*, 501 U. S. 722, 740 (1991) (opinion of O'Connor, J.) (declining to expand the *Long* and *Harris* presumption to instances "where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law").

[3] Justice Ginsburg acknowledges as much when she states that since *Long*, "state courts, on remand, have reinstated their prior judgments after clarifying their reliance on state grounds." *Post*, at 32 (citing statistics).

Court. This principle was enunciated in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), and presumably JUSTICE GINSBURG does not quarrel with it.[4] In *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940), we recognized that our authority as final arbiter of the United States Constitution could be eroded by a lack of clarity in state-court decisions.

> "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. . . . For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states." *Id.*, at 557.

We therefore adhere to the standard adopted in *Michigan* v. *Long*, *supra*.

Applying that standard here, we conclude that we have jurisdiction. In reversing the Court of Appeals, the Arizona Supreme Court stated that "[w]hile it may be inappropriate to invoke the exclusionary rule where a magistrate has issued a facially valid warrant (a discretionary judicial function) based on an erroneous evaluation of the facts, the law, or both, *Leon*, 468 U. S. 897 . . . (1984), it is useful and proper

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[4] Surely if we have jurisdiction to vacate and remand a state-court judgment for clarification, *post*, at 34, n. 7, we also must have jurisdiction to determine whether a state-court judgment is based upon an adequate and independent state ground. See *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773 (1931).

to do so where negligent record keeping (a purely clerical function) results in an unlawful arrest." 177 Ariz., at 204, 866 P. 2d, at 872. Thus, the Arizona Supreme Court's decision to suppress the evidence was based squarely upon its interpretation of federal law. See *ibid.* Nor did it offer a plain statement that its references to federal law were "being used only for the purpose of guidance, and d[id] not themselves compel the result that [it] reached." *Long*, *supra*, at 1041.

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." We have recognized, however, that the Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. See *United States* v. *Leon*, 468 U. S. 897, 906 (1984). "The wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself," *ibid.* (quoting *United States* v. *Calandra*, 414 U. S. 338, 354 (1974)), and the use of the fruits of a past unlawful search or seizure "'work[s] no new Fourth Amendment wrong,'" *Leon*, *supra*, at 906 (quoting *Calandra*, *supra*, at 354).

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983); see also *United States* v. *Havens*, 446 U. S. 620, 627–628 (1980); *Stone* v. *Powell*, 428 U. S. 465, 486–487 (1976); *Calandra*, *supra*, at 348. The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect. *Leon*, *supra*, at

906; *Calandra*, *supra*, at 348. As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served. *Leon*, *supra*, at 908; *Calandra*, *supra*, at 348. Where "the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted." *United States* v. *Janis*, 428 U. S. 433, 454 (1976).

In *Leon*, we applied these principles to the context of a police search in which the officers had acted in objectively reasonable reliance on a search warrant, issued by a neutral and detached Magistrate, that later was determined to be invalid. 468 U. S., at 905. On the basis of three factors, we determined that there was no sound reason to apply the exclusionary rule as a means of deterring misconduct on the part of judicial officers who are responsible for issuing warrants. See *Illinois* v. *Krull*, 480 U. S. 340, 348 (1987) (analyzing *Leon*, *supra*). First, we noted that the exclusionary rule was historically designed "'to deter police misconduct rather than to punish the errors of judges and magistrates.'" *Krull*, *supra*, at 348 (quoting *Leon*, *supra*, at 916). Second, there was "'no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires the application of the extreme sanction of exclusion.'" *Krull*, *supra*, at 348 (quoting *Leon*, *supra*, at 916). Third, and of greatest importance, there was no basis for believing that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate. *Krull*, *supra*, at 348.

The *Leon* Court then examined whether application of the exclusionary rule could be expected to alter the behavior of the law enforcement officers. We concluded:

> "[W]here the officer's conduct is objectively reasonable, 'excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reason-

> able officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.'" *Leon*, *supra*, at 919–920 (quoting *Stone*, *supra*, at 539–540 (White, J., dissenting)).

See also *Massachusetts* v. *Sheppard*, 468 U. S. 981, 990–991 (1984) ("[S]uppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve"). Thus, we held that the "marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Leon*, *supra*, at 922.

Respondent relies on *United States* v. *Hensley*, 469 U. S. 221 (1985), and argues that the evidence seized incident to his arrest should be suppressed because he was the victim of a Fourth Amendment violation. Brief for Respondent 10–12, 21–22. In *Hensley*, the Court determined that evidence uncovered as a result of a stop pursuant to *Terry* v. *Ohio*, 392 U. S. 1 (1968), was admissible because the officers who made the stop acted in objectively reasonable reliance on a flyer that had been issued by officers of another police department who possessed a reasonable suspicion to justify a *Terry* stop. 469 U. S., at 231. Because the *Hensley* Court determined that there had been no Fourth Amendment violation, *id.*, at 236, the Court never considered whether the seized evidence should have been excluded. *Hensley* does not contradict our earlier pronouncements that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Gates*, *supra*, at 223; see also *Stone*, *supra*, at 486–487; *Calandra*, *supra*, at 348.

Respondent also argues that *Whiteley* v. *Warden, Wyo. State Penitentiary,* 401 U. S. 560 (1971), compels exclusion of the evidence. In *Whiteley,* the Court determined that the Fourth Amendment had been violated when police officers arrested Whiteley and recovered inculpatory evidence based upon a radio report that two suspects had been involved in two robberies. *Id.,* at 568–569. Although the "police were entitled to act on the strength of the radio bulletin," the Court determined that there had been a Fourth Amendment violation because the initial complaint, upon which the arrest warrant and subsequent radio bulletin were based, was insufficient to support an independent judicial assessment of probable cause. *Id.,* at 568. The Court concluded that "an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Ibid.* Because the "arrest violated [Whiteley's] constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial. *Mapp* v. *Ohio,* 367 U. S. 643 (1961)." *Id.,* at 568–569.

Although *Whiteley* clearly retains relevance in determining whether police officers have violated the Fourth Amendment, see *Hensley, supra,* at 230–231, its precedential value regarding application of the exclusionary rule is dubious. In *Whiteley,* the Court treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation. 401 U. S., at 568–569. Subsequent case law has rejected this reflexive application of the exclusionary rule. Cf. *Illinois* v. *Krull,* 480 U. S. 340 (1987); *Sheppard, supra; United States* v. *Leon,* 468 U. S. 897 (1984); *United States* v. *Calandra,* 414 U. S. 338 (1974). These later cases have emphasized that the issue of exclusion is separate from whether the Fourth Amendment has been violated, see, *e. g., Leon, supra,* at 906, and exclusion is appropriate only if the

remedial objectives of the rule are thought most efficaciously served, see *Calandra*, *supra*, at 348.

Our approach is consistent with the dissenting Justices' position in *Krull*, our only major case since *Leon* and *Sheppard* involving the good-faith exception to the exclusionary rule. In that case, the Court found that the good-faith exception applies when an officer conducts a search in objectively reasonable reliance on the constitutionality of a statute that subsequently is declared unconstitutional. *Krull*, *supra*, at 346. Even the dissenting Justices in *Krull* agreed that *Leon* provided the proper framework for analyzing whether the exclusionary rule applied; they simply thought that "application of *Leon*'s stated rationales le[d] to a contrary result." 480 U. S., at 362 (O'CONNOR, J., dissenting). In sum, respondent does not persuade us to abandon the *Leon* framework.

Applying the reasoning of *Leon* to the facts of this case, we conclude that the decision of the Arizona Supreme Court must be reversed. The Arizona Supreme Court determined that it could not "support the distinction drawn . . . between clerical errors committed by law enforcement personnel and similar mistakes by court employees," 177 Ariz., at 203, 866 P. 2d, at 871, and that "even assuming . . . that responsibility for the error rested with the justice court, it does not follow that the exclusionary rule should be inapplicable to these facts," *ibid.*

This holding is contrary to the reasoning of *Leon*, *supra; Massachusetts* v. *Sheppard*, *supra;* and, *Krull*, *supra*. If court employees were responsible for the erroneous computer record, the exclusion of evidence at trial would not sufficiently deter future errors so as to warrant such a severe sanction. First, as we noted in *Leon*, the exclusionary rule was historically designed as a means of deterring police misconduct, not mistakes by court employees. See *Leon*, *supra*, at 916; see also *Krull*, *supra*, at 350. Second, respondent offers no evidence that court employees are in-

clined to ignore or subvert the Fourth Amendment or that lawlessness among these actors requires application of the extreme sanction of exclusion. See *Leon*, *supra*, at 916, and n. 14; see also *Krull*, *supra*, at 350–351. To the contrary, the Chief Clerk of the Justice Court testified at the suppression hearing that this type of error occurred once every three or four years. App. 37.

Finally, and most important, there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed. Because court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime, see *Johnson* v. *United States*, 333 U. S. 10, 14 (1948), they have no stake in the outcome of particular criminal prosecutions. Cf. *Leon*, *supra*, at 917; *Krull*, *supra*, at 352. The threat of exclusion of evidence could not be expected to deter such individuals from failing to inform police officials that a warrant had been quashed. Cf. *Leon*, *supra*, at 917; *Krull*, *supra*, at 352.

If it were indeed a court clerk who was responsible for the erroneous entry on the police computer, application of the exclusionary rule also could not be expected to alter the behavior of the arresting officer. As the trial court in this case stated: "I think the police officer [was] bound to arrest. I think he would [have been] derelict in his duty if he failed to arrest." App. 51. Cf. *Leon*, *supra*, at 920 (" 'Excluding the evidence can in no way affect [the officer's] future conduct unless it is to make him less willing to do his duty.' " quoting *Stone*, 428 U. S., at 540 (White, J., dissenting)). The Chief Clerk of the Justice Court testified that this type of error occurred "on[c]e every three or four years." App. 37. In fact, once the court clerks discovered the error, they immediately corrected it, *id.*, at 30, and then proceeded to search their files to make sure that no similar mistakes had occurred, *id.*, at 37. There is no indication that the arresting

officer was not acting objectively reasonably when he relied upon the police computer record. Application of the *Leon* framework supports a categorical exception to the exclusionary rule for clerical errors of court employees. See *Leon*, *supra*, at 916–922; *Sheppard*, *supra*, at 990–991.[5]

The judgment of the Supreme Court of Arizona is therefore reversed, and the case is remanded to that court for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

The evidence in this case strongly suggests that it was a court employee's departure from established recordkeeping procedures that caused the record of respondent's arrest warrant to remain in the computer system after the warrant had been quashed. Prudently, then, the Court limits itself to the question whether a court employee's departure from such established procedures is the kind of error to which the exclusionary rule should apply. The Court holds that it is not such an error, and I agree with that conclusion and join the Court's opinion. The Court's holding reaffirms that the exclusionary rule imposes significant costs on society's law enforcement interests and thus should apply only where its deterrence purposes are "most efficaciously served," *ante*, at 11.

In limiting itself to that single question, however, the Court does not hold that the court employee's mistake in this case was necessarily the *only* error that may have occurred and to which the exclusionary rule might apply. While the

[5] The Solicitor General, as *amicus curiae*, argues that an analysis similar to that we apply here to court personnel also would apply in order to determine whether the evidence should be suppressed if police personnel were responsible for the error. As the State has not made any such argument here, we agree that "[t]he record in this case . . . does not adequately present that issue for the Court's consideration." Brief for United States as *Amicus Curiae* 13. Accordingly, we decline to address that question.

police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself.* Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

This is saying nothing new. We have said the same with respect to other information sources police use, informants being an obvious example. In *Illinois* v. *Gates*, 462 U. S. 213 (1983), the Court indicated that where an informant provides information about certain criminal activities but does not specify the basis for his knowledge, a finding of probable cause based on that information will not be upheld unless the informant is "known for [his] unusual reliability." *Id.*, at 233, citing *United States* v. *Sellers*, 483 F. 2d 37, 40, n. 1 (CA5 1973) (involving informant who had provided accurate information "in more than one hundred instances in matters of investigation"); see generally 1 W. LaFave, Search and Seizure § 3.3(b) (2d ed. 1987 and Supp. 1995). Certainly the reliability of recordkeeping systems deserves no *less* scrutiny than that of informants. Of course, the comparison to informants may be instructive the opposite way as well. So long as an informant's reliability does pass constitutional muster, a finding of probable cause may not be defeated by an after-the-fact showing that the information the informant provided was mistaken. See 2 *id.*, § 3.5(d), at 21, n. 73 (citation omitted); see also 1 *id.*, § 3.2(d), at 575 ("It is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause").

In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possible. The police, of course, are entitled to enjoy the substantial advantages this technology confers. They may not, however, rely on it blindly. With the benefits of more efficient law enforce-

ment mechanisms comes the burden of corresponding constitutional responsibilities.

JUSTICE SOUTER, with whom JUSTICE BREYER joins, concurring.

In joining the Court's opinion, I share JUSTICE O'CONNOR's understanding of the narrow scope of what we hold today. To her concurrence, which I join as well, I add only that we do not answer another question that may reach us in due course, that is, how far, in dealing with fruits of computerized error, our very concept of deterrence by exclusion of evidence should extend to the government as a whole, not merely the police, on the ground that there would otherwise be no reasonable expectation of keeping the number of resulting false arrests within an acceptable minimum limit.

JUSTICE STEVENS, dissenting.

JUSTICE GINSBURG has written an important opinion explaining why the Court unwisely departed from settled law when it interpreted its own jurisdiction so expansively in *Michigan* v. *Long*, 463 U. S. 1032 (1983). I join her dissent and her conclusion that the writ of certiorari should be dismissed. Because the Court has addressed the merits, however, I add this comment on its holding.

The Court seems to assume that the Fourth Amendment—and particularly the exclusionary rule, which effectuates the Amendment's commands—has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption and interpretation identify a more majestic conception. The Amendment protects the fundamental "right of the people to be secure in their persons, houses, papers, and effects," against *all* official searches and seizures that are unreasonable. The Amendment is a constraint on the power of the sovereign, not merely on some of its agents. See *Olmstead* v. *United States*, 277 U. S. 438, 472–479 (1928) (Brandeis, J., dissenting). The remedy for its violation imposes costs on that sovereign, motivating it to train all of

its personnel to avoid future violations. See Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1400 (1983).

The exclusionary rule is not fairly characterized as an "extreme sanction," *ante*, at 11 (internal quotation marks omitted). As Justice Stewart cogently explained, the implementation of this constitutionally mandated sanction merely places the government in the same position as if it had not conducted the illegal search and seizure in the first place.[1] Given the undisputed fact in this case that the Constitution prohibited the warrantless arrest of respondent, there is nothing "extreme" about the Arizona Supreme Court's conclusion that the State should not be permitted to profit from its negligent misconduct.

Even if one accepts deterrence as the sole rationale for the exclusionary rule, the Arizona Supreme Court's decision is correct on the merits. The majority's reliance on *United States* v. *Leon*, 468 U. S. 897 (1984), is misplaced. The search in that case had been authorized by a presumptively valid warrant issued by a California Superior Court Judge. In

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[1] See Stewart, The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1392 (1983). I am fully aware of the Court's statements that the question whether the exclusionary rule should be applied is distinct from the question whether the Fourth Amendment has been violated. Indeed, the majority twice quotes the same statement from the Court's opinion in *Illinois* v. *Gates*, 462 U. S. 213, 223 (1983). See *ante*, at 10, 12. I would note that such eminent Members of this Court as Justices Holmes, Brandeis, Harlan, and Stewart have expressed the opposite view. See, *e. g.*, *Olmstead* v. *United States*, 277 U. S. 438, 470 (1928) (Holmes, J., dissenting); *id.*, at 477–479 (Brandeis, J., dissenting); *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560 (1971) (Harlan, J.); *Elkins* v. *United States*, 364 U. S. 206 (1960) (Stewart, J.); Stewart, *supra*, at 1383–1385. The majority today candidly acknowledges that Justice Harlan's opinion for the Court in *Whiteley* "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation." *Ante*, at 13.

contrast, this case involves a search pursuant to an arrest made when no warrant at all was outstanding against respondent. The holding in *Leon* rested on the majority's doubt "that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing judge or magistrate." *Id.*, at 916. The reasoning in *Leon* assumed the existence of a warrant; it was, and remains, wholly inapplicable to warrantless searches and seizures.[2]

The Fourth Amendment's Warrant Clause provides the fundamental check on official invasions of the individual's right to privacy. *E. g.*, *Harris* v. *United States*, 331 U. S. 145, 195–196 (1947) (Jackson, J., dissenting); see generally Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?, 16 Creighton L. Rev. 565, 571–579 (1983). *Leon* stands for the dubious but limited proposition that courts should not look behind the face of a warrant on which police have relied in good faith. The *Leon* Court's exemption of judges and magistrates from the deterrent ambit of the exclusionary rule rested, consistently with the emphasis on the warrant requirement, on those officials' constitutionally determined role in issuing warrants. See 468 U. S., at 915–917. Taken on its own terms, *Leon*'s logic does not extend to the time after the warrant has issued; nor does it extend to court clerks and functionaries, some of whom work in the same building with police officers and may have more regular and direct contact with police than with judges or magistrates.

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[2] As JUSTICE O'CONNOR observed in her dissent in *Illinois* v. *Krull*, 480 U. S. 340 (1987): "[T]he *Leon* Court relied explicitly on the tradition of judicial independence in concluding that, until it was presented with evidence to the contrary, there was relatively little cause for concern that judicial officers might take the opportunity presented by the good-faith exception to authorize unconstitutional searches." *Id.*, at 365. I joined that dissent, and I take exception to the majority's pronouncement that today's opinion is "consistent with" it. *Ante*, at 14.

The Phoenix Police Department was part of the chain of information that resulted in respondent's unlawful, warrantless arrest. We should reasonably presume that law enforcement officials, who stand in the best position to monitor such errors as occurred here, can influence mundane communication procedures in order to prevent those errors. That presumption comports with the notion that the exclusionary rule exists to deter future police misconduct systemically. See, *e. g., Stone* v. *Powell*, 428 U. S. 465, 492 (1976); *Dunaway* v. *New York*, 442 U. S. 200, 221 (1979) (STEVENS, J., concurring); see generally Kamisar, 16 Creighton L. Rev., at 659–662; Stewart, 83 Colum. L. Rev., at 1400. The deterrent purpose extends to law enforcement as a whole, not merely to "the arresting officer." Compare *ante*, at 15, with *Whiteley* v. *Warden, Wyo. State Penitentiary*, 401 U. S. 560, 568 (1971). Consequently, the Phoenix officers' good faith does not diminish the deterrent value of invalidating their arrest of respondent.

The Court seeks to minimize the impact of its holding on the security of the citizen by referring to the testimony of the Chief Clerk of the East Phoenix Number One Justice Court that in her "particular court" this type of error occurred "'maybe on[c]e every three or four years.'" See *ante*, at 15. Apart from the fact that the Clerk promptly contradicted herself,[3] see *post*, at 28, this is slim evidence

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[3] "Q. In your eight years as a chief clerk with the Justice of the Peace, have there been other occasions where a warrant was quashed but the police were not notified?

"A. That does happen on rare occasions.

"Q. And when you say rare occasions, about how many times in your eight years as chief clerk?

"A. In my particular court, they would be like maybe one every three or four years.

"Q. When something like this happens, is anything done by your office to correct that problem?

"A. Well, when this one happened, we searched all the files to make sure that there were no other ones in there, which there were three other ones

on which to base a conclusion that computer error poses no appreciable threat to Fourth Amendment interests. For support, the Court cites a case from 1948. See *ante*, at 15, citing *Johnson* v. *United States*, 333 U. S. 10. The Court overlooks the reality that computer technology has changed the nature of threats to citizens' privacy over the past half century. See *post*, at 26–28. What has not changed is the reality that only that fraction of Fourth Amendment violations held to have resulted in unlawful arrests is ever noted and redressed. As Justice Jackson observed: "There may be, and I am convinced that there are, many unlawful searches . . . 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." *Brinegar* v. *United States*, 338 U. S. 160, 181 (1949) (dissenting opinion). Moreover, even if errors in computer records of warrants were rare, that would merely minimize the cost of enforcing the exclusionary rule in cases like this.

While I agree with JUSTICE GINSBURG that premature adjudication of this issue is particularly unwise because we have much to learn about the consequences of computer error as well as the efficacy of other preventive measures, see *post*, at 29–30, one consequence of the Court's holding seems immediately obvious. Its most serious impact will be on the otherwise innocent citizen who is stopped for a minor traffic infraction and is wrongfully arrested based on erroneous information in a computer data base. I assume the police officer who reasonably relies on the computer information would be immune from liability in a § 1983 action. Of course, the Court has held that *respondeat superior* is unavailable as a basis for imposing liability on his or her municipality. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 663–664, n. 7 (1978). Thus, if courts are to

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on that same day that it happened. Fortunately, they weren't all arrested." App. 37.

have any power to discourage official error of this kind, it must be through application of the exclusionary rule.

The use of general warrants to search for evidence of violations of the Crown's revenue laws understandably outraged the authors of the Bill of Rights. See, *e. g.*, *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 325 (1979); *Weeks* v. *United States*, 232 U. S. 383, 389–391 (1914). "'It is a power, that places the liberty of every man in the hands of every petty officer.'" James Otis, quoted in 2 Works of John Adams 524 (C. Adams ed. 1850), quoted in turn in *Illinois* v. *Krull*, 480 U. S. 340, 363 (1987) (O'CONNOR, J., dissenting). The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as equally outrageous. In this case, of course, such an error led to the fortuitous detection of respondent's unlawful possession of marijuana, and the suppression of the fruit of the error would prevent the prosecution of his crime. That cost, however, must be weighed against the interest in protecting other, wholly innocent citizens from unwarranted indignity. In my judgment, the cost is amply offset by an appropriately "jealous regard for maintaining the integrity of individual rights." *Mapp* v. *Ohio*, 367 U. S. 643, 647 (1961). For this reason, as well as those set forth by JUSTICE GINSBURG, I respectfully dissent.

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins, dissenting.

This case portrays the increasing use of computer technology in law enforcement; it illustrates an evolving problem this Court need not, and in my judgment should not, resolve too hastily.[1] The Arizona Supreme Court relied on "the

[1] We have in many instances recognized that when frontier legal problems are presented, periods of "percolation" in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court. See, *e. g.*, *McCray* v. *New*

principles of a free society" in reaching its decision. This Court reviews and reverses the Arizona decision on the assumption that Arizona's highest court sought assiduously to apply this Court's Fourth Amendment jurisprudence. The Court thus follows the presumption announced in *Michigan* v. *Long*, 463 U. S. 1032 (1983): If it is unclear whether a state court's decision rests on state or federal law, *Long* dictates the assumption that the state court relied on federal law. On the basis of that assumption, the Court asserts jurisdiction to review the decision of the Arizona Supreme Court.

The *Long* presumption, as I see it, impedes the States' ability to serve as laboratories for testing solutions to novel legal problems. I would apply the opposite presumption and assume that Arizona's Supreme Court has ruled for its own State and people, under its own constitutional recognition of individual security against unwarranted state intrusion. Accordingly, I would dismiss the writ of certiorari.

I

Isaac Evans was arrested because a computer record erroneously identified an outstanding misdemeanor arrest warrant in his name. The Arizona Supreme Court's suppression of evidence obtained from this unlawful arrest did not rest on a close analysis of this Court's Fourth Amendment precedents. Indeed, the court found our most relevant decision, *United States* v. *Leon*, 468 U. S. 897 (1984), "not helpful." 177 Ariz. 201, 203, 866 P. 2d 869, 871 (1994). Instead, the Arizona court emphasized its comprehension of the severe curtailment of personal liberty inherent in arrest warrants.

York, 461 U. S. 961, 961–963 (1983) (STEVENS, J., respecting denial of petitions for writs of certiorari) ("My vote to deny certiorari in these cases does not reflect disagreement with JUSTICE MARSHALL's appraisal of the importance of the underlying issue . . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

Specifically, the Arizona Supreme Court saw the growing use of computerized records in law enforcement as a development presenting new dangers to individual liberty; excluding evidence seized as a result of incorrect computer data, the Arizona court anticipated, would reduce the incidence of uncorrected records:

> "The dissent laments the 'high costs' of the exclusionary rule, and suggests that its application here is 'purposeless' and provides 'no offsetting benefits.' Such an assertion ignores the fact that arrest warrants result in a denial of human liberty, and are therefore among the most important of legal documents. It is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows. Under such circumstances, the exclusionary rule is a 'cost' we cannot afford to be without." *Id.*, at 204, 866 P. 2d, at 872.

Thus, the Arizona court did not consider this case to involve simply and only a court employee's slip in failing to communicate with the police, or a police officer's oversight in failing to record information received from a court employee. That court recognized a "potential for Orwellian mischief" in the government's increasing reliance on computer technology in law enforcement. The Arizona Supreme Court concluded that *Leon*'s distinction between police conduct and judicial conduct loses force where, as here, the error derives not from a discretionary judicial function, but from inattentive recordkeeping. Application of an exclusionary rule in the circumstances Evans' case presents, the Arizona court said, "will hopefully serve to improve the efficiency of those who keep records in our criminal justice system." *Ibid.*

Invoking *Long*, this Court's majority presumes that the Arizona Supreme Court relied on federal law. *Long* in-

structs that a state-court opinion discussing both state and federal precedents shall be deemed to rely on federal law, absent a plain statement in the opinion that the decision rests on state law. 463 U. S., at 1040–1042.[2] For reasons this case illustrates, I would choose the opposite plain statement rule. I would presume, absent a plain statement to the contrary, that a state court's decision of the kind here at issue rests on an independent state-law ground.[3]

II

A

Widespread reliance on computers to store and convey information generates, along with manifold benefits, new possibilities of error, due to both computer malfunctions and operator mistakes. Most germane to this case, computerization greatly amplifies an error's effect, and correspondingly intensifies the need for prompt correction; for inaccurate data can infect not only one agency, but the many agencies that share access to the data base. The computerized data bases of the Federal Bureau of Investigation's National Crime Information Center (NCIC), to take a conspicuous example, contain

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[2] The *Long* presumption becomes operative when two conditions are met: (1) the state-court decision must "fairly appea[r] to rest primarily on federal law, or to be interwoven with the federal law"; and (2) "the adequacy and independence of any possible state law ground [must] not [be] clear from the face of the opinion." 463 U. S., at 1040–1041.

[3] I recognize, in accord with *Long* on this point, that there will be cases in which a presumption concerning exercise of the Court's jurisdiction should yield, *i. e.*, exceptional instances in which vacation of a state court's judgment and remand for clarification of the court's decision is in order. See *id.*, at 1041, n. 6 ("There may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action."); *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378, 379 (1984) *(per curiam)* (post-*Long* decision vacating state-court judgment and remanding for such further proceedings as the state court might deem appropriate to clarify the ground of its decision).

over 23 million records, identifying, among other things, persons and vehicles sought by law enforcement agencies nationwide. See Hearings before the Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Committee on Appropriations, 102d Cong., 2d Sess., pt. 2B, p. 467 (1992). NCIC information is available to approximately 71,000 federal, state, and local agencies. See Hearings before the Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Committee on Appropriations, 103d Cong., 1st Sess., pt. 2A, p. 489 (1993). Thus, any mistake entered into the NCIC spreads nationwide in an instant.

Isaac Evans' arrest exemplifies the risks associated with computerization of arrest warrants. Though his arrest was in fact warrantless—the warrant once issued having been quashed over two weeks before the episode in suit—the computer reported otherwise. Evans' case is not idiosyncratic. *Rogan* v. *Los Angeles*, 668 F. Supp. 1384 (CD Cal. 1987), similarly indicates the problem. There, the Los Angeles Police Department, in 1982, had entered into the NCIC computer an arrest warrant for a man suspected of robbery and murder. Because the suspect had been impersonating Terry Dean Rogan, the arrest warrant erroneously named Rogan. Compounding the error, the Los Angeles Police Department had failed to include a description of the suspect's physical characteristics. During the next two years, this incorrect and incomplete information caused Rogan to be arrested four times, three times at gunpoint, after stops for minor traffic infractions in Michigan and Oklahoma. See *id.*, at 1387–1389.[4] In another case of the same genre, the District Court observed:

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[4] See also *Finch* v. *Chapman*, 785 F. Supp. 1277, 1278–1279 (ND Ill. 1992) (misinformation long retained in NCIC records twice caused plaintiff's arrest and detention), affirmance order, 991 F. 2d 799 (CA7 1993).

> "Because of the inaccurate listing in the NCIC computer, defendant was a 'marked man' for the five months prior to his arrest . . . . At any time . . . a routine check by the police could well result in defendant's arrest, booking, search and detention. . . . Moreover, this could happen anywhere in the United States where law enforcement officers had access to NCIC information. Defendant was subject to being deprived of his liberty at any time and without any legal basis." *United States* v. *Mackey,* 387 F. Supp. 1121, 1124 (Nev. 1975).

In the instant case, the Court features testimony of the Chief Clerk of the Justice Court in East Phoenix to the effect that errors of the kind Evans encountered are reported only "on[c]e every three or four years." *Ante,* at 15 (citing App. 37). But the same witness also recounted that, when the error concerning Evans came to light, an immediate check revealed that three other errors of the very same kind had occurred on "that same day." See *ante,* at 21–22, and n. 3 (STEVENS, J., dissenting).

B

This Court and the Arizona Supreme Court hold diverse views on the question whether application of an exclusionary rule will reduce the incidence of erroneous computer data left without prompt correction. Observing that "court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," the Court reasons that "there is no basis for believing that application of the exclusionary rule in these circumstances will have a significant effect on court employees responsible for informing the police that a warrant has been quashed." *Ante,* at 15. In the Court's view, exclusion of evidence, even if capable of deterring police officer errors, cannot deter the

carelessness of other governmental actors.[5] Whatever federal precedents may indicate—an issue on which I voice no opinion—the Court's conclusion is not the lesson inevitably to be drawn from logic or experience.

In this electronic age, particularly with respect to record-keeping, court personnel and police officers are not neatly compartmentalized actors. Instead, they serve together to carry out the State's information-gathering objectives. Whether particular records are maintained by the police or the courts should not be dispositive where a single computer data base can answer all calls. Not only is it artificial to distinguish between court clerk and police clerk slips; in practice, it may be difficult to pinpoint whether one official, *e. g.*, a court employee, or another, *e. g.*, a police officer, caused the error to exist or to persist. Applying an exclusionary rule as the Arizona court did may well supply a powerful incentive to the State to promote the prompt updating of computer records. That was the Arizona Supreme Court's hardly unreasonable expectation. The incentive to update promptly would be diminished if court-initiated records were exempt from the rule's sway.

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[5] It has been suggested that an exclusionary rule cannot deter carelessness, but can affect only intentional or reckless misconduct. This suggestion runs counter to a premise underlying all of negligence law—that imposing liability for negligence, *i. e.*, lack of due care, creates an incentive to act with greater care.

That the mistake may have been made by a clerical worker does not alter the conclusion that application of the exclusionary rule has deterrent value. Just as the risk of *respondeat superior* liability encourages employers to supervise more closely their employees' conduct, so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems. In the words of the trial court, the mistake in Evans' case was "perhaps the negligence of the Justice Court, or the negligence of the Sheriff's office. But it is still the negligence of the State." App. 51.

C

The debate over the efficacy of an exclusionary rule reveals that deterrence is an empirical question, not a logical one. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). With that facet of our federalism in mind, this Court should select a jurisdictional presumption that encourages States to explore different means to secure respect for individual rights in modern times.

Historically, state laws were the source, and state courts the arbiters, of individual rights. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 382 (1980). The drafters of the Federal Bill of Rights looked to provisions in state constitutions as models. *Id.*, at 381. Moreover, many States that adopted constitutions after 1789 modeled their bills of rights on pre-existing state constitutions, rather than on the Federal Bill of Rights. *Ibid.* And before this Court recognized that the Fourteenth Amendment—which constrains actions by States—incorporates provisions of the Federal Bill of Rights, state constitutional rights, as interpreted by state courts, imposed the primary constraints on state action. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 501–502 (1977).

State courts interpreting state law remain particularly well situated to enforce individual rights against the States. Institutional constraints, it has been observed, may limit the ability of this Court to enforce the federal constitutional guarantees. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1217–1218 (1978). Prime among the institutional constraints, this Court is reluctant to intrude too deeply into areas traditionally regulated by the States. This aspect of

federalism does not touch or concern state courts interpreting state law.

III

Under *Long*, when state courts engage in the essential process of developing state constitutional law, they may insulate their decisions from this Court's review by means of a plain statement of intent to rest upon an independent state ground. The plain statement option does not, however, make pleas for reconsideration of the *Long* presumption much ado about nothing.[6] Both on a practical and on a symbolic level, the presumption chosen matters.

The presumption is an imperfect barometer of state courts' intent. Although it is easy enough for a state court to say the requisite magic words, the court may not recognize that its opinion triggers *Long*'s plain statement requirement. "[A]pplication of Long's presumption depends on a whole series of 'soft' requirements: the state decision must 'fairly appear' to rest 'primarily' on federal law or be 'interwoven' with federal law, and the independence of the state ground must be 'not clear' from the face of the state opinion. These are not self-applying concepts." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 552 (3d ed. 1988) (hereinafter Hart and Wechsler); cf. *Coleman* v. *Thompson*, 501 U. S. 722, 735–740 (1991) (declining to apply *Long* presumption to summary dismissal order).

Can the highest court of a State satisfy *Long*'s "plain statement" requirement in advance, through a blanket disclaimer? The New Hampshire Supreme Court, for example, has declared: "We hereby make clear that when this court cites federal or other State court opinions in construing provisions of the New Hampshire Constitution or statutes, we

[6] *Long* has generated many pages of academic commentary, some supportive, some critical of the presumption. See, *e. g.*, P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 553, n. 3 (3d ed. 1988) (citing commentary).

rely on those precedents merely for guidance and do not consider our results bound by those decisions." *State* v. *Ball*, 124 N. H. 226, 233, 471 A. 2d 347, 352 (1983). See also *State* v. *Kennedy*, 295 Ore. 260, 267, 666 P. 2d 1316, 1321 (1983) ("Lest there be any doubt about it, when this court cites federal opinions in interpreting a provision of Oregon law, it does so because it finds the views there expressed persuasive, not because it considers itself bound to do so by its understanding of federal doctrines."). This Court's stated reluctance to look beneath or beyond the very state-court opinion at issue in order to answer the jurisdictional question, see *Long*, 463 U. S., at 1040, may render such blanket declarations ineffective. Cf. Hart and Wechsler 553 ("[T]he Court's protestations—that its presumption shows greater respect for state courts than asking them to clarify their opinions—ring hollow: Long simply puts the burden of clarification on the state court in advance.").

Application of the *Long* presumption has increased the incidence of nondispositive United States Supreme Court determinations—instances in which state courts, on remand, have reinstated their prior judgments after clarifying their reliance on state grounds. Westling, Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine, 63 Tulane L. Rev. 379, 389, and n. 47 (1988) (pre-*Long*, *i. e.*, between January 1, 1978, and June 30, 1983, 14.3% of decisions (2 of 14) involving potentially adequate and independent state grounds were reinstated on state grounds upon remand; post-*Long*, *i. e.*, between July 1, 1983, and January 1, 1988, 26.7% of such decisions (4 of 15) were reinstated on remand). Even if these reinstatements do not render the Supreme Court's opinion technically "advisory," see Hart and Wechsler 537, they do suggest that the Court unnecessarily spent its resources on cases better left, at the time in question, to state-court solution.

The *Long* presumption, in sum, departs from the traditional understanding that "every federal court is 'without

jurisdiction' unless 'the contrary appears affirmatively from the record.' " *Delaware* v. *Van Arsdall*, 475 U. S. 673, 692 (1986) (STEVENS, J., dissenting) (quoting *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887)). And it is out of sync with the principle that this Court will avoid constitutional questions when an alternative basis of decision fairly presents itself. *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring). Most critically, as this case shows, the *Long* presumption interferes prematurely with state-court endeavors to explore different solutions to new problems facing modern society.

I recognize that "[s]ince *Long*, we repeatedly have followed [its] 'plain statement' requirement," *Harris* v. *Reed*, 489 U. S. 255, 261, n. 7 (1989), and that precedent ought not be overruled absent strong cause. But the *Long* ruling itself did

> "a virtual about-face regarding the guidelines for determining the reviewability of state court decisions in situations where the state court opinion is not absolutely clear about the bases on which it rests. The traditional presumption was that the Court lacked jurisdiction unless its authority to review was clear on the face of the state court opinion. When faced with uncertainty, the Court in the past occasionally remanded such cases to the state court for clarification. But more commonly, the Court would deny jurisdiction where there was uncertainty." G. Gunther, Constitutional Law 56 (12th ed. 1991).

Restoring a main rule "deny[ing] jurisdiction where there [is] uncertainty," *ibid.*, would stop this Court from asserting authority in matters belonging, or at least appropriately left, to the States' domain. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 77–80 (1938). Recognizing that "adequate state grounds are independent unless it clearly appears other-

wise," *Long,* 463 U. S., at 1066 (STEVENS, J., dissenting),[7] would also avoid premature settlement of important federal questions. The submission for the United States is telling in this regard. While filing in support of petitioner, the United States acknowledges the problem occasioned by "erroneous information contained in law enforcement computer-information systems," but does not see this case as a proper vehicle for a pathmarking opinion. The United States suggests that the Court "await a case in which relevant characteristics of such systems and the legal questions they pose can be thoroughly explored." Brief for United States as *Amicus Curiae* 13.

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The Arizona Supreme Court found it "repugnant to the principles of a free society," 177 Ariz., at 204, 866 P. 2d, at 872, to take a person "into police custody because of a computer error precipitated by government carelessness." *Ibid.* Few, I believe, would disagree. Whether, in order to guard against such errors, "the exclusionary rule is a 'cost' we cannot afford to be without," *ibid.*, seems to me a question this Court should not rush to decide. The Court errs, as I see it, in presuming that Arizona rested its decision on federal grounds. I would abandon the *Long* presumption and dismiss the writ because the generally applicable obligation affirmatively to establish the Court's jurisdiction has not been satisfied.

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[7] For instances in which a state court's decision, even if arguably placed on a state ground, embodies a misconstruction of federal law threatening gravely to mislead, or to engender disuniformity, confusion, or instability, a Supreme Court order vacating the judgment and remanding for clarification should suffice. See Hart and Wechsler 554; see also *supra,* at 26, n. 3.

Syllabus

SWINT ET AL. *v.* CHAMBERS COUNTY COMMISSION ET AL.

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

No. 93–1636. Argued January 10, 1995—Decided March 1, 1995

In the wake of police raids on a nightclub in Chambers County, Alabama, two of the club's owners joined by an employee and a patron (all petitioners here) sued respondent Chambers County Commission, along with a municipality and three individual police officers; petitioners sought damages and other relief under 42 U. S. C. § 1983 for alleged civil rights violations. The District Court denied the summary judgment motions of all five defendants, ruling, *inter alia*, that the individual officers were not entitled to qualified immunity from suit and that the sheriff who authorized the raids, although a state employee, may have been the county's final policymaker for law enforcement. The District Court stated that it would rule dispositively on the county's liability before jury deliberations. Invoking the rule that an order denying qualified immunity is appealable before trial, *Mitchell* v. *Forsyth*, 472 U. S. 511, 530, the individual defendants immediately appealed. The county commission also appealed, arguing that the denial of its summary judgment motion was immediately appealable as a collateral order satisfying the test announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546, and, alternatively, that the Eleventh Circuit had "pendent appellate jurisdiction" to decide the questions presented by the commission. The Eleventh Circuit rejected the county commission's first argument, but asserted pendent jurisdiction over the commission's appeal. Determining that the sheriff was not a policymaker for the county, the Eleventh Circuit held that the county commission qualified for summary judgment.

Held: The Eleventh Circuit lacked jurisdiction to rule on the county commission's liability at this interlocutory stage of the litigation and, accordingly, should have dismissed the commission's appeal. Pp. 41–51.

(a) The order denying the county commission's summary judgment motion was not an appealable collateral order under *Cohen*, *supra*, at 546, which allows immediate appeal from decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from final judgment. The order in question fails this test because it was tentative, the District Court having announced its intention to revisit its initial determination. Moreover,

the order is effectively reviewable after final judgment, because the commission's assertion that the sheriff is not its policymaker ranks solely as a defense to liability, not as an immunity from suit that is effectively lost if the case is erroneously permitted to go to trial. See *Mitchell*, *supra*, at 526. Pp. 41–43.

(b) There is no "pendent party" appellate jurisdiction of the kind the Eleventh Circuit purported to exercise. Although that court unquestionably had jurisdiction immediately to review the denial of the individual officers' summary judgment motions, it did not thereby gain authority to review at once the unrelated question of the county commission's liability. The parties' arguments to the contrary drift away from the statutory instructions Congress has given to control the timing of appellate proceedings. In particular, 28 U. S. C. § 1292(b) confers on district courts first line discretion to certify for immediate appeal interlocutory orders deemed pivotal and debatable; this provision grants to the court of appeals discretion to review only orders first certified by the district court. If courts of appeals had jurisdiction of the type here claimed by the Eleventh Circuit, § 1292(b)'s two-tiered arrangement would be severely undermined. Furthermore, provisions Congress passed in 1990 and 1992, 28 U. S. C. § 2072(c) and 28 U. S. C. § 1292(e), designate the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable. These legislative provisions counsel resistance to expansion of appellate jurisdiction by court decision. *Abney* v. *United States*, 431 U. S. 651, 662–663, and *United States* v. *Stanley*, 483 U. S. 669, 676–677, securely support the conclusion that the Eleventh Circuit lacked jurisdiction to review the denial of the county commission's summary judgment motion. Although the parties are correct that this Court has not universally required courts of appeals to confine review to the precise decision independently subject to review, the Court need not definitively or preemptively settle here whether or when it may be proper for a court of appeals with jurisdiction over one ruling to review, conjunctively, related rulings that are not themselves independently appealable. The parties do not—indeed could not—contend that the District Court's decision to deny the commission's motion on the ground that the sheriff may have been a county policymaker was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter. Pp. 43–51.

5 F. 3d 1435 and 11 F. 3d 1030, vacated in part and remanded.

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

Robert B. McDuff argued the cause for petitioners. With him on the briefs were *Carlos A. Williams*, *Bryan Stevenson*, and *Bernard Harcourt*.

Paul R. Q. Wolfson argued the cause for the United States as *amicus curiae* in support of petitioners. On the brief were *Solicitor General Days*, *Assistant Attorney General Patrick*, *Deputy Solicitor General Bender*, *Beth S. Brinkmann*, *Jessica Dunsay Silver*, and *Linda F. Thome*.

Paul M. Smith argued the cause for respondents. With him on the brief for respondent Chambers County Commission were *Bruce J. Ennis*, *Donald B. Verrilli, Jr.*, *James W. Webb*, *Kendrick E. Webb*, and *Bart Harmon*.*

JUSTICE GINSBURG delivered the opinion of the Court.

In the wake of successive police raids on a nightclub in Chambers County, Alabama, two of the club's owners joined by an employee and a patron (petitioners here) sued the Chambers County Commission (respondent here), the city of Wadley, and three individual police officers. Petitioners sought damages and other relief, pursuant to 42 U. S. C. § 1983, for alleged civil rights violations. We granted certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, which held that the Chambers County Commission qualified for summary judgment because the sheriff who authorized the raids was a state executive officer and not an agent of the county commission. We do not reach that issue, however, because we conclude

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**J. Michael McGuinness* filed a brief for the Southern States Police Benevolent Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Jefferson County, Alabama, by *Charles S. Wagner;* and for the National Association of Counties et al. by *Richard Ruda*.

Mitchell F. Dolin, *T. Jeremy Gunn*, *Steven R. Shapiro*, *Michael A. Cooper*, *Herbert J. Hansell*, *Norman Redlich*, *Thomas J. Henderson*, and *Sharon R. Vinick* filed a brief for the American Civil Liberties Union et al. as *amici curiae*.

that the Eleventh Circuit lacked jurisdiction to rule on the county commission's liability at this interlocutory stage of the litigation.

The Eleventh Circuit unquestionably had jurisdiction to review the denial of the individual police officer defendants' motions for summary judgment based on their alleged qualified immunity from suit. But the Circuit Court did not thereby gain authority to review the denial of the Chambers County Commission's motion for summary judgment. The commission's appeal, we hold, does not fit within the "collateral order" doctrine, nor is there "pendent party" appellate authority to take up the commission's case. We therefore vacate the relevant portion of the Eleventh Circuit's judgment and remand the case for proceedings consistent with this opinion.

I

On December 14, 1990, and again on March 29, 1991, law enforcement officers from Chambers County and the city of Wadley, Alabama, raided the Capri Club in Chambers County as part of a narcotics operation. The raids were conducted without a search warrant or an arrest warrant. Petitioners filed suit, alleging, among other claims for relief, violations of their federal civil rights. Petitioners named as defendants the county commission; the city of Wadley; and three individual defendants, Chambers County Sheriff James C. Morgan, Wadley Police Chief Freddie Morgan, and Wadley Police Officer Gregory Dendinger.

The five defendants moved for summary judgment on varying grounds. The three individual defendants asserted qualified immunity from suit on petitioners' federal claims. See *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987) (governmental officials are immune from suit for civil damages unless their conduct is unreasonable in light of clearly established law). Without addressing the question whether Wadley Police Chief Freddie Morgan, who participated in the

raids, was a policymaker for the municipality, the city argued that a *respondeat superior* theory could not be used to hold it liable under § 1983. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978) (a local government may not be sued under § 1983 for injury inflicted solely by its nonpolicymaking employees or agents). The Chambers County Commission argued that County Sheriff James C. Morgan, who authorized the raids, was not a policymaker for the county.

The United States District Court for the Middle District of Alabama denied the motions for summary judgment. The District Court agreed that § 1983 liability could not be imposed on the city for an injury inflicted by a nonpolicymaking employee; that court denied the city's summary judgment motion, however, because the city had failed to argue that Wadley Police Chief Freddie Morgan was not its policymaker for law enforcement. Regarding the county commission's motion, the District Court was "persuaded by the Plaintiffs that Sheriff [James C.] Morgan may have been the final decision-maker for the County in ferreting out crime, although he is a State of Alabama employee." App. to Pet. for Cert. 67a. The District Court later denied the defendants' motions for reconsideration, but indicated its intent to revisit, before jury deliberations, the question whether Sheriff Morgan was a policymaker for the county:

> "The Chambers County Defendants correctly point out that whether Sheriff James Morgan was the final policy maker is a question of law that this Court can decide. What th[is] Court decided in its [prior order] was that the Plaintiffs had come forward with sufficient evidence to persuade this Court that Sheriff Morgan may be the final policy maker for the County. The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker

> for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the jury." *Id.*, at 72a.

Invoking the rule that an order denying qualified immunity is appealable before trial, *Mitchell* v. *Forsyth*, 472 U. S. 511, 530 (1985), the individual defendants immediately appealed. The city of Wadley and the Chambers County Commission also appealed, arguing, first, that the denial of their summary judgment motions—like the denial of the individual defendants' summary judgment motions—was immediately appealable as a collateral order satisfying the test announced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949) (decisions that are conclusive, that resolve important questions apart from the merits of the underlying action, and that are effectively unreviewable on appeal from final judgment may be appealed immediately). Alternatively, the city and county commission urged the Eleventh Circuit Court of Appeals to exercise "pendent appellate jurisdiction," a power that court had asserted in earlier cases. Stressing the Eleventh Circuit's undisputed jurisdiction over the individual defendants' qualified immunity pleas, the city and county commission maintained that, in the interest of judicial economy, the court should resolve, simultaneously, the city's and commission's appeals.

The Eleventh Circuit affirmed in part and reversed in part the District Court's order denying summary judgment for the individual defendants. 5 F. 3d 1435, 1448 (1993), modified, 11 F. 3d 1030, 1031–1032 (1994). Next, the Eleventh Circuit held that the District Court's rejections of the county commission's and city's summary judgment motions were not immediately appealable as collateral orders. 5 F. 3d, at 1449, 1452. Nevertheless, the Circuit Court decided to exercise pendent appellate jurisdiction over the county commission's appeal. *Id.*, at 1449–1450. Holding that Sheriff James C.

Morgan was not a policymaker for the county in the area of law enforcement, the Eleventh Circuit reversed the District Court's order denying the county commission's motion for summary judgment. *Id.*, at 1450–1451. The Eleventh Circuit declined to exercise pendent appellate jurisdiction over the city's appeal because the District Court had not yet decided whether Wadley Police Chief Freddie Morgan was a policymaker for the city. *Id.*, at 1451–1452.[1]

We granted certiorari to review the Court of Appeals' decision that Sheriff Morgan is not a policymaker for Chambers County. 512 U. S. 1204 (1994). We then instructed the parties to file supplemental briefs addressing this question: Given the Eleventh Circuit's jurisdiction to review immediately the District Court's refusal to grant summary judgment for the individual defendants in response to their pleas of qualified immunity, did the Circuit Court also have jurisdiction to review at once the denial of the county commission's summary judgment motion? 513 U. S. 958 (1994). We now hold that the Eleventh Circuit should have dismissed the county commission's appeal for want of jurisdiction.

II

We inquire first whether the denial of the county commission's summary judgment motion was appealable as a collateral order. The answer, as the Court of Appeals recognized, is a firm "No."

By statute, federal courts of appeals have "jurisdiction of appeals from all final decisions of the district courts," except where direct review may be had in this Court. 28 U. S. C. § 1291. "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Con-

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[1] On Sheriff James C. Morgan's suggestion for rehearing en banc, the Eleventh Circuit modified its opinion with respect to an issue not relevant here and denied rehearing en banc. 11 F. 3d 1030 (1994).

gress in § 1291, but as a 'practical construction' of it." *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U. S. 863, 867 (1994) (quoting *Cohen*, 337 U. S., at 546). In *Cohen*, we held that § 1291 permits appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered "final." *Id.*, at 546. That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action. *Ibid.*

The District Court planned to reconsider its ruling on the county commission's summary judgment motion before the case went to the jury. That court had initially determined only that "Sheriff Morgan . . . *may have been* the final policy maker for the County." App. to Pet. for Cert. 67a (emphasis added). The ruling thus fails the *Cohen* test, which "disallow[s] appeal from any decision which is tentative, informal or incomplete." 337 U. S., at 546; see *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469 (1978) (order denying class certification held not appealable under collateral order doctrine, in part because such an order is "subject to revision in the District Court").

Moreover, the order denying the county commission's summary judgment motion does not satisfy *Cohen*'s requirement that the decision be effectively unreviewable after final judgment. When we placed within the collateral order doctrine decisions denying pleas of government officials for qualified immunity, we stressed that an official's qualified immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U. S., at 526 (emphasis in original).

The county commission invokes our decision in *Monell*, which held that municipalities are liable under § 1983 only for violations of federal law that occur pursuant to official governmental policy or custom. *Monell*, the commission contends, should be read to accord local governments a qualified right to be free from the burdens of trial. Accordingly, the commission maintains, the commission should be able to appeal immediately the District Court's denial of its summary judgment motion. This argument undervalues a core point we reiterated last Term: "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye," *Digital Equipment*, 511 U. S., at 873, for "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial,'" *ibid.;* cf. *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978) (denial of pretrial motion to dismiss an indictment on speedy trial grounds held not appealable under collateral order doctrine).

The commission's assertion that Sheriff Morgan is not its policymaker does not rank, under our decisions, as an immunity from suit. Instead, the plea ranks as a "mere defense to liability." *Mitchell*, 472 U. S., at 526. An erroneous ruling on liability may be reviewed effectively on appeal from final judgment. Therefore, the order denying the county commission's summary judgment motion was not an appealable collateral order.

III

Although the Court of Appeals recognized that the District Court's order denying the county commission's summary judgment motion was not appealable as a collateral order, the Circuit Court reviewed that ruling by assuming jurisdiction pendent to its undisputed jurisdiction to review the denial of the individual defendants' summary judgment motions. Describing this "pendent appellate jurisdiction" as discretionary, the Eleventh Circuit concluded that judicial

economy warranted its exercise in the instant case: "If the County Commission is correct about the merits in its appeal," the court explained, "reviewing the district court's order would put an end to the entire case against the County . . . ." 5 F. 3d, at 1450.[2]

[2] The Federal Courts of Appeals have endorsed the doctrine of pendent appellate jurisdiction, although they have expressed varying views about when such jurisdiction is properly exercised. See, *e. g.*, *Roque-Rodriguez* v. *Lema Moya*, 926 F. 2d 103, 105, n. 2 (CA1 1991) (noting that the First Circuit has "refrained" from exercising pendent appellate jurisdiction, but characterizing the Circuit's practice as "self-imposed"); *Golino* v. *New Haven*, 950 F. 2d 864, 868–869 (CA2 1991) (exercising discretion to consider otherwise nonappealable issues because sufficient overlap exists in the factors relevant to the appealable and nonappealable issues), cert. denied, 505 U. S. 1221 (1992); *Natale* v. *Ridgefield*, 927 F. 2d 101, 104 (CA2 1991) ("Only in exceptional circumstances should litigants, over whom this Court cannot ordinarily exercise jurisdiction, be permitted to ride on the jurisdictional coattails of another party."); *National Union Fire Ins. Co.* v. *City Savings, F. S. B.*, 28 F. 3d 376, 382, and n. 4 (CA3 1994) (reserving question whether pendent appellate jurisdiction is available in any circumstances other than when "necessary to ensure meaningful review of an appealable order") (internal quotation marks omitted); *Roberson* v. *Mullins*, 29 F. 3d 132, 136 (CA4 1994) (recognizing pendent appellate jurisdiction "if the issues involved in the two rulings substantially overlap and review will advance the litigation or avoid further appeals") (internal quotation marks omitted); *Silver Star Enterprises* v. *M/V SARAMACCA*, 19 F. 3d 1008, 1014 (CA5 1994) (declining to exercise pendent appellate jurisdiction because otherwise nonappealable order was not "inextricably entwined" with appealable order); *Williams* v. *Kentucky*, 24 F. 3d 1526, 1542 (CA6 1994) (same); *United States ex rel. Valders Stone & Marble, Inc.* v. *C-Way Constr. Co.*, 909 F. 2d 259, 262 (CA7 1990) (pendent appellate jurisdiction is proper only "[w]hen an ordinarily unappealable interlocutory order is inextricably entwined with an appealable order" and there are "compelling reasons" for immediate review; a "close relationship" between the two orders does not suffice) (internal quotation marks omitted); *Drake* v. *Scott*, 812 F. 2d 395, 399 (CA8) ("[W]hen an interlocutory appeal is properly before us . . . we have jurisdiction also to decide closely related issues of law."), cert. denied, 484 U. S. 965 (1987); *TransWorld Airlines, Inc.* v. *American Coupon Exchange, Inc.*, 913 F. 2d 676, 680 (CA9 1990) (jurisdiction under § 1291(a)(1) to review on an interlocutory basis a preliminary

Petitioners join respondent Chambers County Commission in urging that the Eleventh Circuit had pendent appellate jurisdiction to review the District Court's order denying the commission's summary judgment motion. Both sides emphasize that § 1291's final decision requirement is designed to prevent parties from interrupting litigation by pursuing piecemeal appeals. Once litigation has already been interrupted by an authorized pretrial appeal, petitioners and the county commission reason, there is no cause to resist the economy that pendent appellate jurisdiction promotes. See Supplemental Brief for Petitioners 16–17; Supplemental Brief for Respondent 5, 9. Respondent county commission invites us to adopt a "'libera[l]'" construction of § 1291, and petitioners urge an interpretation sufficiently "[p]ractical" and "[f]lexible" to accommodate pendent appellate review as exercised by the Eleventh Circuit. See *id.*, at 4; Supplemental Brief for Petitioners 14.

These arguments drift away from the statutory instructions Congress has given to control the timing of appellate proceedings. The main rule on review of "final decisions," § 1291, is followed by prescriptions for appeals from "interlocutory decisions," § 1292. Section 1292(a) lists three cate-

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injunction order "extends to all matters 'inextricably bound up' with th[at] order"); *Robinson* v. *Volkswagenwerk AG*, 940 F. 2d 1369, 1374 (CA10 1991) (pendent appellate jurisdiction is properly exercised where "review of the appealable issue involves consideration of factors closely related or relevant to the otherwise nonappealable issue" and judicial economy is served by review), cert. denied, 502 U. S. 1091 (1992); *Stewart* v. *Baldwin County Bd. of Ed.*, 908 F. 2d 1499, 1509 (CA11 1990) ("Pendent jurisdiction is properly exercised over nonappealable decisions of the district court when the reviewing court already has jurisdiction over one issue in the case."); *Consarc Corp.* v. *Iraqi Ministry*, 27 F. 3d 695, 700 (CADC 1994) ("This Circuit has invoked [pendent appellate jurisdiction] only in a narrow class of cases, to review an interlocutory order that itself is not yet subject to appeal but is 'closely related' to an appealable order.").

gories of immediately appealable interlocutory decisions.[3] Of prime significance to the jurisdictional issue before us, Congress, in 1958, augmented the § 1292 catalog of immediately appealable orders; Congress added a provision, § 1292(b), according the district courts circumscribed authority to certify for immediate appeal interlocutory orders deemed pivotal and debatable. Section 1292(b) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

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[3] Section 1292(a) provides in relevant part:

"[T]he courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals.[4] If courts of appeals had discretion to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined.[5]

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[4] When it passed § 1292(b), Congress had before it a proposal, by Jerome Frank of the Court of Appeals for the Second Circuit, to give the courts of appeals sole discretion to allow interlocutory appeals. Judge Frank had opposed making interlocutory appeal contingent upon procurement of a certificate from the district judge; he advanced instead the following proposal:

"'It shall be the duty of the district judge to state in writing whether in his opinion the appeal is warranted; this statement shall be appended to the petition for appeal or, as promptly as possible after the filing of such petition in the court of appeals, shall be forwarded to said court by the district judge. The court of appeals shall take into account, but shall not be bound by, such statement in exercising its discretion.'" Undated letter from study committee to the Tenth Circuit Judicial Conference, in S. Rep. No. 2434, 85th Cong., 2d Sess., 8–9 (1958).

[5] This case indicates how the initial discretion Congress lodged in district courts under § 1292(b) could be circumvented by the "liberal" or "flexible" approach petitioners and respondent prefer. The District Court here ruled only tentatively on the county commission's motion and apparently contemplated receipt of further evidence from the parties before ruling definitively. See order denying motions to reconsider, App. to Pet. for Cert. 72a ("The parties will have an opportunity to convince this Court that Sheriff Morgan was or was not the final policy maker for the County, and the Court will make a ruling as a matter of law on that issue before the case goes to the jury."); cf. *Swint* v. *Wadley*, 5 F. 3d 1435, 1452 (CA11 1993) (to determine whether an official is a final policymaker, a district court "should examine not only the relevant positive law . . . *but also the relevant customs and practices having the force of law*") (emphasis in original). In view of the incomplete state of the District Court's adjudication, including some uncertainty whether plaintiffs meant to sue the county as discrete from the commission members, it is unlikely that a § 1292(b) certification would have been forthcoming from the District Judge.

Two relatively recent additions to the Judicial Code also counsel resistance to expansion of appellate jurisdiction in the manner endorsed by the Eleventh Circuit. The Rules Enabling Act, 28 U. S. C. § 2071 *et seq.*, gives this Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals." § 2072(a). In 1990, Congress added § 2072(c), which authorizes us to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." Two years later, Congress added § 1292(e), which allows us to "prescribe rules, in accordance with section 2072 . . . to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under [§ 1292] (a), (b), (c), or (d)."

Congress thus has empowered this Court to clarify when a decision qualifies as "final" for appellate review purposes, and to expand the list of orders appealable on an interlocutory basis. The procedure Congress ordered for such changes, however, is not expansion by court decision, but by rulemaking under § 2072. Our rulemaking authority is constrained by §§ 2073 and 2074, which require, among other things, that meetings of bench-bar committees established to recommend rules ordinarily be open to the public, § 2073(c)(1), and that any proposed rule be submitted to Congress before the rule takes effect, § 2074(a). Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is "final" and when an interlocutory order is appealable warrants the Judiciary's full respect.[6]

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[6] In the instant case, the Eleventh Circuit asserted not merely pendent appellate jurisdiction, but pendent *party* appellate jurisdiction: The court appended to its jurisdiction to review the denial of the *individual defendants'* qualified immunity motions jurisdiction to review the denial of the *commission's* summary judgment motion. We note that in 1990, Congress endeavored to clarify and codify instances appropriate for the exercise of pendent or "supplemental" jurisdiction in district courts. 28 U. S. C. § 1367 (1988 ed., Supp. V); see § 1367(a) (providing for "supplemen-

Two decisions of this Court securely support the conclusion that the Eleventh Circuit lacked jurisdiction instantly to review the denial of the county commission's summary judgment motion: *Abney* v. *United States*, 431 U. S. 651 (1977), and *United States* v. *Stanley*, 483 U. S. 669 (1987). In *Abney*, we permitted appeal before trial of an order denying a motion to dismiss an indictment on double jeopardy grounds. Immediate appeal of that ruling, we held, fit within the *Cohen* collateral order doctrine. 431 U. S., at 662. But we further held that the Court of Appeals lacked authority to review simultaneously the trial court's rejection of the defendant's challenge to the sufficiency of the indictment. *Id.*, at 662–663. We explained:

> "Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality. Quite obviously, such considerations do not extend beyond the claim of formal jeopardy and encompass other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss. Rather, such claims are appealable if, and only if, they too fall within *Cohen*'s collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Id.*, at 663 (citation omitted).

Petitioners suggest that *Abney* should control in criminal cases only. Supplemental Brief for Petitioners 11. But the concern expressed in *Abney*—that a rule loosely allowing pendent appellate jurisdiction would encourage parties to

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tal jurisdiction" over "claims that involve the joinder or intervention of additional parties").

parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets—bears on civil cases as well.

In *Stanley*, we similarly refused to allow expansion of the scope of an interlocutory appeal. That civil case involved an order certified by the trial court, and accepted by the appellate court, for immediate review pursuant to § 1292(b). Immediate appellate review, we held, was limited to the certified order; issues presented by other, noncertified orders could not be considered simultaneously. 483 U. S., at 676–677.

The parties are correct that we have not universally required courts of appeals to confine review to the precise decision independently subject to appeal. See, *e. g.*, *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 755–757 (1986) (Court of Appeals reviewing District Court's ruling on preliminary injunction request properly reviewed merits as well); *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 172–173 (1974) (Court of Appeals reviewing District Court's order allocating costs of class notification also had jurisdiction to review ruling on methods of notification); *Chicago, R. I. & P. R. Co.* v. *Stude*, 346 U. S. 574, 578 (1954) (Court of Appeals reviewing order granting motion to dismiss properly reviewed order denying opposing party's motion to remand); *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940) (Court of Appeals reviewing order granting preliminary injunction also had jurisdiction to review order denying motions to dismiss). Cf. *Schlagenhauf* v. *Holder*, 379 U. S. 104, 110–111 (1964) (Court of Appeals exercising mandamus power should have reviewed not only whether District Court had authority to order mental and physical examinations of defendant in personal injury case, but also whether there was good cause for the ordered examinations).

We need not definitively or preemptively settle here whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively,

related rulings that are not themselves independently appealable. See *supra*, at 48 (describing provisions by Congress for rulemaking regarding appeals prior to the district court's final disposition of entire case). The parties do not contend that the District Court's decision to deny the Chambers County Commission's summary judgment motion was inextricably intertwined with that court's decision to deny the individual defendants' qualified immunity motions, or that review of the former decision was necessary to ensure meaningful review of the latter. Cf. Kanji, The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context, 100 Yale L. J. 511, 530 (1990) ("Only where essential to the resolution of properly appealed collateral orders should courts extend their *Cohen* jurisdiction to rulings that would not otherwise qualify for expedited consideration."). Nor could the parties so argue. The individual defendants' qualified immunity turns on whether they violated clearly established federal law; the county commission's liability turns on the allocation of law enforcement power in Alabama.

* * *

The Eleventh Circuit's authority immediately to review the District Court's denial of the individual police officer defendants' summary judgment motions did not include authority to review at once the unrelated question of the county commission's liability. The District Court's preliminary ruling regarding the county did not qualify as a "collateral order," and there is no "pendent party" appellate jurisdiction of the kind the Eleventh Circuit purported to exercise. We therefore vacate the relevant portion of the Eleventh Circuit's judgment and remand the case for proceedings consistent with this opinion.

It is so ordered.

Syllabus

MASTROBUONO ET AL. *v.* SHEARSON LEHMAN HUTTON, INC., ET AL.

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

No. 94–18. Argued January 10, 1995—Decided March 6, 1995

Petitioners filed this action in the Federal District Court, alleging that their securities trading account had been mishandled by respondent brokers. An arbitration panel, convened under the arbitration provision in the parties' standard-form contract and under the Federal Arbitration Act (FAA), awarded petitioners punitive damages and other relief. The District Court and the Court of Appeals disallowed the punitive damages award because the contract's choice-of-law provision specifies that "the laws of the State of New York" should govern, but New York law allows only courts, not arbitrators, to award punitive damages.

Held: The arbitral award should have been enforced as within the scope of the contract between the parties. Pp. 55–64.

(a) This case is governed by what the contract has to say about the arbitrability of petitioners' punitive damages claim. The FAA's central purpose is to ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479. This Court's decisions make clear that if contracting parties agree to *include* punitive damages claims within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. See, *e. g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265. Pp. 55–58.

(b) The Court of Appeals misinterpreted the parties' contract by reading the choice-of-law provision and the arbitration provision as conflicting. Although the agreement contains no express reference to punitive damages claims, the fact that it is intended to include such claims is demonstrated by considering separately the impact of each of the two provisions, and then inquiring into their meaning taken together. This process reveals that the choice-of-law provision is not, in itself, an unequivocal exclusion of punitive damages claims, that the arbitration provision strongly implies that an arbitral award of punitive damages is appropriate, and that the best way to harmonize the two is to read "the laws of the State of New York" to encompass substantive principles that

New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither provision intrudes upon the other. Pp. 58–64.

20 F. 3d 713, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 64.

William J. Harte argued the cause for petitioners. With him on the briefs were *Robert L. Tucker* and *Joan M. Mannix*.

Malcolm L. Stewart argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Deputy Solicitor General Wallace*, *Simon M. Lorne*, *Paul Gonson*, *Jacob H. Stillman*, *Lucinda O. McConathy*, and *Mark Pennington*.

Joseph Polizzotto argued the cause for respondents. With him on the brief were *Phil C. Neal*, *H. Nicholas Berberian*, and *Robert J. Mandel*.*

JUSTICE STEVENS delivered the opinion of the Court.

New York law allows courts, but not arbitrators, to award punitive damages. In a dispute arising out of a standard-form contract that expressly provides that it "shall be governed by the laws of the State of New York," a panel of arbitrators awarded punitive damages. The District Court and Court of Appeals disallowed that award. The question presented is whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Limited Partners by *Michael B. Dashjian;* for the Public Investors Arbitration Bar Association by *Stuart C. Goldberg* and *Seth E. Lipner*.

Andrew L. Frey, *Andrew J. Pincus*, and *Stuart J. Kaswell* filed a brief for the Securities Industry Association as *amicus curiae* urging affirmance.

ensure "that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

I

In 1985, petitioners, Antonio Mastrobuono, then an assistant professor of medieval literature, and his wife Diana Mastrobuono, an artist, opened a securities trading account with respondent Shearson Lehman Hutton, Inc. (Shearson), by executing Shearson's standard-form Client's Agreement. Respondent Nick DiMinico, a vice president of Shearson, managed the Mastrobuonos' account until they closed it in 1987. In 1989, petitioners filed this action in the United States District Court for the Northern District of Illinois, alleging that respondents had mishandled their account and claiming damages on a variety of state and federal law theories.

Paragraph 13 of the parties' agreement contains an arbitration provision and a choice-of-law provision. Relying on the arbitration provision and on §§ 3 and 4 of the Federal Arbitration Act (FAA), 9 U. S. C. §§ 3, 4, respondents filed a motion to stay the court proceedings and to compel arbitration pursuant to the rules of the National Association of Securities Dealers. The District Court granted that motion, and a panel of three arbitrators was convened. After conducting hearings in Illinois, the panel ruled in favor of petitioners.

In the arbitration proceedings, respondents argued that the arbitrators had no authority to award punitive damages. Nevertheless, the panel's award included punitive damages of $400,000, in addition to compensatory damages of $159,327. Respondents paid the compensatory portion of the award but filed a motion in the District Court to vacate the award of punitive damages. The District Court granted the motion, 812 F. Supp. 845 (ND Ill. 1993), and the Court of Appeals for the Seventh Circuit affirmed, 20 F. 3d 713 (1994). Both courts relied on the choice-of-law provision in paragraph 13

of the parties' agreement, which specifies that the contract shall be governed by New York law. Because the New York Court of Appeals has decided that in New York the power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators, *Garrity* v. *Lyle Stuart, Inc.*, 40 N. Y. 2d 354, 353 N. E. 2d 793 (1976), the District Court and the Seventh Circuit held that the panel of arbitrators had no power to award punitive damages in this case.

We granted certiorari, 513 U. S. 921 (1994), because the Courts of Appeals have expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper. Compare *Barbier* v. *Shearson Lehman Hutton Inc.*, 948 F. 2d 117 (CA2 1991), and *Pierson* v. *Dean, Witter, Reynolds, Inc.*, 742 F. 2d 334 (CA7 1984), with *Bonar* v. *Dean Witter Reynolds, Inc.*, 835 F. 2d 1378, 1386–1388 (CA11 1988), *Raytheon Co.* v. *Automated Business Systems, Inc.*, 882 F. 2d 6 (CA1 1989), and *Lee* v. *Chica*, 983 F. 2d 883 (CA8 1993). We now reverse.[1]

II

Earlier this Term, we upheld the enforceability of a predispute arbitration agreement governed by Alabama law, even though an Alabama statute provides that arbitration agreements are unenforceable. *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265 (1995). Writing for the Court, Justice Breyer observed that Congress passed the FAA "to overcome courts' refusals to enforce agreements to arbitrate." *Id.*, at 270. See also *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S., at 474; *Dean Witter Reynolds Inc.* v. *Byrd*, 470

[1] Because our disposition would be the same under either a *de novo* or a deferential standard, we need not decide in this case the proper standard of a court's review of an arbitrator's decision as to the arbitrability of a dispute or as to the scope of an arbitration. We recently granted certiorari in a case that involves some of these issues. *First Options of Chicago, Inc.* v. *Kaplan*, No. 94–560, now pending before the Court.

U. S. 213, 220 (1985). After determining that the FAA applied to the parties' arbitration agreement, we readily concluded that the federal statute pre-empted Alabama's statutory prohibition. *Allied-Bruce*, 513 U. S., at 272–273, 281–282.

Petitioners seek a similar disposition of the case before us today. Here, the Seventh Circuit interpreted the contract to incorporate New York law, including the *Garrity* rule that arbitrators may not award punitive damages. Petitioners ask us to hold that the FAA pre-empts New York's prohibition against arbitral awards of punitive damages because this state law is a vestige of the "'"ancient"'" judicial hostility to arbitration. See *Allied-Bruce*, 513 U. S., at 270, quoting *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U. S. 198, 211, n. 5 (1956) (Frankfurter, J., concurring). Petitioners rely on *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984), and *Perry* v. *Thomas*, 482 U. S. 483 (1987), in which we held that the FAA pre-empted two California statutes that purported to require judicial resolution of certain disputes. In *Southland*, we explained that the FAA not only "declared a national policy favoring arbitration," but actually "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 465 U. S., at 10.

Respondents answer that the choice-of-law provision in their contract evidences the parties' express agreement that punitive damages should not be awarded in the arbitration of any dispute arising under their contract. Thus, they claim, this case is distinguishable from *Southland* and *Perry*, in which the parties presumably desired unlimited arbitration but state law stood in their way. Regardless of whether the FAA pre-empts the *Garrity* decision in contracts not expressly incorporating New York law, respondents argue that the parties may themselves agree to be bound by *Garrity*, just as they may agree to forgo arbitration altogether. In other words, if the contract says "no punitive damages," that

is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration.

We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties. In *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468 (1989), the California Court of Appeal had construed a contractual provision to mean that the parties intended the California rules of arbitration, rather than the FAA's rules, to govern the resolution of their dispute. *Id.*, at 472. Noting that the California rules were "manifestly designed to encourage resort to the arbitral process," *id.*, at 476, and that they "generally foster[ed] the federal policy favoring arbitration," *id.*, at 476, n. 5, we concluded that such an interpretation was entirely consistent with the federal policy "to ensure the enforceability, according to their terms, of private agreements to arbitrate," *id.*, at 476. After referring to the holdings in *Southland* and *Perry*, which struck down state laws limiting agreed-upon arbitrability, we added:

> "But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi* [*Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628 (1985)], so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U. S., at 479.

Relying on our reasoning in *Volt*, respondents thus argue that the parties to a contract may lawfully agree to limit the issues to be arbitrated by waiving any claim for punitive damages. On the other hand, we think our decisions in *Allied-Bruce*, *Southland*, and *Perry* make clear that if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

III

Shearson's standard-form "Client Agreement," which petitioners executed, contains 18 paragraphs. The two relevant provisions of the agreement are found in paragraph 13.[2] The first sentence of that paragraph provides, in part, that the entire agreement "shall be governed by the laws of the

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[2] "Paragraph 13 of the Client's Agreement provides:

"This agreement shall inure to the benefit of your [Shearson's] successors and assigns[,] shall be binding on the undersigned, my [petitioners'] heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, to transactions with you, your officers, directors, agents and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof. This agreement to arbitrate does not apply to future disputes arising under certain of the federal securities laws to the extent it has been determined as a matter of law that I cannot be compelled to arbitrate such claims." App. to Pet. for Cert. 44.

State of New York." App. to Pet. for Cert. 44. The second sentence provides that "any controversy" arising out of the transactions between the parties "shall be settled by arbitration" in accordance with the rules of the National Association of Securities Dealers (NASD), or the Boards of Directors of the New York Stock Exchange and/or the American Stock Exchange. *Ibid.* The agreement contains no express reference to claims for punitive damages. To ascertain whether paragraph 13 expresses an intent to include or exclude such claims, we first address the impact of each of the two relevant provisions, considered separately. We then move on to the more important inquiry: the meaning of the two provisions taken together. See Restatement (Second) of Contracts § 202(2) (1979) ("A writing is interpreted as a whole").

The choice-of-law provision, when viewed in isolation, may reasonably be read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship. Thus, if a similar contract, without a choice-of-law provision, had been signed in New York and was to be performed in New York, presumably "the laws of the State of New York" would apply, even though the contract did not expressly so state. In such event, there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims. Accordingly, punitive damages would be allowed because, in the absence of contractual intent to the contrary, the FAA would pre-empt the *Garrity* rule. See *supra*, at 58, and n. 8, *infra*.

Even if the reference to "the laws of the State of New York" is more than a substitute for ordinary conflict-of-laws analysis and, as respondents urge, includes the caveat, "detached from otherwise-applicable federal law," the provision might not preclude the award of punitive damages because New York allows its courts, though not its arbitrators, to enter such awards. See *Garrity*, 40 N. Y. 2d, at 358, 353

N. E. 2d, at 796. In other words, the provision might include only New York's substantive rights and obligations, and not the State's allocation of power between alternative tribunals.[3] Respondents' argument is persuasive only if "New York law" means "New York decisional law, including that State's allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law." But, as we have demonstrated, the provision need not be read so broadly. It is not, in itself, an unequivocal exclusion of punitive damages claims.[4]

The arbitration provision (the second sentence of paragraph 13) does not improve respondents' argument. On the contrary, when read separately this clause strongly implies that an arbitral award of punitive damages is appropriate. It explicitly authorizes arbitration in accordance with NASD rules;[5] the panel of arbitrators in fact proceeded under that

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[3] In a related point, respondents argue that there is no meaningful distinction between "substance" and "remedy," that is, between an entitlement to prevail on the law and an entitlement to a specific form of damages. See Brief for Respondents 25–27. We do not rely on such a distinction here, nor do we pass upon its persuasiveness.

[4] The dissent makes much of the similarity between this choice-of-law clause and the one in *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468 (1989), which we took to incorporate a California statute allowing a court to stay arbitration pending resolution of related litigation. In *Volt,* however, we did not interpret the contract *de novo.* Instead, we deferred to the California court's construction of its own State's law. *Id.*, at 474 ("[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"). In the present case, by contrast, we review a *federal* court's interpretation of this contract, and our interpretation accords with that of the only decisionmaker arguably entitled to deference—the arbitrator. See n. 1, *supra.*

[5] The contract also authorizes (at petitioners' election) that the arbitration be governed by the rules of the New York Stock Exchange or the American Stock Exchange, instead of those of the NASD. App. to Pet. for Cert. 44. Neither set of alternative rules purports to limit an arbitrator's discretion to award punitive damages. Moreover, even if there were any doubt as to the ability of an arbitrator to award punitive damages under

set of rules.[6] The NASD's Code of Arbitration Procedure indicates that arbitrators may award "damages and other relief." NASD Code of Arbitration Procedure ¶ 3741(e) (1993). While not a clear authorization of punitive damages, this provision appears broad enough at least to contemplate such a remedy. Moreover, as the Seventh Circuit noted, a manual provided to NASD arbitrators contains this provision:

> "B. Punitive Damages
>
> "The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy." 20 F. 3d, at 717.

Thus, the text of the arbitration clause itself surely does not support—indeed, it contradicts—the conclusion that the parties agreed to foreclose claims for punitive damages.[7]

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the Exchanges' rules, the contract expressly allows petitioners, the claimants in this case, to choose NASD rules; and the panel of arbitrators in this case in fact proceeded under NASD rules.

[6] As the Solicitor General reminds us, one NASD rule is *not* before us, namely Rule 21(f)(4) of the NASD Rules of Fair Practice, which reads:

"'No agreement [between a member and a customer] shall include any condition which . . . limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award.'" Brief for United States et al. 6.

Rule 21(f)(4) applies only to contracts executed after September 7, 1989. Notwithstanding any effect it may have on agreements signed after that date, this rule is not applicable to the agreement in this case, which was executed in 1985.

[7] "Were we to confine our analysis to the plain language of the arbitration clause, we would have little trouble concluding that a contract clause which bound the parties to 'settle' 'all disputes' through arbitration conducted according to rules which allow any form of 'just and equitable' 'remedy of relief' was sufficiently broad to encompass the award of punitive damages. Inasmuch as agreements to arbitrate are 'generously construed,' *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, [*Inc.*, 473 U. S. 614, 626 (1985)], it would seem sensible to interpret the 'all disputes' and 'any remedy or relief' phrases to indicate, at a minimum, an intention to resolve through arbitration any dispute that would otherwise be settled

Although neither the choice-of-law clause nor the arbitration clause, separately considered, expresses an intent to preclude an award of punitive damages, respondents argue that a fair reading of the entire paragraph 13 leads to that conclusion. On this theory, even if "New York law" is ambiguous, and even if "arbitration in accordance with NASD rules" indicates that punitive damages are permissible, the juxtaposition of the two clauses suggests that the contract incorporates "New York law relating to arbitration." We disagree. At most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards. As we pointed out in *Volt*, when a court interprets such provisions in an agreement covered by the FAA, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." 489 U. S., at 476. See also *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983).[8]

Moreover, respondents cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. See, *e. g.*, *United States Fire Ins. Co.* v. *Schnackenberg*, 88 Ill. 2d 1, 4, 429 N. E. 2d 1203, 1205 (1981); *Graff* v. *Billet*, 64 N. Y. 2d 899, 902, 477 N. E. 2d 212, 213–214

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in a court, and to allow the chosen dispute resolvers to award the same varieties and forms of damages or relief as a court would be empowered to award. Since courts are empowered to award punitive damages with respect to certain types of claims, the Raytheon-Automated arbitrators would be equally empowered." *Raytheon Co.* v. *Automated Business Systems, Inc.*, 882 F. 2d 6, 10 (CA1 1989).

[8] "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U. S., at 24–25.

(1984);[9] Restatement (Second) of Contracts §206; *United States* v. *Seckinger*, 397 U. S. 203, 210 (1970). Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result.[10] That rationale is well suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.

Finally respondents' reading of the two clauses violates another cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other. See, *e. g.*, *In re Halas*, 104 Ill. 2d 83, 92, 470 N. E. 2d 960, 964 (1984); *Crimmins Contracting Co.* v. *City of New York*, 74 N. Y. 2d 166, 172–173, 542 N. E. 2d 1097, 1100 (1989); *Trump-Equitable Fifth Avenue Co.* v. *H. R. H. Constr. Corp.*, 106 App. Div. 2d 242, 244, 485 N. Y. S. 2d 65, 67 (1985); Restatement (Second) of Contracts §203(a) and Comment *b; id.*, §202(5). We think the best way to harmonize the choice-of-

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[9] We cite precedent from Illinois, the forum State and place where the contract was executed, and New York, the State designated in the contract's choice-of-law clause. The parties suggest no other State's law as arguably relevant to this controversy.

[10] The drafters of the Second Restatement justified the rule as follows:

"Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party." Restatement (Second) of Contracts §206, Comment *a* (1979).

law provision with the arbitration provision is to read "the laws of the State of New York" to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other. In contrast, respondents' reading sets up the two clauses in conflict with one another: one foreclosing punitive damages, the other allowing them. This interpretation is untenable.

We hold that the Court of Appeals misinterpreted the parties' agreement. The arbitral award should have been enforced as within the scope of the contract. The judgment of the Court of Appeals is, therefore, reversed.

It is so ordered.

JUSTICE THOMAS, dissenting.

In *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 478 (1989), we held that the Federal Arbitration Act (FAA) simply requires courts to enforce private contracts to arbitrate as they would normal contracts—according to their terms. This holding led us to enforce a choice-of-law provision that incorporated a state procedural rule concerning arbitration proceedings. Because the choice-of-law provision here cannot reasonably be distinguished from the one in *Volt*, I dissent.[1]

[1] The Seventh Circuit adopted a *de novo* standard of review of the arbitrators' decision. Although we have not yet decided what standard of review to apply in cases of this sort, see *First Options of Chicago, Inc.* v. *Kaplan*, cert. granted, 513 U. S. 1040 (1994), petitioners waived the argument that a deferential standard was appropriate. Petitioners did not raise the argument in their petition for certiorari or in their opening brief. While the standard of review may be an antecedent question, see *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439 (1993), given petitioners' waiver of the argument it seems more appropriate to resolve the question in *First Options* than here.

I

A

In *Volt*, Stanford University had entered into a construction contract under which Volt Information Sciences, Inc., was to install certain electrical systems on the Stanford campus. The contract contained an agreement to arbitrate all disputes arising out of the contract. A choice-of-law clause in the contract provided that "[t]he Contract shall be governed by the law of the place where the Project is located," *id.*, at 470 (citation and internal quotation marks omitted), which happened to be California. When a dispute arose regarding compensation, Volt invoked arbitration. Stanford filed an action in state court, however, and moved to stay arbitration pursuant to California Rules of Civil Procedure. Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982). Opposing the stay, Volt argued that the relevant state statute authorizing the stay was pre-empted by the FAA, 9 U. S. C. § 1 *et seq.*

We concluded that even if the FAA pre-empted the state statute as applied to other parties, the choice-of-law clause in the contract at issue demonstrated that the parties had agreed to be governed by the statute. Rejecting Volt's position that the FAA imposes a proarbitration policy that precluded enforcement of the statute permitting the California courts to stay the arbitration proceedings, we concluded that the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." 489 U. S., at 478. As a result, we interpreted the choice-of-law clause "to make applicable state rules governing the conduct of arbitration," *id.*, at 476, even if a specific rule itself hampers or delays arbitration. We rejected the argument that the choice-of-law clause was to be construed as incorporating only substantive law, and dismissed the claim that the FAA pre-empted those contract provisions that might hinder arbitration.

We so held in *Volt* because we concluded that the FAA does not force arbitration on parties who enter into contracts involving interstate commerce. Instead, the FAA requires only that "arbitration proceed in the manner provided for in [the parties'] agreement." 9 U. S. C. § 4. Although we will construe ambiguities concerning the scope of arbitrability in favor of arbitration, see *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983), we remain mindful that "as with any other contract, the parties' intentions control," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985). Thus, if the parties intend that state procedure shall govern, federal courts must enforce that understanding. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt*, 489 U. S., at 476.

B

In this case, as in *Volt*, the parties agreed to mandatory arbitration of all disputes. As in *Volt*, the contract at issue here includes a choice-of-law clause. Indeed, the language of the two clauses is functionally equivalent: Whereas the choice-of-law clause in *Volt* provided that "[t]he Contract shall be governed by the law of [the State of California]," *id.*, at 470 (citation and internal quotation marks omitted), the one before us today states, in paragraph 13 of the Client's Agreement, App. to Pet. for Cert. 44, that "[t]his agreement . . . shall be governed by the laws of the State of New York." New York law prohibits arbitrators from awarding punitive damages, *Garrity* v. *Lyle Stuart, Inc.*, 40 N. Y. 2d 354, 353 N. E. 2d 793 (1976), and permits only courts to award such damages. As in *Volt*, petitioners here argue that the New York rule is "antiarbitration," and hence is pre-empted by the FAA. In concluding that the choice-of-law clause is am-

biguous, the majority essentially accepts petitioners' argument. *Volt* itself found precisely the same argument irrelevant, however, and the majority identifies no reason to think that the state law governing the interpretation of the parties' choice-of-law clause supports a different result.

The majority claims that the incorporation of New York law "need not be read so broadly" as to include both substantive and procedural law, and that the choice of New York law "is not, in itself, an unequivocal exclusion of punitive damages claims." *Ante*, at 60. But we rejected these same arguments in *Volt*, and the *Garrity* rule is just the sort of "state rul[e] governing the conduct of arbitration" that *Volt* requires federal courts to enforce. 489 U. S., at 476. "Just as [the parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Id.*, at 479 (citation omitted). To be sure, the majority might be correct that *Garrity* is a rule concerning the State's allocation of power between "alternative tribunals," *ante*, at 60, although *Garrity* appears to describe itself as substantive New York law.[2] Nonetheless, *Volt* makes no distinction between rules that serve only to distribute authority between courts and arbitrators (which the majority finds unenforceable) and other types of rules (which the majority finds enforceable). Indeed, the California rule in *Volt* could be considered to be one that allocates authority between arbitrators and courts, for it permits California courts to stay arbitration pending resolution of related litigation. See *Volt*, *supra*, at 471.

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[2] The New York Court of Appeals rested its holding on the principle that punitive damages are exemplary social remedies intended to punish, rather than to compensate. Because the power to punish can rest only in the hands of the State, the court found that private arbitrators could not wield the authority to impose such damages. *Garrity* v. *Lyle Stuart, Inc.*, 40 N. Y. 2d, at 360, 353 N. E. 2d, at 796–797.

II

The majority relies upon two assertions to defend its departure from *Volt*. First, it contends that "[a]t most, the choice-of-law clause introduces an ambiguity into an arbitration agreement." *Ante*, at 62. We are told that the agreement "would otherwise allow punitive damages awards," *ibid.*, because of paragraph 13's statement that arbitration would be conducted "in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. [NASD]." App. to Pet. for Cert. 44. It is unclear which NASD "rules" the parties mean, although I am willing to agree with the majority that the phrase refers to the NASD Code of Arbitration Procedure. But the provision of the NASD Code offered by the majority simply does not speak to the availability of punitive damages. It only states:

> "The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award." NASD Code of Arbitration Procedure § 41(e) (1985).

It is clear that § 41(e) does not define or limit the powers of the arbitrators; it merely describes the form in which the arbitrators must announce their decision. The other provisions of § 41 confirm this point. See, *e. g.*, § 41(a) ("All awards shall be in writing and signed by a majority of the arbitrators . . ."); § 41(c) ("Director of Arbitration shall endeavor to serve a copy of the award" to the parties); § 41(d) (arbitrators should render an award within 30 days); § 41(f)

(awards shall be "publicly available"). The majority cannot find a provision of the NASD Code that specifically addresses punitive damages, or that speaks more generally to the types of damages arbitrators may or may not allow. Such a rule simply does not exist. The code certainly does not *require* that arbitrators be empowered to award punitive damages; it leaves to the parties to define the arbitrators' remedial powers.

The majority also purports to find a clear expression of the parties' agreement on the availability of punitive damages in "a manual provided to NASD arbitrators." *Ante*, at 61. But paragraph 13 of the Client's Agreement nowhere mentions this manual; it mentions only "the rules then in effect, of the [NASD]." App. to Pet. for Cert. 44. The manual does not fit either part of this description: it is neither "of the [NASD]," nor a set of "rules."

First, the manual apparently is not an official NASD document. The manual was not promulgated or adopted by the NASD. Instead, it apparently was compiled by members of the Securities Industry Conference on Arbitration (SICA) as a supplement to the Uniform Code of Arbitration, which the parties clearly did not adopt in paragraph 13. Petitioners present no evidence that the NASD has a policy of giving this specific manual to its arbitrators. Nor do petitioners assert that this manual was even used in the arbitration that gave rise to this case. More importantly, there is no indication in the text of the Client's Agreement that the parties *intended* this manual to be used by the arbitrators.

Second, the manual does not provide any "rules" in the sense contemplated by paragraph 13; instead, it provides general information and advice to the arbitrator, such as "Hints for the Chair." SICA, Arbitrator's Manual 21 (1992). The manual is nothing more than a sort of "how to" guide for the arbitrator. One bit of advice, for example, states: "Care should be exercised, particularly when questioning a witness, so that the arbitrator does not indicate disbelief.

Grimaces, frowns, or hand signals should all be avoided. A 'poker' face is the goal." *Id.*, at 19.[3]

Even if the parties had intended to adopt the manual, it cannot be read to resolve the issue of punitive damages. When read in context, the portion of the SICA manual upon which the majority relies seems only to explain what punitive damages *are*, not to establish whether arbitrators have the authority to award them:

> "The issue of punitive damages may arise with great frequency in arbitrations. Parties to arbitration are informed that arbitrators can consider punitive damages as a remedy. Generally, in court proceedings, punitive damages consist of compensation in excess of actual damages and are awarded as a form of punishment against the wrongdoer. If punitive damages are awarded, the decision of the arbitrators should clearly specify what portion of the award is intended as punitive damages, and the arbitrators should consider referring to the authority on which they relied." *Id.*, at 26–27.

A glance at neighboring passages, which explain the purpose of "Compensatory/Actual Damages," "Injunctive Relief," "Interest," "Attorneys' Fees," and "Forum Fees," see *id.*, at 26–29, confirms that the SICA manual does not even attempt to provide a standardized set of procedural rules.

Even if one made the stretch of reading the passage on punitive damages to relate to an NASD arbitrator's authority, the SICA manual limits its own applicability in the situa-

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[3] Other "rules" include: "The Chair should maintain decorum at all times. Shouting, profanity, or gratuitous remarks should be stopped." SICA, Arbitrator's Manual 20. "Some attorneys think that the more often a statement is made, the truer it becomes. The Chair, however, should discourage needless repetition." *Ibid.* "Immediately after the close of the hearing, the arbitrators usually remain in the hearing room either to begin deliberations or set a date for deliberation. Unlike jurors, the panel members are not restricted from discussing the case among themselves." *Id.*, at 25.

tion presented by this case. According to the manual's Code of Ethics for Arbitrators, "[w]hen an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely." *Id.*, at 38. Regarding procedural rules, the code states that "[w]here the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules." *Id.*, at 38–39. The manual clearly contemplates that the parties' agreement will define the powers and authorities of the arbitrator. Thus, we are directed back to the rest of paragraph 13 and the intent of the parties, whose only expression on the issue is their decision to incorporate the laws of New York.[4]

My examination of the Client's Agreement, the choice-of-law provision, the NASD Code of Procedure, and the SICA manual demonstrates that the parties made their intent clear, but not in the way divined by the majority. New York law specifically precludes arbitrators from awarding punitive damages, and it should be clear that there is no "conflict," as the majority puts it, between the New York law and the NASD rules. The choice-of-law provision speaks directly to the issue, while the NASD Code is silent. Giving effect to every provision of the contract requires us to honor the parties' intent, as indicated in the text of the agreement, to preclude the award of punitive damages by arbitrators.

III

Thankfully, the import of the majority's decision is limited and narrow. This case amounts to nothing more than a fed-

[4] It is telling that petitioners did not even claim until their reply brief that paragraph 13 expressed an intent to reserve to arbitrators the authority to award punitive damages. Instead, petitioners consistently have argued only that the agreement did not constitute a "waiver" of their "right" to obtain punitive damages.

eral court applying Illinois and New York contract law to an agreement between parties in Illinois. Much like a federal court applying a state rule of decision to a case when sitting in diversity, the majority's interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law. As such, the majority's opinion has applicability only to this specific contract and to no other. But because the majority reaches an erroneous result on even this narrow question, I respectfully dissent.

Syllabus

CURTISS-WRIGHT CORP. *v.* SCHOONEJONGEN ET AL.

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

No. 93–1935. Argued January 17, 1995—Decided March 6, 1995

Petitioner Curtiss-Wright Corp. amended its employee benefit plan to provide that the postretirement health care coverage it had maintained for many years would cease for retirees upon the termination of business operations in the facility from which they retired. In ruling for respondent retirees in their ensuing suit, the District Court found, among other things, that the new provision constituted an "amendment" to the plan; that the plan documents nowhere contained a valid "procedure for amending [the] plan, and for identifying the persons who have authority to amend the plan," as required by § 402(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA); and that the proper remedy for this violation was to declare the provision void *ab initio*. The Court of Appeals affirmed, holding that the standard reservation clause contained in Curtiss-Wright's plan constitution—which states that "[t]he Company reserves the right . . . to modify or amend" the plan—is too vague to be an amendment procedure under § 402(b)(3).

Held:

1. Curtiss-Wright's reservation clause sets forth a valid amendment procedure. Pp. 78–86.

(a) The clause satisfies the plain text of § 402(b)(3)'s two requirements. Since ERISA's general definitions section makes quite clear that the term "person," wherever it appears in the statute, includes companies, the clause appears to satisfy § 402(b)(3)'s identification requirement by naming "[t]he Company" as "the perso[n]" with amendment authority. This outright identification necessarily indicates a *procedure* for identifying the person as well, since the plan, in effect, says that the procedure is to look always to the company rather than to any other party. The reservation clause also contains a "procedure for amending [the] plan." Section 402(b)(3) requires only that there be an amendment procedure, and its literal terms are indifferent to the procedure's level of detail. As commonly understood, a procedure is a "particular way" of doing something, and a plan that says in effect it may be amended only by "[t]he Company" adequately sets forth a particular way of making an amendment. Principles of corporate law provide a ready-made set of rules for deciding who has authority to act on behalf of the company. But to read § 402(b)(3) as requiring a plan to specify

on its face who has authority to act on the company's behalf might lead to the invalidation of myriad amendment procedures that no one would think violate the statute. Pp. 78–81.

(b) There is no support for respondents' argument that Congress intended amendment procedures to convey enough detail to serve beneficiaries' interest in knowing their plans' terms. Section 402(b)(3)'s primary purpose is to ensure that every plan *has* a workable amendment procedure, while ERISA's goal of enabling plan beneficiaries to learn their rights and obligations under the plan at any time is served by an elaborate scheme, detailed elsewhere in the statute, which specifies that a plan must be written, meet certain reporting and disclosure requirements, and be made available for inspection at the plan administrator's office. Pp. 81–85.

2. On remand, the Court of Appeals must decide whether Curtiss-Wright's valid amendment procedure was complied with in this case. The answer will depend on a fact-intensive inquiry, under applicable corporate law principles, into who at Curtiss-Wright had plan amendment authority and whether they approved the new provision. If the new provision was not properly authorized when issued, the question would arise whether any subsequent actions served to ratify it *ex post.* Pp. 85–86.

18 F. 3d 1034, reversed and remanded.

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

Laurence Reich argued the cause for petitioner. With him on the briefs were *Stephen F. Payerle* and *Aaron J. Carr.*

Richard P. Bress argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Deputy Solicitor General Kneedler*, *Allen H. Feldman*, and *Ellen L. Beard.*

Thomas M. Kennedy argued the cause for respondents. With him on the brief were *Everett E. Lewis*, *Nicholas F. Lewis*, *Daniel Clifton*, *Ira Cure*, and *Shirley Fingerhood.**

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Hollis T. Hurd*, *Stephen A. Bokat*, *Robin S. Conrad*, and *Mona C. Zeiberg;* for the ERISA Industry Committee et al. by *Steven J. Sacher* and *Susan A. Cahoon;* for the Manufacturers Alliance for Productivity and Innovation, Inc., by *Peter Buscemi* and *Neal*

JUSTICE O'CONNOR delivered the opinion of the Court.

Section 402(b)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 875, 29 U. S. C. § 1102(b)(3), requires that every employee benefit plan provide "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." This case presents the question whether the standard provision in many employer-provided benefit plans stating that "The Company reserves the right at any time to amend the plan" sets forth an amendment procedure that satisfies § 402(b)(3). We hold that it does.

I

For many years, petitioner Curtiss-Wright voluntarily maintained a postretirement health plan for employees who had worked at certain Curtiss-Wright facilities; respondents are retirees who had worked at one such facility in Wood-Ridge, New Jersey. The specific terms of the plan, the District Court determined, could be principally found in two plan documents: the plan constitution and the Summary Plan Description (SPD), both of which primarily covered active employee health benefits.

In early 1983, presumably due to the rising cost of health care, a revised SPD was issued with the following new provision: "TERMINATION OF HEALTH CARE BENEFITS . . . . Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." App. 49. The two main authors of the new SPD provision, Curtiss-Wright's director of benefits and its labor counsel,

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D. Mollen; and for the National Union Fire Insurance Co. of Pittsburgh, Pa., by *Robert N. Eccles.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Steven S. Zaleznick* and *Mary Ellen Signorille;* and for the National Association of Securities and Commercial Law Attorneys by *Jonathan W. Cuneo, Kevin P. Roddy, Steve W. Berman, Bryan L. Clobes,* and *Henry H. Rossbacher.*

testified that they did not think the provision effected a "change" in the plan, but rather merely clarified it. *Id.*, at 70–71, 79. Probably for this reason, the record is less than clear as to which Curtiss-Wright officers or committees had authority to make plan amendments on behalf of the company and whether such officers or committees approved or ratified the new SPD provision. In any event, later that year, Curtiss-Wright announced that the Wood-Ridge facility would close. Shortly thereafter, an executive vice president wrote respondents a series of letters informing them that their post-retirement health benefits were being terminated.

Respondents brought suit in federal court over the termination of their benefits, and many years of litigation ensued. The District Court ultimately rejected most of respondents' claims, including their contention that Curtiss-Wright had bound itself contractually to provide health benefits to them for life. The District Court agreed, however, that the new SPD provision effected a significant change in the plan's terms and thus constituted an "amendment" to the plan; that the plan documents nowhere contained a valid amendment procedure, as required by § 402(b)(3); and that the proper remedy for the § 402(b)(3) violation was to declare the new SPD provision void *ab initio*. The court eventually ordered Curtiss-Wright to pay respondents $2,681,086 in back benefits.

On appeal, Curtiss-Wright primarily argued that the plan documents did contain an amendment procedure, namely, the standard reservation clause contained in the plan constitution and in a few secondary plan documents. The clause states: "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." App. 37; see also 2 RIA Pension Coordinator ¶ 13,181, p. 13,276R–124 (1994) (reproducing IRS' prototype employee benefits plan, which contains similar language). In Curtiss-Wright's view, this

clause sets forth an amendment procedure as required by the statute. It says, in effect, that the plan is to be amended *by "[t]he Company."*

The Court of Appeals for the Third Circuit rejected this argument, as well as all other arguments before it, and affirmed the District Court's remedy. See 18 F. 3d 1034 (1994). It explained: "A primary purpose of § 402(b)(3) is to ensure that all interested parties [including beneficiaries] will know how a plan may be altered and who may make such alterations. Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides." *Id.*, at 1038. And the court suggested that § 402(b)(3) cannot serve that purpose unless it is read to require that every amendment procedure specify precisely "what individuals or bodies within the Company c[an] promulgate an effective amendment." *Id.*, at 1039. In the court's view, then, a reservation clause that says that the plan may be amended "by the Company," without more, is too vague. In so holding, the court distinguished a case, *Huber* v. *Casablanca Industries, Inc.*, 916 F. 2d 85 (1990), in which it had upheld a reservation clause that said, in effect, that the plan may be amended "by the Trustees." "By the trustees," the court reasoned, had a very particular meaning in *Huber;* it meant "by resolutio[n] at a regularly constituted board [of trustees] meeting in accordance with the established process of the trustees." 18 F. 3d, at 1039 (citation omitted).

In a footnote, the court related the concurring views of Judge Roth. *Id.*, at 1039, n. 3. According to the court, Judge Roth thought that the notion of an amendment "by the Company" should be read in light of traditional corporate law principles, which is to say amendment "by the board of directors or whomever of the company has the authority to take such action." *Ibid.* And read in this more specific way, "by the Company" indicates a valid amendment procedure that satisfies § 402(b)(3). She con-

curred rather than dissented, however, because, in the court's words, "neither [Curtiss-Wright's] board nor any other person or entity within [Curtiss-Wright] with the power to act on behalf of 'the Company' ratified [the new SPD provision]." *Ibid.*

Curtiss-Wright petitioned for certiorari on the questions whether a plan provision stating that "[t]he Company" reserves the right to amend the plan states a valid amendment procedure under § 402(b)(3) and, if not, whether the proper remedy is to declare this or any other amendment void *ab initio.* We granted certiorari on both. 512 U. S. 1288 (1994).

II

In interpreting § 402(b)(3), we are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. See *Adams* v. *Avondale Industries, Inc.*, 905 F. 2d 943, 947 (CA6 1990) ("[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"). Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 90–91 (1983). Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner.

A

The text of § 402(b)(3) actually requires *two* things: a "procedure for amending [the] plan" *and* "[a procedure] for identifying the persons who have authority to amend the plan." With respect to the second requirement, the general "Definitions" section of ERISA makes quite clear that the term

"person," wherever it appears in the statute, includes companies. See 29 U. S. C. § 1002(9) ("The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization"). The Curtiss-Wright reservation clause thus appears to satisfy the statute's identification requirement by naming "[t]he Company" as "the perso[n]" with amendment authority.

The text of § 402(b)(3) speaks, somewhat awkwardly, of requiring a *procedure* for identifying the persons with amendment authority, rather than requiring identification of those persons outright. Be that as it may, a plan that simply identifies the persons outright necessarily indicates a procedure for identifying the persons as well. With respect to the Curtiss-Wright plan, for example, to identify "[t]he Company" as the person with amendment authority is to say, in effect, that the procedure for identifying the person with amendment authority is to look always to "[t]he Company." Such an identification procedure is more substantial than might first appear. To say that one must look always to "[t]he Company" is to say that one must look *only* to "[t]he Company" and *not* to any other person—that is, not to any union, not to any third-party trustee, and not to any of the other kinds of outside parties that, in many other plans, exercise amendment authority.

The more difficult question in this case is whether the Curtiss-Wright reservation clause contains a "procedure for amending [the] plan." To recall, the reservation clause says in effect that the plan may be amended "by the Company." Curtiss-Wright is correct, we think, that this states an amendment procedure and one that, like the identification procedure, is more substantial than might first appear. It says the plan may be amended by a unilateral company decision to amend, and only by such a decision—and not, for example, by the unilateral decision of a third-party trustee or upon the approval of the union. Moreover, to the extent

that this procedure *is* the barest of procedures, that is because the Curtiss-Wright plan is the simplest of plans: a voluntarily maintained single-employer health plan that is administered by the employer and funded by the employer. More complicated plans, such as multiemployer plans, may have more complicated amendment procedures, and § 402(b)(3) was designed to cover them as well.

In any event, the literal terms of § 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure, or in an identification procedure for that matter. The provision requires only that there *be* an amendment procedure, which here there is. A "procedure," as that term is commonly understood, is a "particular way" of doing something, Webster's Third New International Dictionary 1807 (1976), or "a manner of proceeding," Random House Dictionary of the English Language 1542 (2d ed. 1987). Certainly a plan that says it may be amended only by a unilateral company decision adequately sets forth "a particular way" of making an amendment. Adequately, that is, with one refinement.

In order for an amendment procedure that says the plan may be amended by "[t]he Company" to make any sense, there must be some way of determining what it means for "[t]he Company" to make a decision to amend or, in the language of trust law, to "sufficiently manifest [its] intention" to amend. Restatement (Second) of Trusts § 331, Comment *c* (1957). After all, only natural persons are capable of making decisions. As Judge Roth suggested, however, principles of corporate law provide a ready-made set of rules for determining, in whatever context, who has authority to make decisions on behalf of a company. Consider, for example, an ordinary sales contract between "Company X" and a third party. We would not think of regarding the contract as meaningless, and thus unenforceable, simply because it does not specify on its face exactly who within "Company X" has the power to enter into such an agreement or carry out its

terms. Rather, we would look to corporate law principles to give "Company X" content. See 2 W. Fletcher, Cyclopedia of Law of Private Corporations § 466, p. 505 (rev. ed. 1990) ("[A] corporation is bound by contracts entered into by its officers and agents acting on behalf of the corporation and for its benefit, provided they act within the scope of their express or implied powers"). So too here.

In the end, perhaps the strongest argument for a textual reading of § 402(b)(3) is that to read it to require specification of individuals or bodies within a company would lead to improbable results. That is, it might lead to the invalidation of myriad amendment procedures that no one would think violate § 402(b)(3), especially those in multiemployer plans—which, as we said, § 402(b)(3) covers as well. For example, imagine a multiemployer plan that says "This Plan may be amended at any time by written agreement of two-thirds of the participating Companies, subject to the approval of the plan Trustees." This would seem to be a fairly robust amendment procedure, and we can imagine numerous variants of it. Yet, because our hypothetical procedure does not specify who within any of "the participating Companies" has authority to enter into such an amendment agreement (let alone what counts as the "approval of the plan Trustees"), respondents would say it is insufficiently specific to pass muster under § 402(b)(3). Congress could not have intended such a result.

B

Curtiss-Wright's reservation clause thus satisfies the plain text of both requirements in § 402(b)(3). Respondents nonetheless argue that, in drafting § 402(b)(3), Congress intended amendment procedures to convey enough detail to serve beneficiaries' interest in knowing the terms of their plans. Ordinarily, we would be reluctant to indulge an argument based on legislative purpose where the text alone yields a clear answer, but we do so here because it is the argument the Court of Appeals found persuasive.

Section 402(b)(3)'s primary purpose is obviously functional: to ensure that every plan *has* a workable amendment procedure. This is clear from not only the face of the provision but also its placement in § 402(b), which lays out the requisite functional features of ERISA plans. 29 U. S. C. § 1102(b) (every ERISA plan shall have, in addition to an amendment procedure, "a procedure for establishing and carrying out a funding policy and method," "[a] procedure under the plan for the allocation of responsibilities for the operation and administration of the plan," and "[a] basis on which payments are made to and from the plan").

Requiring every plan to have a coherent amendment procedure serves several laudable goals. First, for a plan *not* to have such a procedure would risk rendering the plan forever unamendable under standard trust law principles. See Restatement (Second) of Trusts, *supra*, § 331(2). Second, such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve. Finally, having an amendment procedure enables plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not. In fact, plan administrators may have a statutory responsibility to do this sorting out. See 29 U. S. C. § 1104(a)(1)(D) (plan administrators have a duty to run the plan "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [the statute]," which would include the amendment procedure provision). That Congress may have had plan administrators in mind is suggested by the fact that § 402(b)(3), and § 402(b) more generally, is located in the "fiduciary responsibility" section of ERISA. See 29 U. S. C. §§ 1101–1114.

Respondents argue that § 402(b)(3) was intended not only to ensure that every plan has an amendment procedure, but also to guarantee that the procedure conveys enough detail to enable beneficiaries to learn their rights and obligations under the plan at any time. Respondents are no doubt right that one of ERISA's central goals is to enable plan beneficiaries to learn their rights and obligations at any time. But ERISA already *has* an elaborate scheme in place for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents.

The basis of that scheme is another of ERISA's core functional requirements, that "[e]very employee benefit plan shall be established and maintained *pursuant to a written instrument.*" 29 U. S. C. § 1102(a)(1) (emphasis added). In the words of the key congressional report, "[a] written plan is to be required in order that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." H. R. Rep. No. 93–1280, p. 297 (1974) (emphasis added). ERISA gives effect to this "written plan documents" scheme through a comprehensive set of "reporting and disclosure" requirements, see 29 U. S. C. §§ 1021–1031, of which § 402(b)(3) is not part. One provision, for example, requires that plan administrators periodically furnish beneficiaries with a Summary Plan Description, see 29 U. S. C. § 1024(b)(1), the purpose being to communicate to beneficiaries the essential information about the plan. Not surprisingly, the information that every SPD must contain includes the "name and address" of plan administrators and other plan fiduciaries, but not the names and addresses of those individuals with amendment authority. § 1022(b). The same provision also requires that plan administrators furnish beneficiaries with summaries of new amendments no later than 210 days after the end of the plan year in which the amendment is adopted. See § 1024(b)(1). Under ERISA, both Summary Plan Descriptions and plan

amendment summaries "shall be written in a manner calculated to be understood by the average plan participant." § 1022(a)(1).

More important, independent of any information automatically distributed to beneficiaries, ERISA requires that every plan administrator make available for inspection in the administrator's "principal office" and other designated locations a set of all currently operative, governing plan documents, see § 1024(b)(2), which necessarily includes any new, bona fide amendments. See also § 1024(b)(4) (requiring plan administrators, upon written request, to furnish beneficiaries with copies of governing plan documents for a reasonable copying charge). As indicated earlier, plan administrators appear to have a statutory responsibility actually to run the plan in accordance with the currently operative, governing plan documents and thus an independent incentive for obtaining new amendments as quickly as possible and for weeding out defective ones.

This may not be a foolproof informational scheme, although it is quite thorough. Either way, it is the scheme that Congress devised. And we do not think Congress intended it to be supplemented by a faraway provision in another part of the statute, least of all in a way that would lead to improbable results, *supra,* at 81.

In concluding that Curtiss-Wright's reservation clause sets forth a valid amendment procedure, we do not mean to imply that there is anything wrong with plan beneficiaries trying to prove that unfavorable plan amendments were not properly adopted and are thus invalid. This is exactly what respondents are trying to do here, and nothing in ERISA is designed to obstruct such efforts. But nothing in ERISA is designed to facilitate such efforts either. To be sure, some companies that have plans with the standard reservation clause may want to provide greater specification to their amendment procedures precisely to avoid such costly litigation. Or they may want to retain the flexibility that

designating "[t]he Company" (read in light of corporate law) provides them. But either way, this is simply a species of a larger dilemma companies face whenever they must designate who, on behalf of the company, may take legally binding actions that third parties may later have an interest in challenging as unauthorized. Cf. R. Clark, Corporate Law § 3.3.2 (1986). It is not a dilemma ERISA addresses. ERISA, rather, follows standard trust law principles in dictating only that whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level.

III

Having determined that the Curtiss-Wright plan satisfies § 402(b)(3), we do not reach the question of the proper remedy for a § 402(b)(3) violation. On remand, the Court of Appeals will have to decide the question that has always been at the heart of this case: whether Curtiss-Wright's valid amendment procedure—amendment "by the Company"—was complied with in this case. The answer will depend on a fact-intensive inquiry, under applicable corporate law principles, into what persons or committees within Curtiss-Wright possessed plan amendment authority, either by express delegation or impliedly, and whether those persons or committees actually approved the new plan provision contained in the revised SPD. See 2 W. Fletcher, Cyclopedia of the Law of Private Corporations § 444, pp. 397–398 (1990) (authority may be by express delegation or it "may be inferred from circumstances or implied from the acquiescence of the corporation or its agents in a general course of business"). If the new plan provision is found not to have been properly authorized when issued, the question would then arise whether any subsequent actions, such as the executive vice president's letters informing respondents of the termination, served to ratify the provision *ex post*. See *id.*, § 437.10, at 386.

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

SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* GUERNSEY MEMORIAL HOSPITAL

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

No. 93–1251. Argued October 31, 1994—Decided March 6, 1995

After the refinancing of its bonded debt resulted in a "defeasance" loss for accounting purposes, respondent health care provider (hereinafter Hospital) determined that it was entitled to Medicare reimbursement for part of that loss. Although the Hospital contended that it should receive its full reimbursement in the year of the refinancing, the fiscal intermediary agreed with petitioner Secretary of Health and Human Services that the loss had to be amortized over the life of the Hospital's old bonds in accord with an informal Medicare reimbursement guideline, PRM § 233. The District Court ultimately sustained the Secretary's position, but the Court of Appeals reversed. Interpreting the Secretary's Medicare regulations, 42 CFR pt. 413, to require reimbursement according to generally accepted accounting principles (GAAP), the latter court concluded that, because PRM § 233 departed from GAAP, it effected a substantive change in the regulations and was void by reason of the Secretary's failure to issue it in accordance with the notice-and-comment provisions of the Administrative Procedure Act (APA).

Held:

1. The Secretary is not required to adhere to GAAP in making provider reimbursement determinations. Pp. 91–97.

(a) The Medicare regulations do not require reimbursement according to GAAP. The Secretary's position that 42 CFR § 413.20(a)—which specifies, *inter alia,* that "[t]he principles of cost reimbursement require that providers maintain sufficient financial records . . . for proper determination of costs," and that "[s]tandardized definitions, accounting, statistics, and reporting practices that are widely accepted in the hospital and related fields are followed"—ensures the existence of adequate provider records but does not dictate the Secretary's own reimbursement determinations is supported by the regulation's text and the overall structure of the regulations and is therefore entitled to deference as a reasonable regulatory interpretation. Moreover, § 413.24—which requires that a provider's cost data be based on the accrual basis of accounting—does not mandate reimbursement according to GAAP, since GAAP is not the only form of accrual accounting. In fact, PRM § 233 reflects a different accrual method. Pp. 92–95.

Syllabus

(b) The Secretary's reading of her regulations is consistent with the Medicare statute, which does not require adherence to GAAP, but merely instructs that, in establishing methods for determining reimbursable costs, she should "consider, among other things, the principles generally applied by national organizations or established prepayment organizations (which have developed such principles) . . . ," 42 U. S. C. § 1395x(v)(1)(A). Nor is there any basis for suggesting that the Secretary has a statutory duty to promulgate regulations that address every conceivable question in the process of determining equitable reimbursement. To the extent that § 1395x(v)(1)(A)'s broad delegation of authority to her imposes a rulemaking obligation, it is one she has without doubt discharged by issuing comprehensive and intricate regulations that address a wide range of reimbursement questions and by relying upon an elaborate adjudicative structure to resolve particular details not specifically addressed by regulation. The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication, and the Secretary's mode of determining benefits by both rulemaking and adjudication is a proper exercise of her statutory mandate. Pp. 95–97.

2. The Secretary's failure to follow the APA notice-and-comment provisions in issuing PRM § 233 does not invalidate that guideline. It was proper for the Secretary to issue a guideline or interpretive rule in determining that defeasance losses should be amortized. PRM § 233 is the Secretary's means of implementing the statute's mandate that the Medicare program bear neither more nor less than its fair share of reimbursement costs, 42 U. S. C. § 1395x(v)(1)(A)(i), and the regulatory requirement that only the actual cost of services rendered to beneficiaries during a given year be reimbursed, 42 CFR § 413.9. As such, PRM § 233 is a prototypical example of an interpretive rule issued by an agency to advise the public of its construction of the statutes and rules it administers. Interpretive rules do not require notice and comment, although they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process. APA rulemaking would be required if PRM § 233 adopted a new position inconsistent with any of the Secretary's existing regulations. However, because the Secretary's regulations do not bind her to make Medicare reimbursements in accordance with GAAP, her determination in PRM § 233 to depart from GAAP by requiring bond defeasance losses to be amortized does not amount to a substantive change to the regulations. Pp. 97–100.

3. An examination of the nature and objectives of GAAP illustrates the unlikelihood that the Secretary would choose to impose upon herself the duty to go through the time-consuming rulemaking process when-

ever she disagreed with any anouncements or changes in GAAP and wished to depart from them. Pp. 100–102.

(a) GAAP does not necessarily reflect economic reality, and its conservative orientation in guiding judgments and estimates ill serves Medicare reimbursement and its mandate to avoid cross-subsidization. Pp. 100–101.

(b) GAAP is not a lucid or encyclopedic set of pre-existing rules. It encompasses the conventions, rules, and procedures that define accepted accounting practice at a particular point in time, and changes over time. Even at any one point, GAAP consists of multiple sources, any number of which might present conflicting treatments of a particular accounting question. Pp. 101–102.

996 F. 2d 830, reversed.

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

Kent L. Jones argued the cause for petitioner. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Anthony J. Steinmeyer*, and *John P. Schnitker.*

Scott W. Taebel argued the cause for respondent. With him on the brief was *Diane M. Signoracci.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this case a health care provider challenges a Medicare reimbursement determination by the Secretary of Health and Human Services. What begins as a rather conventional accounting problem raises significant questions respecting the interpretation of the Secretary's regulations and her authority to resolve certain reimbursement issues by adju-

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*Briefs of *amici curiae* urging affirmance were filed for the American Hospital Association et al. by *Robert A. Klein* and *Charles W. Bailey;* for the hospitals participating in *St. John Hospital* v. *Shalala* by *William G. Christopher*, *Chris Rossman*, and *Kenneth R. Marcus;* and for the Mother Frances Hospital et al. by *Dan M. Peterson.*

dication and interpretive rules, rather than by regulations that address all accounting questions in precise detail.

The particular dispute concerns whether the Medicare regulations require reimbursement according to generally accepted accounting principles (GAAP), and whether the reimbursement guideline the Secretary relied upon is invalid because she did not follow the notice-and-comment provisions of the Administrative Procedure Act (APA) in issuing it. We hold that the Secretary's regulations do not require reimbursement according to GAAP and that her guideline is a valid interpretive rule.

I

Respondent Guernsey Memorial Hospital (hereinafter Hospital) issued bonds in 1972 and 1982 to fund capital improvements. In 1985, the Hospital refinanced its bonded debt by issuing new bonds. Although the refinancing will result in an estimated $12 million saving in debt service costs, the transaction did result in an accounting loss, sometimes referred to as an advance refunding or defeasance loss, of $672,581. The Hospital determined that it was entitled to Medicare reimbursement for about $314,000 of the loss. The total allowable amount of the loss is not in issue, but its timing is. The Hospital contends it is entitled to full reimbursement in one year, the year of the refinancing; the Secretary contends the loss must be amortized over the life of the old bonds.

The Secretary's position is in accord with an informal Medicare reimbursement guideline. See U. S. Dept. of Health and Human Services, Medicare Provider Reimbursement Manual § 233 (Mar. 1993) (PRM). PRM § 233 does not purport to be a regulation and has not been adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act. The fiscal intermediary relied on § 233 and determined that the loss had to be amortized. The Provider Reimbursement Review Board disagreed, see App. to Pet. for Cert. 54a, but the Administrator of the Health Care

Financing Administration reversed the Board's decision, see *id.*, at 40a. In the District Court the Secretary's position was sustained, see *Guernsey Memorial Hospital* v. *Sullivan*, 796 F. Supp. 283 (SD Ohio 1992), but the Court of Appeals reversed, see *Guernsey Memorial Hospital* v. *Secretary of Health and Human Services*, 996 F. 2d 830 (CA6 1993). In agreement with the Hospital, the court interpreted the Secretary's own regulations to contain a "flat statement that generally accepted accounting principles 'are followed' " in determining Medicare reimbursements. *Id.*, at 833 (quoting 42 CFR § 413.20(a)). Although it was willing to accept the argument that PRM § 233's treatment of advance refunding losses "squares with economic reality," 996 F. 2d, at 834, the Court of Appeals concluded that, because PRM § 233 departed from GAAP, it "effects a substantive change in the regulations [and is] void by reason of the agency's failure to comply with the Administrative Procedure Act in adopting it." *Id.*, at 832. Once the court ruled that GAAP controlled the timing of the accrual, it followed that the Hospital, not the Secretary, was correct and that the entire loss should be recognized in the year of refinancing.

We granted certiorari, 511 U. S. 1016 (1994), and now reverse.

II

Under the Medicare reimbursement scheme at issue here, participating hospitals furnish services to program beneficiaries and are reimbursed by the Secretary through fiscal intermediaries. See 42 U. S. C. §§ 1395g and 1395h (1988 and Supp. V). Hospitals are reimbursed for "reasonable costs," defined by the statute as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." § 1395x(v)(1)(A). The Medicare Act, 79 Stat. 290, as amended, 42 U. S. C. § 1395 *et seq.*, authorizes the Secretary to promulgate regulations "establishing the method or methods to be used" for determining reasonable costs, directing

her in the process to "consider, among other things, the principles generally applied by national organizations or established prepayment organizations (which have developed such principles) in computing" reimbursement amounts. § 1395x(v)(1)(A).

The Secretary has promulgated, and updated on an annual basis, regulations establishing the methods for determining reasonable cost reimbursement. See *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402, 404–407 (1993). The relevant provisions can be found within 42 CFR pt. 413 (1994). Respondent contends that two of these regulations, §§ 413.20(a) and 413.24, mandate reimbursement according to GAAP, and the Secretary counters that neither does.

A

Section 413.20(a) provides as follows:

> "The principles of cost reimbursement require that providers maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Standardized definitions, accounting, statistics, and reporting practices that are widely accepted in the hospital and related fields are followed. Changes in these practices and systems will not be required in order to determine costs payable under the principles of reimbursement. Essentially the methods of determining costs payable under Medicare involve making use of data available from the institution's basis accounts, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries."

Assuming, *arguendo*, that the "[s]tandardized definitions, accounting, statistics, and reporting practices" referred to by the regulation refer to GAAP, that nevertheless is just the beginning, not the end, of the inquiry. The decisive question still remains: Who is it that "follow[s]" GAAP, and for what purposes? The Secretary's view is that § 413.20(a) ensures

the existence of adequate provider records but does not dictate her own reimbursement determinations. We are persuaded that the Secretary's reading is correct.

Section 413.20(a) sets forth its directives in an ordered progression. The first sentence directs that providers must maintain records that are sufficient for proper determination of costs. It does not say the records are conclusive of the entire reimbursement process. The second sentence makes it clear to providers that standardized accounting practices are followed. The third sentence reassures providers that changes in their recordkeeping practices and systems are not required in order to determine what costs the provider can recover when principles of reimbursement are applied to the provider's raw cost data. That sentence makes a distinction between recordkeeping practices and systems on one hand and principles of reimbursement on the other. The last sentence confirms the distinction, for it contemplates that a provider's basic financial information is organized according to GAAP as a beginning point from which the Secretary "arrive[s] at equitable and proper payment for services." This is far different from saying that GAAP is by definition an equitable and proper measure of reimbursement.

The essential distinction between recordkeeping requirements and reimbursement principles is confirmed by the organization of the regulations in 42 CFR pt. 413 (1994). Subpart A sets forth introductory principles. Subpart B, containing the regulation here in question, is entitled "Accounting Records and Reports." The logical conclusion is that the provisions in subpart B concern recordkeeping requirements rather than reimbursement, and closer inspection reveals this to be the case. Section 413.20 is the first section in subpart B, and is entitled "Financial data and reports." In addition to § 413.20(a), the other paragraphs in § 413.20 govern the "[f]requency of cost reports," "[r]ecordkeeping requirements for new providers," "[c]ontinuing provider recordkeeping requirements," and "[s]uspension of program

payments to a provider . . . [who] does not maintain . . . adequate records." Not until the following subparts are cost reimbursement matters considered. Subpart C is entitled "Limits on Cost Reimbursement," subpart D "Apportionment [of Allowable Costs]," subpart E "Payments to Providers," and subparts F through H address reimbursement of particular cost categories. The logical sequence of a regulation or a part of it can be significant in interpreting its meaning.

It is true, as the Court of Appeals said, that § 413.20(a) "does not exist in a vacuum" but rather is a part of the overall Medicare reimbursement scheme. 996 F. 2d, at 835. But it does not follow from the fact that a provider's cost accounting is the first step toward reimbursement that it is the only step. It is hardly surprising that the reimbursement process begins with certain recordkeeping requirements.

The regulations' description of the fiscal intermediary's role underscores this interpretation. The regulations direct the intermediary to consult and assist providers in interpreting and applying the principles of Medicare reimbursement to generate claims for reimbursable costs, § 413.20(b), suggesting that a provider's own determination of its claims involves more than handing over its existing cost reports. The regulations permit initial acceptance of reimbursable cost claims, unless there are obvious errors or inconsistencies, in order to expedite payment. § 413.64(f)(2). When a subsequent, more thorough audit follows, it may establish that adjustments are necessary. *Ibid.*; see also §§ 421.100(a), (c). This sequence as well is consistent with the Secretary's view that a provider's cost accounting systems are only the first step in the ultimate determination of reimbursable costs.

The Secretary's position that § 413.20(a) does not bind her to reimburse according to GAAP is supported by the regulation's text and the overall structure of the regulations. It

is a reasonable regulatory interpretation, and we must defer to it. *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512 (1994); see also *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151 (1991) ("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"); *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986) ("agency's construction of its own regulations is entitled to substantial deference").

Respondent argues that, even if § 413.20(a) does not mandate reimbursement according to GAAP, § 413.24 does. This contention need not detain us long. Section 413.24 requires that a provider's cost data be based on the accrual basis of accounting, under which "revenue is reported in the period when it is earned, regardless of when it is collected, and expenses are reported in the period in which they are incurred, regardless of when they are paid." § 413.24(b)(2). But GAAP is not the only form of accrual accounting; in fact, both the GAAP approach and PRM § 233 reflect different methods of accrual accounting. See Accounting Principles Board (APB) Opinion No. 26, ¶¶ 5–8, reprinted at App. 64–66 (describing alternative accrual methods of recognizing advance refunding losses, including the one adopted in PRM § 233). Section 413.24 does not, simply by its accrual accounting requirement, bind the Secretary to make reimbursements according to GAAP.

B

The Secretary's reading of her regulations is consistent with the Medicare statute. Rather than requiring adherence to GAAP, the statute merely instructs the Secretary, in establishing the methods for determining reimbursable costs, to "consider, among other things, the principles generally applied by national organizations or established prepay-

ment organizations (which have developed such principles) in computing the amount of payment . . . to providers of services." 42 U. S. C. § 1395x(v)(1)(A).

Nor is there any basis for suggesting that the Secretary has a statutory duty to promulgate regulations that, either by default rule or by specification, address every conceivable question in the process of determining equitable reimbursement. To the extent the Medicare statute's broad delegation of authority imposes a rulemaking obligation, see *ibid.*, it is one the Secretary has without doubt discharged. See *Good Samaritan Hospital* v. *Shalala*, 508 U. S., at 418, and n. 13, 419, n. 15. The Secretary has issued regulations to address a wide range of reimbursement questions. The regulations are comprehensive and intricate in detail, addressing matters such as limits on cost reimbursement, apportioning costs to Medicare services, and the specific treatment of numerous particular costs. As of 1994, these regulations consumed some 640 pages of the Code of Federal Regulations.

As to particular reimbursement details not addressed by her regulations, the Secretary relies upon an elaborate adjudicative structure which includes the right to review by the Provider Reimbursement Review Board, and, in some instances, the Secretary, as well as judicial review in federal district court of final agency action. 42 U. S. C. § 1395*oo*(f)(1); see *Bethesda Hospital Assn.* v. *Bowen*, 485 U. S. 399, 400–401 (1988). That her regulations do not resolve the specific timing question before us in a conclusive way, or "could use a more exact mode of calculating," does not, of course, render them invalid, for the "methods for the estimation of reasonable costs" required by the statute only need be "generalizations [that] necessarily will fail to yield exact numbers." *Good Samaritan*, *supra*, at 418. The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267

(1974); *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947). The Secretary's mode of determining benefits by both rulemaking and adjudication is, in our view, a proper exercise of her statutory mandate.

III

We also believe it was proper for the Secretary to issue a guideline or interpretive rule in determining that defeasance losses should be amortized. PRM § 233 is the means to ensure that capital-related costs allowable under the regulations are reimbursed in a manner consistent with the statute's mandate that the program bear neither more nor less than its fair share of costs. 42 U. S. C. § 1395x(v)(1)(A)(i) ("[T]he necessary costs of efficiently delivering covered services to individuals covered by [Medicare] will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by [Medicare]"). The Secretary has promulgated regulations authorizing reimbursement of capital-related costs such as respondent's that are "appropriate and helpful in . . . maintaining the operation of patient care facilities," 42 CFR § 413.9(b)(2) (1994); see generally §§ 413.130–413.157, including "[n]ecessary and proper interest" and other costs associated with capital indebtedness, § 413.153(a)(1); see also §§ 413.130(a)(7) and (g). The only question unaddressed by the otherwise comprehensive regulations on this particular subject is whether the loss should be recognized at once or spread over a period of years. It is at this step that PRM § 233 directs amortization.

Although one-time recognition in the initial year might be the better approach where the question is how best to portray a loss so that investors can appreciate in full a company's financial position, see APB Opinion 26, ¶¶ 4–5, reprinted at App. 64, the Secretary has determined in PRM § 233 that amortization is appropriate to ensure that Medicare only reimburse its fair share. The Secretary must calculate how much of a provider's total allowable costs are

attributable to Medicare services, see 42 CFR §§ 413.5(a), 413.9(a), and (c)(3) (1994), which entails calculating what proportion of the provider's services were delivered to Medicare patients, §§ 413.50 and 413.53. This ratio is referred to as the provider's "Medicare utilization." App. to Pet. for Cert. 49a. In allocating a provider's total allowable costs to Medicare, the Secretary must guard against various contingencies. The percentage of a hospital's patients covered by Medicare may change from year to year; or the provider may drop from the Medicare program altogether. Either will cause the hospital's Medicare utilization to fluctuate. Given the undoubted fact that Medicare utilization will not be an annual constant, the Secretary must strive to assure that costs associated with patient services provided over time be spread, to avoid distortions in reimbursement. As the provider's yearly Medicare utilization becomes ascertainable, the Secretary is able to allocate costs with accuracy and the program can bear its proportionate share. Proper reimbursement requires proper timing. Should the Secretary reimburse in one year costs in fact attributable to a span of years, the reimbursement will be determined by the provider's Medicare utilization for that one year, not for later years. This leads to distortion. If the provider's utilization rate changes or if the provider drops from the program altogether the Secretary will have reimbursed up front an amount other than that attributable to Medicare services. The result would be cross-subsidization, *id.*, at 50a, which the Act forbids. 42 U. S. C. § 1395x(v)(1)(A)(i).

That PRM § 233 implements the statutory ban on cross-subsidization in a reasonable way is illustrated by the Administrator's application of § 233 to the facts of this case. The Administrator found that respondent's loss "did not relate exclusively to patient care services rendered in the year of the loss . . . . [but were] more closely related to [patient care services in] the years over which the original bond term extended." App. to Pet. for Cert. 49a. Because the loss

was associated with patient services over a period of time, the Administrator concluded that amortization was required to avoid the statutory ban on cross-subsidization:

> "The statutory prohibition against cross-subsidization [citing the provision codified at 42 U. S. C. § 1395x (v)(1)(A)], requires that costs recognized in one year, but attributable to health services rendered over a number of years, be amortized and reimbursed during those years when Medicare beneficiaries use those services." *Id.*, at 50a (footnote omitted).
>
> "By amortizing the loss to match it to Medicare utilization over the years to which it relates, the program is protected from any drop in Medicare utilization, and the provider is likewise assured that it will be adequately reimbursed if Medicare utilization increases. Further, the program is protected from making a payment attributable to future years and then having the provider drop out of the Program before services are rendered to Medicare beneficiaries in those future years." *Id.*, at 49a (footnote omitted).

As an application of the statutory ban on cross-subsidization and the regulatory requirement that only the actual cost of services rendered to beneficiaries during a given year be reimbursed, 42 U. S. C. § 1395x(v)(1)(A)(i); 42 CFR § 413.9 (1994), PRM § 233 is a prototypical example of an interpretive rule " 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.' " *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302, n. 31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)). Interpretive rules do not require notice and comment, although, as the Secretary recognizes, see Foreword to PRM, they also do not have the force and effect of law and are not accorded that weight in the adjudicatory process, *ibid.*

We can agree that APA rulemaking would still be required if PRM § 233 adopted a new position inconsistent with any of the Secretary's existing regulations. As set forth in Part II, however, her regulations do not require reimbursement according to GAAP. PRM § 233 does not, as the Court of Appeals concluded it does, "effec[t] a substantive change in the regulations." 996 F. 2d, at 832.

IV

There is much irony in the suggestion, made in support of the Hospital's interpretation of the statute and regulations, that the Secretary has bound herself to delegate the determination of any matter not specifically addressed by the regulations to the conventions of financial accounting that comprise GAAP. The Secretary in effect would be imposing upon herself a duty to go through the time-consuming rulemaking process whenever she disagrees with any announcements or changes in GAAP and wishes to depart from them. Examining the nature and objectives of GAAP illustrates the unlikelihood that the Secretary would choose that course.

Contrary to the Secretary's mandate to match reimbursement with Medicare services, which requires her to determine with some certainty just when and on whose account costs are incurred, GAAP "do[es] not necessarily parallel economic reality." R. Kay & D. Searfoss, Handbook of Accounting and Auditing, ch. 5, p. 7 (2d ed. 1989). Financial accounting is not a science. It addresses many questions as to which the answers are uncertain and is a "process [that] involves continuous judgments and estimates." *Id.*, ch. 5, at 7–8. In guiding these judgments and estimates, "financial accounting has as its foundation the principle of conservatism, with its corollary that 'possible errors in measurement [should] be in the direction of understatement rather than overstatement of net income and net assets.' " *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 542 (1979) (citation omitted). This orientation may be consistent with the ob-

jective of informing investors, but it ill serves the needs of Medicare reimbursement and its mandate to avoid cross-subsidization. Cf. *id.*, at 543 ("[T]he accountant's conservatism cannot bind the Commissioner [of the IRS] in his efforts to collect taxes").

GAAP is not the lucid or encyclopedic set of pre-existing rules that the dissent might perceive it to be. Far from a single-source accounting rulebook, GAAP "encompasses the conventions, rules, and procedures that define accepted accounting practice at a particular point in time." Kay & Searfoss, ch. 5, at 7 (1994 Update). GAAP changes and, even at any one point, is often indeterminate. "[T]he determination that a particular accounting principle is generally accepted may be difficult because no single source exists for all principles." *Ibid.* There are 19 different GAAP sources, any number of which might present conflicting treatments of a particular accounting question. *Id.*, ch. 5, at 6–7. When such conflicts arise, the accountant is directed to consult an elaborate hierarchy of GAAP sources to determine which treatment to follow. *Ibid.* We think it is a rather extraordinary proposition that the Secretary has consigned herself to this process in addressing the timing of Medicare reimbursement.

The framework followed in this case is a sensible structure for the complex Medicare reimbursement process. The Secretary has promulgated regulations setting forth the basic principles and methods of reimbursement, and has issued interpretive rules such as PRM § 233 that advise providers how she will apply the Medicare statute and regulations in adjudicating particular reimbursement claims. Because the Secretary's regulations do not bind her to make Medicare reimbursements in accordance with GAAP, her determination in PRM § 233 to depart from GAAP by requiring bond defeasance losses to be amortized does not amount to a substantive change to the regulations. It is a valid interpretive rule, and it was reasonable for the Secretary to follow that

policy here to deny respondent's claim for full reimbursement of its defeasance loss in 1985.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS join, dissenting.

Unlike the Court, I believe that general Medicare reporting and reimbursement regulations require provider costs to be treated according to "generally accepted accounting principles." As a result, I would hold that contrary guidelines issued by the Secretary of Health and Human Services in an informal policy manual and applied to determine the timing of reimbursement in this case are invalid for failure to comply with the notice and comment procedures established by the Administrative Procedure Act, 5 U. S. C. § 553. Because the Court holds to the contrary, I respectfully dissent.

I

It is undisputed, as the Court notes, *ante*, at 90, that respondent, Guernsey Memorial Hospital (Hospital), is entitled to reimbursement for the reasonable advance refunding costs it incurred when it refinanced its capital improvement bonds in 1985. The only issue here is one of timing: whether reimbursement is to be made in a lump sum in the year of the refinancing, in accordance with generally accepted accounting principles (known in the accounting world as GAAP), or in a series of payments over the remaining life of the original bonds, as the Secretary ultimately concluded after applying § 233 of the Medicare Provider Reimbursement Manual (PRM). The Hospital challenged the Secretary's reimbursement decision under the Medicare Act, 42 U. S. C. § 1395*oo*(f), which incorporates the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* (1988 ed. and Supp. V), by reference. Under the governing standard, reviewing courts are to "hold

unlawful and set aside" an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. § 706(2)(A). We must give substantial deference to an agency's interpretation of its own regulations, *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986), but an agency's interpretation cannot be sustained if it is "'plainly erroneous or inconsistent with the regulation.'" *Stinson* v. *United States*, 508 U. S. 36, 45 (1993) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945)). In my view, that is the case here.

The Medicare Act requires that, for reimbursement purposes, the actual reasonable costs incurred by a provider "shall be determined in accordance with regulations establishing the method or methods to be used . . . in determining such costs." 42 U. S. C. § 1395x(v)(1)(A). The Secretary's regulations similarly provide that the "[r]easonable cost of any services must be determined in accordance with regulations establishing the method or methods to be used, and the items to be included." 42 CFR § 413.9(b)(1) (1994). The Secretary is not bound to adopt GAAP for reimbursement purposes; indeed, the statute only requires that, in promulgating the necessary regulations, "the Secretary shall consider, among other things, the principles generally applied by national organizations or established prepayment organizations (which have developed such principles) in computing the amount of payment . . . to providers of services . . . ." 42 U. S. C. § 1395x(v)(1)(A). Neither the Hospital nor the Court of Appeals disputes that the Secretary has broad and flexible authority to prescribe standards for reimbursement. See *Good Samaritan Hospital* v. *Shalala*, 508 U. S. 402, 418, n. 13 (1993).

Nevertheless, the statute clearly contemplates that the Secretary will state the applicable reimbursement methods in regulations—including default rules that cover a range of situations unless and until specific regulations are promulgated to supplant them with respect to a particular type of

cost. Indeed, despite the Court's suggestion to the contrary, *ante*, at 96, only by employing such default rules can the Secretary operate the sensible, comprehensive reimbursement scheme that Congress envisioned. Otherwise, without such background guidelines, providers would not have the benefit of regulations establishing the accounting principles upon which reimbursement decisions will be based, and administrators would be free to select, without having to comply with notice and comment procedures, whatever accounting rule may appear best in a particular context (so long as it meets minimum standards of rationality). In my view, the question becomes simply whether the Secretary has in fact adopted GAAP as the default rule for cost reimbursement accounting.

Like the Court, see *ante*, at 95–96, I do not think that 42 CFR § 413.24(a) (1994), which provides that Medicare cost data "must be based on . . . the accrual basis of accounting," requires the use of GAAP. As the regulation itself explains, "[u]nder the accrual basis of accounting, revenue is reported in the period when it is earned, regardless of when it is collected, and expenses are reported in the period in which they are incurred, regardless of when they are paid." § 413.24(b)(2). This definition of "accrual basis" simply incorporates the dictionary understanding of the term, thereby distinguishing the method required of cost providers from "cash basis" accounting (under which revenue is reported only when it is actually received and expenses are reported only when they are actually paid). GAAP employs the generally accepted form of accrual basis accounting, but not the only possible form. In fact, both the applicable GAAP rule, established by Early Extinguishment of Debt, Accounting Principles Board Opinion No. 26 (1972), reprinted at App. 62, and PRM § 233 appear to reflect accrual, as opposed to cash basis, accounting principles.

Although § 413.24 simply opens the door for the Secretary to employ GAAP, § 413.20 makes clear that she has, in fact,

incorporated GAAP into the cost reimbursement process. That section provides that "[s]tandardized definitions, accounting, statistics, and reporting practices that are widely accepted in the hospital and related fields are followed." § 413.20(a). As the Court of Appeals noted, "[i]t is undisputed, in the case at bar, that Guernsey Memorial Hospital keeps its books on the accrual basis of accounting and in accordance with generally accepted accounting principles." *Guernsey Memorial Hospital* v. *Secretary of HHS*, 996 F. 2d 830, 834 (CA6 1993). Similarly, related entities in the health care field employ GAAP as their standardized accounting practices. See American Institute of Certified Public Accountants, Audits of Providers of Health Care Services § 3.01, p. 11 (1993) ("Financial statements of health care entities should be prepared in conformity with generally accepted accounting principles"); Brief for American Hospital Association et al. as *Amici Curiae* 7–8 ("Generally accepted accounting principles have always provided the standard definitions and accounting practices applied by non-government hospitals in maintaining their books and records"). Accordingly, the Secretary concedes that, under § 413.20, the Hospital at the very least was required to submit its request for Medicare reimbursement in accordance with GAAP. *Guernsey Memorial Hospital* v. *Sullivan*, 796 F. Supp. 283, 288–289 (SD Ohio 1992); Tr. of Oral Arg. 8.

The remainder of § 413.20 demonstrates, moreover, that the accounting practices commonly used in the health care field determine how costs will be reimbursed by Medicare, not just how they are to be reported. The first sentence of § 413.20(a) begins with a statement that the provision explains what "[t]he principles of *cost reimbursement* require." (Emphasis added.) And the sentence emphasizing that standardized accounting and reporting practices "are followed" is itself accompanied by the promise that "[c]hanges in these practices and systems will not be required in order to determine costs payable [that is, reimbursable] under the

principles of reimbursement." The language of the regulation, taken as a whole, indicates that the accounting system maintained by the provider ordinarily forms the basis for determining how Medicare costs will be reimbursed. I find it significant that the Secretary, through the Administrator of the Health Care Finance Administration, has changed her interpretation of this regulation, having previously concluded that this provision generally requires the costs of Medicare providers to be reimbursed according to GAAP when that construction was to her benefit. See *Dr. David M. Brotman Memorial Hospital* v. *Blue Cross Assn./Blue Cross of Southern California*, HCFA Admin. Decision, CCH Medicare and Medicaid Guide ¶ 30,922, p. 9839 (1980) (holding that, "[u]nder 42 CFR 405.406 [now codified as § 413.20], the determination of costs payable under the program should follow standardized accounting practices" and applying the GAAP rule—that credit card costs should be treated as expenses in the period incurred—and not the PRM's contrary rule—that such costs should be considered reductions of revenue).

Following the Secretary's current position, the Court concludes, *ante*, at 92–93, that § 413.20 was intended to do no more than reassure Medicare providers that they would not be required fundamentally to alter their accounting practices for reporting purposes. Indeed, the Court maintains, the regulation simply ensures the existence of adequate provider financial records, maintained according to widely accepted accounting practices, that will enable the Secretary to calculate the costs payable under the Medicare program using some other systemwide method of determining costs, which method she does not, and need not, state in any regulations. For several reasons, I find the Court's interpretation of § 413.20 untenable.

Initially, the Court's view is belied by the text and structure of the regulations. As the Court of Appeals noted, "the sentence in [§ 413.20(a)] that says standardized reporting

practices 'are followed' does not exist in a vacuum." 996 F. 2d, at 835. The Provider Reimbursement Review Board has explained: "[T]he purpose of cost reporting is to enable a hospital's costs to be known so that its reimbursement can be calculated. For that reason, there must be some consistency between the fundamental principles of cost reporting and those principles used for cost reimbursement." *Fort Worth Osteopathic Medical Center* v. *Blue Cross and Blue Shield Ass'n/Blue Cross and Blue Shield of Texas,* CCH Medicare and Medicaid Guide ¶ 40,413, p. 31,848 (1991). The text of § 413.20 itself establishes this link between cost reporting and cost reimbursement by explaining that a provider hospital generally need not modify its accounting and reporting practices in order to determine what costs Medicare will reimburse. That is, "the methods of determining costs payable under Medicare involve making use of data available from the institution's basis accounts, as usually maintained, to arrive at equitable and proper payment for services to beneficiaries." § 413.20(a). By linking the reimbursement process to the provider's existing financial records, the regulation contemplates that both the agency and the provider will be able to determine what costs are reimbursable. It would make little sense to tie cost reporting to cost reimbursement in this manner while simultaneously mandating different accounting systems for each.

In addition, as the Court aptly puts it, "[t]he logical sequence of a regulation . . . can be significant in interpreting its meaning." *Ante,* at 94. Consideration of how a provider's claim for reimbursement is processed undermines the Court's interpretation of § 413.20(a). The Court suggests that the fiscal intermediaries who make the initial reimbursement decisions take a hospital's cost report as raw data and apply a separate set of accounting principles to determine the proper amount of reimbursement. In certain situations, namely where the regulations provide for specific departures from GAAP, this is undoubtedly the case. But the

description of the intermediary's role in the regulations contemplates reliance on the GAAP-based cost report *as determining reimbursable costs* in considering the ordinary claim. See, *e. g.*, § 413.60(b) (providing that, "[a]t the end of the [reporting] period, the actual apportionment, *based on the cost finding and apportionment methods selected by the provider*, *determines* the Medicare reimbursement for the actual services provided to beneficiaries during the period" (emphasis added)); § 413.64(f)(2) ("In order to reimburse the provider as quickly as possible, an initial retroactive adjustment will be made as soon as the cost report is received. For this purpose, *the costs will be accepted as reported, unless there are obvious errors or inconsistencies, subject to later audit.* When an audit is made and the final liability of the program is determined, a final adjustment will be made" (emphasis added)). The fiscal intermediary, then, is essentially instructed to check the hospital's cost report for accuracy, reasonableness, and presumably compliance with the regulations. But that task seems to operate within the framework of the hospital's normal accounting procedure—*i. e.*, GAAP—and not some alternative, uncodified set of accounting principles employed by the Secretary. See generally 42 CFR §§ 421.1–421.128 (1994).

I take seriously our obligation to defer to an agency's reasonable interpretation of its own regulations, particularly "when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 512 (1994) (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U. S. 680, 697 (1991)). In this case, however, the Secretary advances a view of the regulations that would force us to conclude that she has not fulfilled her statutory duty to promulgate regulations determining the methods by which reasonable Medicare costs are to be

calculated. If § 413.20 does not incorporate GAAP as the basic method for determining cost reimbursement in the absence of a more specific regulation, then there is *no* regulation that specifies an overall methodology to be applied in the cost determination process. Given that the regulatory scheme could not operate without such a background method, and given that the statute requires the Secretary to make reimbursement decisions "in accordance with regulations establishing the method or methods to be used," 42 U. S. C. § 1395x(v)(1)(A), I find the Secretary's interpretation to be unreasonable and unworthy of deference.

Unlike the Court, therefore, I would hold that § 413.20 requires the costs incurred by Medicare providers to be reimbursed according to GAAP in the absence of a specific regulation providing otherwise. The remainder of my decision flows from this conclusion. PRM § 233, which departs from the GAAP rule concerning advance refunding losses, does not have the force of a regulation because it was promulgated without notice and comment as required by the Administrative Procedure Act, 5 U. S. C. § 553. And, contrary to the Secretary's argument, PRM § 233 cannot be a valid "interpretation" of the Medicare regulations because it is clearly at odds with the meaning of § 413.20 itself. Thus, I would conclude that the Secretary's refusal, premised upon an application of PRM § 233, to reimburse the Hospital's bond defeasement costs in accordance with GAAP was invalid.

II

The remaining arguments advanced by the Court in support of the Secretary's position do not alter my view of the regulatory scheme. The Court suggests that a contrary decision, by requiring the Secretary to comply with the notice and comment provisions of the Administrative Procedure Act in promulgating reimbursement regulations, would impose an insurmountable burden on the Secretary's administration of the Medicare program. I disagree. Congress obviously

thought that the Secretary could manage that task when it required that she act by regulation. Moreover, despite the Court's suggestion, *ante*, at 96, nothing in my position requires the agency to adopt substantive rules addressing every detailed and minute reimbursement issue that might arise. An agency certainly cannot foresee every factual scenario with which it may be presented in administering its programs; to fill in the gaps, it must rely on adjudication of particular cases and other forms of agency action, such as the promulgation of interpretive rules and policy statements, that give effect to the statutory principles and the background methods embodied in the regulations. Far from being foreclosed from case-by-case adjudication, the Secretary is simply obligated, in making those reimbursement decisions, to abide by whatever ground rules she establishes by regulation. Under the Court's reading of the regulations, the Secretary in this case did not apply any accounting principle found in the regulations to the specific facts at issue—and indeed could not have done so because no such principles are stated outside the detailed provisions governing particular reimbursement decisions. I believe that the Medicare Act's command that reimbursement requests by providers be evaluated "in accordance with regulations establishing the method or methods to be used" precludes this result.

Moreover, I find it significant that the bond defeasement situation at issue here *was* foreseen. If the Secretary had the opportunity to include a section on advance refunding costs in the PRM, then she could have promulgated a regulation to that effect in compliance with the Administrative Procedure Act, thereby giving the public a valuable opportunity to comment on the regulation's wisdom and those adversely affected the chance to challenge the ultimate rule in court. An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through substantive changes recorded in an informal policy

manual that are unsupported by the language of the regulation. Here, Congress expressed a clear policy in the Medicare Act that the reimbursement principles selected by the Secretary—whatever they may be—must be adopted subject to the procedural protections of the Administrative Procedure Act. I would require the Secretary to comply with that statutory mandate.

The PRM, of course, remains an important part of the Medicare reimbursement process, explaining in detail what the regulations lay out in general and providing those who must prepare and process claims with the agency's statements of policy concerning how those regulations should be applied in particular contexts. One role for the manual, therefore, is to assist the Secretary in her daunting task of overseeing the thousands of Medicare reimbursement decisions made each year. As the foreword to the PRM explains, "[t]he procedures and methods set forth in this manual have been devised to accommodate program needs and the administrative needs of providers and their intermediaries and will assure that the reasonable cost regulations are uniformly applied nationally without regard to where covered services are furnished." Indeed, large portions of the PRM are devoted to detailed examples, including step-by-step calculations, of how certain rules should be applied to particular facts. The manual also provides a forum for the promulgation of interpretive rules and general statements of policy, types of agency action that describe what the agency believes the statute and existing regulations require but that do not alter the substantive obligations created thereby. Such interpretive rules are exempt from the notice and comment provisions of the Administrative Procedure Act, see 5 U. S. C. § 553(b)(A), but they must *explain* existing law and not *contradict* what the regulations require.

As a result, the policy considerations upon which the Court focuses, see *ante,* at 97–100, are largely beside the point. Like the Court of Appeals, I do not doubt that the

amortization approach embodied in PRM § 233 "squares with economic reality," 996 F. 2d, at 834, and would likely be upheld as a rational regulation were it properly promulgated. Nor do I doubt that amortization of advance refunding costs may have certain advantages for Medicare reimbursement purposes. It is certainly true that the Act prohibits the Medicare program from bearing more or less than its proper share of hospital costs, 42 U. S. C. § 1395x(v)(1)(A)(i), but immediate recognition of advance refunding losses does not violate this principle. While the Court, like the Secretary, assumes that advance refunding costs are properly attributed to health care services rendered over a number of years, it does not point to any evidence in the record substantiating that proposition. In fact, what testimony there is supports the view that it is appropriate to recognize advance refunding losses in the year of the transaction because the provider no longer carries the costs of the refunded debt on its books thereafter; the losses in question simply represent a one-time recognition of the difference between the net carrying costs of the old bonds and the price necessary to reacquire them. See, *e. g.*, App. 14–15, 22. While reasonable people may debate the merits of the two options, the point is that both appear in the end to represent economically reasonable and permissible methods of determining what costs are properly reimbursable and when. Given that neither approach is commanded by the statute, the cross-subsidization argument should not alter our reading of § 413.20.

Finally, the Secretary argues that she was given a "broad and flexible mandate" to prescribe standards for Medicare reimbursement, and that, as a result, "it is exceedingly unlikely that the Secretary would have intended, in general regulations promulgated as part of the initial implementation of the Medicare Act, to abdicate to the accounting profession (or to anyone else) ultimate responsibility for making particular cost reimbursement determinations." Brief for Petitioner 19. She points out that the purpose of Medicare

reimbursement, to provide payment of the necessary costs of efficient delivery of covered services to Medicare beneficiaries, may not be identical to the objective of financial accounting, which is "to provide useful information to management, shareholders, creditors, and others properly interested" and "has as its foundation the principle of [financial] conservatism." *Thor Power Tool Co.* v. *Commissioner*, 439 U. S. 522, 542 (1979) (rejecting taxpayer's assertion that an accounting principle that conforms to GAAP must be presumed to be permissible for tax purposes). The Court makes this argument as well. See *ante*, at 100–101.

Reading the regulations to employ GAAP, even though it is possible that the relevant reimbursement standard will change over time as the position of the accounting profession evolves, does not imply an abdication of statutory authority but a necessary invocation of an established body of accounting principles to apply where specific regulations have not provided otherwise. The Secretary is, of course, not bound by GAAP in such a situation and, indeed, has promulgated reimbursement *regulations* that depart from the GAAP default rule in specific situations. Compare, *e. g.*, § 413.134 (f)(2) (limited recognition of gain or loss on involuntary conversion of depreciable asset) with R. Kay & D. Searfoss, Handbook of Accounting and Auditing, ch. 15, p. 14 (2d ed. 1989 and 1994 Supp.) (gains or losses are recognized under GAAP in the period of disposal of a depreciable asset, even if reinvested in a similar asset). The Secretary would also be free to devise a reimbursement scheme that does not involve GAAP as a background principle at all if she believes, as the Court argues, that use of GAAP binds her to a cost allocation methodology ill suited to Medicare reimbursement, see *ante*, at 101. Our task is simply to review the regulations the Secretary has in fact adopted, and I conclude that the Secretary has incorporated GAAP as the reimbursement default rule.

III

Contrary to the Court's conclusion, I do not believe that the Administrator's reimbursement decision can be defended as a rational application of the statute and the existing regulations. The Hospital sought reimbursement for its advance refunding costs in accordance with GAAP and in compliance with the Secretary's published regulations. The Administrator applied PRM §233, which calls for a departure from GAAP in this instance, to deny the Hospital's request; that decision contradicted the agency's own regulations and therefore resulted in a reimbursement decision that was "not in accordance with law" within the meaning of the Administrative Procedure Act, 5 U. S. C. §706(2)(A). I agree with the court below that "[t]he 'nexus' that exists in the regulations between cost reporting and cost reimbursement is too strong . . . to be broken by a rule not adopted in accordance with the rulemaking requirements of the Administrative Procedure Act." 996 F. 2d, at 836. Because the Court holds otherwise, I respectfully dissent.

GOEKE, SUPERINTENDENT, RENZ CORRECTIONAL CENTER *v.* BRANCH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94–898. Decided March 20, 1995

Before a Missouri trial court could hold a hearing to consider respondent's motion for a new trial and to sentence her for the murder of her husband, respondent took flight. She was recaptured and sentenced to life imprisonment without possibility of parole. The State Court of Appeals dismissed her timely notice of appeal on direct review and an appeal of the trial court's denial of her motion for postconviction relief, finding that, under Missouri's well-established fugitive dismissal rule, a defendant who attempts to escape justice after conviction forfeits her right to appeal. Subsequently, the Federal District Court rejected her procedural due process argument and denied her petition for habeas relief. On appeal, the Eighth Circuit found that dismissal of respondent's appeal where her preappeal flight had no adverse effect on the appellate process violated substantive due process. The court also concluded that the State had waived its argument that application of the court's ruling constituted a new rule that could not be announced in a case on collateral review under *Teague* v. *Lane*, 489 U. S. 288.

Held: The State did not waive the *Teague* issue, and application of the Eighth Circuit's novel rule violates *Teague*'s holding. The record supports the State's position that it raised the *Teague* claim in the District Court and the Eighth Circuit. Thus, it must be considered now, and it is dispositive. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389. The Eighth Circuit's fugitive dismissal rule was neither dictated nor compelled by existing precedent when respondent's conviction became final. Nor does the rule fall into *Teague*'s exception for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.

Certiorari granted; 37 F. 3d 371, reversed.

PER CURIAM.

In this case, the Eighth Circuit granted habeas relief on the ground that it is a violation of Fourteenth Amendment due process for a state appellate court to dismiss the appeal of a recaptured fugitive where there is no demonstrated ad-

verse effect on the appellate process. The court declined to consider whether application of its ruling in respondent's case would violate the principle of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), concluding the State had waived that argument. The State raised the *Teague* bar, and application of the Eighth Circuit's novel rule violates *Teague*'s holding. For this reason, certiorari is granted and the judgment is reversed.

In 1986, a Missouri jury convicted Lynda Branch of the first-degree murder of her husband. On retrial after the Missouri Court of Appeals reversed her conviction because of an error in the admission of evidence, the jury again convicted her. Branch moved for a new trial, and the trial court scheduled a hearing for April 3, 1989, to consider this motion and to sentence her. Before the hearing, however, Branch, who was free on bail, took flight to a neighboring county. She was recaptured on April 6, 1989, and sentenced to life imprisonment without possibility of parole.

Branch filed a timely notice of appeal on direct review and an appeal of the trial court's denial of her motion for post-conviction relief. In 1991, the Missouri Court of Appeals consolidated and dismissed the appeals under Missouri's well-established fugitive dismissal rule, which provides that a defendant who attempts to escape justice after conviction forfeits her right to appeal. *State* v. *Branch*, 811 S. W. 2d 11, 12 (Mo. App. 1991) (citing *State* v. *Carter*, 98 Mo. 431, 11 S. W. 979 (1889)). "[E]ven in the absence of prejudice to the state," the court explained, "the dismissal was justified by a more fundamental principle: preservation of public respect for our system of law." 811 S. W. 2d, at 12. Branch did not seek review in this Court.

On petition for federal habeas relief under 28 U. S. C. § 2254, Branch alleged that the dismissal of her consolidated appeal violated due process. The District Court undertook what it termed a procedural due process analysis under the framework set forth in *Mathews* v. *Eldridge*, 424 U. S. 319,

335 (1976), and denied relief. App. to Pet. for Cert. 17, 22–24. Branch appealed to the Court of Appeals for the Eighth Circuit, arguing she had stated a procedural due process violation. For the first time, at oral argument, the Eighth Circuit panel suggested the claim was a substantive, not a procedural, due process claim. *Id.*, at 137. Branch's counsel, of course, welcomed the suggestion. On that ground, a divided panel held that dismissal of an appeal where preappeal flight had no adverse effect on the appellate process violated the defendant's substantive rights under the Fourteenth Amendment. After the Eighth Circuit denied the State's motion for rehearing en banc, the majority modified its opinion to explain that it would not confront the applicability of *Teague* because the State had waived the point. *Branch* v. *Turner*, 37 F. 3d 371, 374–375 (1994).

The application of *Teague* is a threshold question in a federal habeas case. *Caspari* v. *Bohlen*, 510 U. S. 383, 388–390 (1994). Although a court need not entertain the defense if the State has not raised it, see *Schiro* v. *Farley*, 510 U. S. 222, 229 (1994); *Godinez* v. *Moran*, 509 U. S. 389, 397, n. 8 (1993), a court must apply it if it was raised by the State, *Caspari*, *supra*, at 389.

The State's *Teague* argument was preserved on this record and in the record before the Court of Appeals. In the District Court, the State argued that respondent's due process claim "is barred from litigation in federal habeas corpus unless the Court could say, as a threshold matter, that it would make its new rule of law retroactive. *Teague* v. *Lane*." App. to Pet. for Cert. 99 (citation omitted). In its brief on appeal, the State pointed out that it had raised the *Teague* issue before the District Court, see *Branch*, *supra*, at 374, and argued that if the court were to decide that a constitutional rule prohibited dismissal, "such a conclusion could not be enforced in this collateral-attack proceeding consistently with the principles set forth in *Teague* v. *Lane*, and its progeny," App. to Pet. for Cert. 129, n. 5 (citation omitted). Con-

fronted for the first time at oral argument with a substantive due process claim, the State reasserted that "the prohibition of *Teague* against *Lane* on the enforcement of new rules of constitutional law for the first time in a collateral attack proceeding in federal court applies with full force to this case." *Id.*, at 152. The next five pages of the record are devoted to the court's questions and the State's responses regarding the *Teague* issue. App. to Pet. for Cert. 153–157.

This record supports the State's position that it raised the *Teague* claim. The State's efforts to alert the Eighth Circuit to the *Teague* problem provided that court with ample opportunity to make a reasoned judgment on the issue. Cf. *Webb* v. *Webb*, 451 U. S. 493, 501 (1981) (federal claim properly raised where there is "no doubt from the record that [the claim] was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim"). The State did not waive the *Teague* issue; it must be considered now; and it is dispositive. See *Caspari*, *supra*, at 389; *Gilmore* v. *Taylor*, 508 U. S. 333, 338–339 (1993).

A new rule for *Teague* purposes is one where "'the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Caspari*, *supra*, at 390 (quoting *Teague*, 489 U. S., at 301) (emphasis deleted); *Gilmore*, *supra*, at 339–340; *Graham* v. *Collins*, 506 U. S. 461, 466–467 (1993). The question is "'whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Caspari*, *supra*, at 390 (quoting *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990)).

Neither respondent nor the Eighth Circuit identifies existing precedent for the proposition that there is no substantial basis for appellate dismissal when a defendant fails to appear at sentencing, becomes a fugitive, demonstrates contempt for the legal system, and imposes significant cost and expense

on the State to secure her recapture. The Eighth Circuit opined that a substantive due process violation arose from conduct that was "arbitrary," "conscience-shocking," "oppressive in a constitutional sense," or "interferes with fundamental rights," and that dismissal of Branch's appeal fell within that category. *Branch*, *supra*, at 375. These arguments are not based upon existing or well-settled authority.

Respondent and the Court of Appeals rely for the most part on *Ortega-Rodriguez* v. *United States*, 507 U. S. 234, 248–249 (1993). There, the Court held, as a matter of its supervisory power to administer the federal court system, that absent some adverse effect of preappeal flight on the appellate process, "the defendant's former fugitive status may well lack the kind of connection to the appellate process that would justify an appellate sanction of dismissal." *Id.*, at 251. The case was decided almost two years after Branch's conviction became final. The rationale of the opinion, moreover, was limited to supervisory powers; it did not suggest that dismissal of a fugitive's appeal implicated constitutional principles. Nor was that suggestion made in any of our earlier cases discussing the fugitive dismissal rule in the federal or state courts. See *Estelle* v. *Dorrough*, 420 U. S. 534 (1975); *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970); *Allen* v. *Georgia*, 166 U. S. 138 (1897); *Bohanan* v. *Nebraska*, 125 U. S. 692 (1887); *Smith* v. *United States*, 94 U. S. 97 (1876). The *Ortega-Rodriguez* dissent reinforced this point: "There can be no argument that the fugitive dismissal rule . . . violates the Constitution because a convicted criminal has no constitutional right to an appeal." 507 U. S., at 253 (REHNQUIST, C. J., dissenting) (citation omitted).

The Eighth Circuit did rely on *Evitts* v. *Lucey*, 469 U. S. 387 (1985), where the Court held that the Due Process Clause, guaranteeing a defendant effective assistance of counsel on his first appeal as of right, did not permit the dismissal of an appeal where the failure to comply with appellate procedure was the result of ineffective assistance of

counsel. The Court did not hold, as respondent argues and the Eighth Circuit seemed to conclude, that due process requires state courts to provide for appellate review where the would-be appellant has not satisfied reasonable preconditions on her right to appeal as a result of her own conduct. *Evitts* turned on the right to effective assistance of counsel; it left intact "the States' ability to conduct appeals in accordance with reasonable procedural rules." *Id.*, at 398–399.

Branch argues that even if *Teague* does apply, the rule announced by the Eighth Circuit falls into *Teague*'s exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, *supra*, at 495 (citing *Teague*, *supra*, at 311). The new rule here is not among the "small core of rules requiring observance of those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Graham*, *supra*, at 478 (some internal quotation marks omitted; citations omitted). Because due process does not require a State to provide appellate process at all, *Evitts*, *supra*, at 393; *McKane* v. *Durston*, 153 U. S. 684, 687 (1894), a former fugitive's right to appeal cannot be said to "'be so central to an accurate determination of innocence or guilt,'" *Graham*, *supra*, at 478 (quoting *Teague*, *supra*, at 313), as to fall within this exception to the *Teague* bar.

As we explained in *Allen* v. *Georgia*, *supra*, at 140, where the Court upheld against constitutional attack the dismissal of the petition of a fugitive whose appeal was pending, "if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test." The Eighth Circuit converted a rule for the administration of the federal courts into a constitutional one. We do not (and we may not, in the face of the State's invocation of

Teague) reach the merits of that contention. The result reached by the Court of Appeals was neither dictated nor compelled by existing precedent when Branch's conviction became final, and *Teague* prevents its application to her case. The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

Syllabus

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. ET AL.

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

No. 93–1783. Argued January 9, 1995—Decided March 21, 1995

The Director of the Labor Department's Office of Workers' Compensation Programs petitioned the Court of Appeals for review of a Benefits Review Board decision that, *inter alia*, denied Jackie Harcum full-disability compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA). Harcum did not seek review and, while not opposing the Director's pursuit of the action, expressly declined to intervene on his own behalf in response to an inquiry by the court. Acting *sua sponte*, the court concluded that the Director lacked standing to appeal the benefits denial because she was not "adversely affected or aggrieved" thereby within the meaning of § 21(c) of the Act, 33 U. S. C. § 921(c).

Held: The Director is not "adversely affected or aggrieved" under § 921(c). Pp. 125–136.

(a) Section 921(c) does not apply to an agency acting as a regulator or administrator under the statute. This is strongly suggested by the fact that, despite long use of the phrase "adversely affected or aggrieved" as a term of art to designate those who have standing to appeal a federal agency decision, no case has held that an agency, without benefit of specific authorization to appeal, falls within that designation; by the fact that the United States Code's general judicial review provision, 5 U. S. C. § 702, which employs the phrase "adversely affected or aggrieved," specifically excludes agencies from the category of persons covered, § 551(2); and by the clear evidence in the Code that when an agency in its governmental capacity *is* meant to have standing, Congress says so, see, *e. g.*, 29 U. S. C. §§ 660(a) and (b). While the text of a particular statute could make clear that "adversely affected or aggrieved" is being used in a peculiar sense, the Director points to no such text in the LHWCA. Pp. 125–130.

(b) Neither of the categories of interest asserted by the Director demonstrates that "adversely affected or aggrieved" in this statute must have an extraordinary meaning. The Director's interest in ensuring adequate payments to claimants is insufficient. Agencies do not automatically have standing to sue for actions that frustrate the purposes

of their statutes; absent some clear and distinctive responsibility conferred upon the agency, an "adversely affected or aggrieved" judicial review provision leaves private interests (even those favored by public policy) to be vindicated by private parties. *Heckman* v. *United States*, 224 U. S. 413; *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463; *Pasadena City Bd. of Ed.* v. *Spangler*, 427 U. S. 424; and *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318, distinguished. Also insufficient is the Director's asserted interest in fulfilling important administrative and enforcement responsibilities. She fails to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns. Pp. 130–136.

8 F. 3d 175, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 136.

Beth S. Brinkmann argued the cause for petitioner. With her on the briefs were *Solicitor General Days*, *Deputy Solicitor General Wallace*, *Allen H. Feldman*, *Steven J. Mandel*, and *Mark S. Flynn*.

Lawrence P. Postol argued the cause for respondents. With him on the brief was *James M. Mesnard*.*

JUSTICE SCALIA delivered the opinion of the Court.

The question before us in this case is whether the Director of the Office of Workers' Compensation Programs in the United States Department of Labor has standing under § 21(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, to seek judicial review of decisions by the Benefits Review Board that in the Director's view deny claimants compensation to which they are entitled.

**Charles T. Carroll, Jr.*, *Thomas D. Wilcox*, and *Dennis J. Lindsay* filed a brief for the National Association of Waterfront Employers et al. as *amici curiae* urging affirmance.

I

On October 24, 1984, Jackie Harcum, an employee of respondent Newport News Shipbuilding and Dry Dock Co., was working in the bilge of a steam barge when a piece of metal grating fell and struck him in the lower back. His injury required surgery to remove a herniated disc, and caused prolonged disability. Respondent paid Harcum benefits under the LHWCA until he returned to light-duty work in April 1987. In November 1987, Harcum returned to his regular department under medical restrictions. He proved unable to perform essential tasks, however, and the company terminated his employment in May 1988. Harcum ultimately found work elsewhere, and started his new job in February 1989.

Harcum filed a claim for further benefits under the LHWCA. Respondent contested the claim, and the dispute was referred to an Administrative Law Judge (ALJ). One of the issues was whether Harcum was entitled to benefits for total disability, or instead only for partial disability, from the date he stopped work for respondent until he began his new job. "Disability" under the LHWCA means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U. S. C. § 902(10).

After a hearing on October 20, 1989, the ALJ determined that Harcum was partially, rather than totally, disabled when he left respondent's employ, and that he was therefore owed only partial-disability benefits for the interval of his unemployment. On appeal, the Benefits Review Board affirmed the ALJ's judgment, and also ruled that under 33 U. S. C. § 908(f), the company was entitled to cease payments to Harcum after 104 weeks, after which time the LHWCA special fund would be liable for disbursements pursuant to § 944.

The Director petitioned the United States Court of Appeals for the Fourth Circuit for review of both aspects of the Board's ruling. Harcum did not seek review and, while not

opposing the Director's pursuit of the action, expressly declined to intervene on his own behalf in response to an inquiry by the Court of Appeals. The Court of Appeals *sua sponte* raised the question whether the Director had standing to appeal the Board's order. 8 F. 3d 175 (1993). It concluded that she did not have standing with regard to that aspect of the order denying Harcum's claim for full-disability compensation, since she was not "adversely affected or aggrieved" by that decision within the meaning of § 21(c) of the Act, 33 U. S. C. § 921(c).[1] We granted the Director's petition for certiorari. 512 U. S. 1287 (1994).

II

The LHWCA provides for compensation of workers injured or killed while employed on the navigable waters or adjoining, shipping-related land areas of the United States. 33 U. S. C. § 903. With the exception of those duties imposed by §§ 919(d), 921(b), and 941, the Secretary of Labor has delegated all responsibilities of the Department with respect to administration of the LHWCA to the Director of the Office of Workers' Compensation Programs (OWCP). 20 CFR §§ 701.201 and 701.202 (1994); 52 Fed. Reg. 48466 (1987). For ease of exposition, the Director will hereinafter be referred to as the statutory recipient of those responsibilities.

A worker seeking compensation under the Act must file a claim with an OWCP district director. 33 U. S. C. § 919(a); 20 CFR §§ 701.301(a) and 702.105 (1994). If the district director cannot resolve the claim informally, 20 CFR § 702.311, it is referred to an ALJ authorized to issue a compensation order, § 702.316; 33 U. S. C. § 919(d). The ALJ's decision is reviewable by the Benefits Review Board, whose members are appointed by the Secretary. § 921(b)(1). The Board's

[1] The court found that, as administrator of the § 944 special fund, the Director did have standing to appeal the Board's decision to grant respondent relief under § 908(f). That ruling is not before us, and we express no view upon it.

decision is in turn appealable to a United States court of appeals, at the instance of "[a]ny person adversely affected or aggrieved by" the Board's order. § 921(c).

With regard to claims that proceed to ALJ hearings, the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal courts of appeals. The Director argues that she nonetheless had standing to petition the Fourth Circuit for review of the Board's order, because she is a "person adversely affected or aggrieved" under § 921(c). Specifically, she contends the Board's decision injures her because it impairs her ability to achieve the Act's purposes and to perform the administrative duties the Act prescribes.

The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision, within the agency or before the courts. See, *e. g.*, federal Communications Act of 1934, 47 U. S. C. § 402(b)(6); Occupational Safety and Health Act of 1970, 29 U. S. C. § 660(a); Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 816. The terms "adversely affected" and "aggrieved," alone or in combination, have a long history in federal administrative law, dating back at least to the federal Communications Act of 1934, § 402(b)(2) (codified, as amended, 47 U. S. C. § 402(b)(6)). They were already familiar terms in 1946, when they were embodied within the judicial review provision of the Administrative Procedure Act (APA), 5 U. S. C. § 702, which entitles "[a] person . . . adversely affected or aggrieved by agency action within the meaning of a relevant statute" to judicial review. In that provision, the qualification "within the meaning of a relevant statute" is not an addition to what "adversely affected or aggrieved" alone conveys; but is rather an acknowledgment of the fact that what *constitutes* adverse effect or aggrievement varies from statute to statute. As the United States Department of Justice, At-

torney General's Manual on the Administrative Procedure Act (1947) put it, "The determination of who is 'adversely affected or aggrieved . . . within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' " *Id.*, at 96 (citation omitted). We have thus interpreted § 702 as requiring a litigant to show, at the outset of the case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute" in question. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, 153 (1970); see also *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 395–396 (1987).

Given the long lineage of the text in question, it is significant that counsel have cited to us no case, neither in this Court nor in the courts of appeals, neither under the APA nor under individual statutory-review provisions such as the present one, which holds that, without benefit of specific authorization to appeal, an agency, in its regulatory or policymaking capacity, is "adversely affected" or "aggrieved." Cf. *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297, 302–305 (1983) (noting the issue of whether the Director has standing under § 921(c), but finding it unnecessary to reach the question).[2]

[2] In addition to not reaching the § 921(c) question, *Perini* also took as a given (because it had been conceded below) the answer to another question: whether the Director (rather than the Benefits Review Board) is the proper party respondent to an appeal from the Board's determination. See 459 U. S., at 304, n. 13. Obviously, an agency's entitlement to party respondent status does not necessarily imply that agency's standing to appeal: The National Labor Relations Board, for example, is always the party respondent to an employer or employee appeal, but cannot initiate an appeal from its own determination. 29 U. S. C. §§ 152(1), 160(f). Indeed, it can be argued, as *amici* in this case have done, that if the Director *is* the proper party respondent in the court of appeals (as her

There are cases in which an agency has been held to be adversely affected or aggrieved in what might be called its nongovernmental capacity—that is, in its capacity as a member of the market group that the statute was meant to protect. For example, in *United States* v. *ICC*, 337 U. S. 426 (1949), we held that the United States had standing to sue the Interstate Commerce Commission (ICC) in federal court to overturn a Commission order that denied the Government recovery of damages for an allegedly unlawful railroad rate. The Government, we said, "is not less entitled than any other shipper to invoke administrative and judicial protection." *Id.*, at 430.[3] But the status of the Government as a statutory beneficiary or market participant must be sharply distinguished from the status of the Government as regulator or administrator.

The latter status would be at issue if—to use an example that continues the ICC analogy—the Environmental Protec-

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regulations assert, see 20 CFR § 802.410 (1994)), in initiating an appeal she would end up on both sides of the case. See Brief for National Association of Waterfront Employers et al. as *Amici Curiae* 17, n. 14. Our opinion today intimates no view on the party-respondent question.

[3] *United States* v. *ICC* accorded the United States standing despite the facts that (1) the Interstate Commerce Act contained no specific judicial review provision, and (2) the APA's general judicial review provision ("person adversely affected or aggrieved") excludes agencies from the definition of "person." See *infra*, at 129. It would thus appear that an agency suing in what might be termed a nongovernmental capacity escapes that definitional limitation. The LHWCA likewise contains a definition of "person" that does not specifically include agencies. 33 U. S. C. § 902(1). We chose not to rely upon that provision in this opinion because it seemed more likely to sweep in the question of the Director's authority to appeal Board rulings that are adverse to the § 944 special fund, which deserves separate attention. It is possible that the Director's status as manager of the privately financed fund removes her from the "person" limitation, just as it may remove her from the more general limitation that agencies *qua* agencies are not "adversely affected or aggrieved." We leave those issues to be resolved in a case where the Director's relationship to the fund is immediately before us.

tion Agency sued to overturn an ICC order establishing high tariffs for the transportation of recyclable materials. Cf. *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U. S. 669 (1973). Or if the Department of Transportation, to further a policy of encouraging so-called "telecommuting" in order to reduce traffic congestion, sued as a "party aggrieved" under 28 U. S. C. § 2344, to reverse the Federal Communications Commission's approval of rate increases on second phone lines used for modems. We are aware of no case in which such a "policy interest" by an agency has sufficed to confer standing under an "adversely affected or aggrieved" statute or any other general review provision. To acknowledge the general adequacy of such an interest would put the federal courts into the regular business of deciding intrabranch and intraagency policy disputes—a role that would be most inappropriate.

That an agency in its governmental capacity is not "adversely affected or aggrieved" is strongly suggested, as well, by two aspects of the United States Code: First, the fact that the Code's general judicial review provision, contained in the APA, does not include agencies within the category of "person adversely affected or aggrieved." See 5 U. S. C. § 551(2) (excepting agencies from the definition of "person"). Since, as we suggested in *United States* v. *ICC*, the APA provision reflects "the general legislative pattern of administrative and judicial relationships," 337 U. S., at 433–434, it indicates that even under specific "adversely affected or aggrieved" statutes (there were a number extant when the APA was adopted) agencies as such normally do not have standing. And second, the United States Code displays throughout that when an agency in its governmental capacity *is* meant to have standing, Congress says so. The LHWCA's silence regarding the Secretary's ability to take an appeal is significant when laid beside other provisions of law. See, *e. g.*, Black Lung Benefits Act (BLBA), 30 U. S. C. § 932(k) ("The Secretary shall be a party in any proceeding

relative to [a] claim for benefits"); Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(f)(1) (authorizing the Attorney General to initiate civil actions against private employers) and § 2000e–4(g)(6) (authorizing the Equal Employment Opportunities Commission to "intervene in a civil action brought . . . by an aggrieved party . . ."); Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1132(a)(2) (granting Secretary power to initiate various civil actions under the Act). It is particularly illuminating to compare the LHWCA with the Occupational Safety and Health Act of 1970 (OSHA), 29 U. S. C. § 651 *et seq.* Section 660(a) of OSHA is virtually identical to § 921(c): It allows "[a]ny person adversely affected or aggrieved" by an order of the Occupational Safety and Health Review Commission (a body distinct from the Secretary, as the Benefits Review Board is) to petition for review in the courts of appeals. OSHA, however, further contains a § 660(b), which expressly grants such petitioning authority to the Secretary—suggesting, of course, that the Secretary would *not* be considered "adversely affected or aggrieved" under § 660(a), and should not be considered so under § 921(c).

All of the foregoing indicates that the phrase "person adversely affected or aggrieved" does not refer to an agency acting in its governmental capacity. Of course the text of a particular statute could make clear that the phrase is being used in a peculiar sense. But the Director points to no such text in the LHWCA, and relies solely upon the mere existence and impairment of her governmental interest. If that alone could ever suffice to contradict the normal meaning of the phrase (which is doubtful), it would have to be an interest of an extraordinary nature, extraordinarily impaired. As we proceed to discuss, that is not present here.

III

The LHWCA assigns four broad areas of responsibility to the Director: (1) supervising, administering, and making

rules and regulations for calculation of benefits and processing of claims, 33 U. S. C. §§ 906, 908–910, 914, 919, 930, and 939; (2) supervising, administering, and making rules and regulations for provision of medical care to covered workers, § 907; (3) assisting claimants with processing claims and receiving medical and vocational rehabilitation, § 939(c); and (4) enforcing compensation orders and administering payments to and disbursements from the special fund established by the Act for the payment of certain benefits, §§ 921(d) and 944. The Director does not assert that the Board's decision hampers her performance of these express statutory responsibilities. She claims only two categories of interest that are affected, neither of which remotely suggests that she has authority to appeal Board determinations.

First, the Director claims that because the LHWCA "has many of the elements of social insurance, and as such is designed to promote the public interest," Brief for Petitioner 17, she has standing to "advance in federal court the public interest in ensuring adequate compensation payments to claimants," *id.*, at 18. It is doubtful, to begin with, that the goal of the LHWCA is simply the support of disabled workers. In fact, we have said that, because "the LHWCA represents a compromise between the competing interests of disabled laborers and their employers," it "is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities." *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268, 282 (1980). The LHWCA is a scheme for fair and efficient resolution of a class of private disputes, managed and arbitered by the Government. It represents a "quid pro quo *between employer and employee.* Employers relinquish certain legal rights which the law affords to them and so, in turn, do the employees." 1 M. Norris, The Law of Maritime Personal Injuries § 4.1, p. 106 (4th ed. 1990) (emphasis added).

But even assuming the single-minded, compensate-the-employee goal that the Director posits, there is nothing to suggest that the Director has been given authority to pursue that goal in the courts. Agencies do not automatically have standing to sue for actions that frustrate the purposes of their statutes. The Interior Department, being charged with the duty to "protect persons and property within areas of the National Park System," 16 U. S. C. § 1a–6(a), does not thereby have authority to intervene in suits for assault brought by campers; or (more precisely) to bring a suit for assault when the camper declines to do so. What the Director must establish here is such a clear and distinctive responsibility for employee compensation as to overcome the universal assumption that "person adversely affected or aggrieved" leaves private interests (even those favored by public policy) to be litigated by private parties. That we are unable to find. The Director is not the designated champion of employees within this statutory scheme. To the contrary, one of her principal roles is to serve as the broker of informal settlements between employers and employees. 33 U. S. C. § 914(h). She is charged, moreover, with providing "information and assistance" regarding the program to *all* persons covered by the Act, including employers. §§ 902(1), 939(c). To be sure, she has discretion under § 939(c) to provide "legal assistance in processing a claim" if it is requested (a provision that is perhaps of little consequence, since the Act provides attorney's fees to successful claimants, see § 928); but that authority, which is discretionary with her and contingent upon a request by the claimant, does not evidence the duty and power, when the claimant is satisfied with his award, to contest the award on her own.

The Director argues that her standing to pursue the public's interest in adequate compensation of claimants is supported by our decisions in *Heckman* v. *United States*, 224 U. S. 413 (1912), *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), *Pasa-*

dena City Bd. of Ed. v. *Spangler*, 427 U. S. 424 (1976), and *General Telephone Co. of Northwest* v. *EEOC*, 446 U. S. 318 (1980). Brief for Petitioner 18. None of those cases is apposite. *Heckman* and *Moe* pertain to the United States' standing to represent the interests of Indians; the former holds, see 224 U. S., at 437, and the latter indicates in dictum, see 425 U. S., at 474, n. 13, that the Government's status as guardian confers standing. The third case, *Spangler*, *supra*, at 427, based standing of the United States upon an explicit provision of Title IX of the Civil Rights Act of 1964 authorizing suit, 42 U. S. C. § 2000h–2, and the last, *General Telephone Co.*, *supra*, at 325, based standing of the Equal Employment Opportunity Commission (EEOC) upon a specific provision of Title VII of the Civil Rights Act of 1964 authorizing suit, 42 U. S. C. § 2000e–5(f)(1). Those two cases certainly establish that Congress *could* have conferred standing upon the Director without infringing Article III of the Constitution; but they do not at all establish that Congress did so. In fact, *General Telephone Co.* suggests just the opposite, since it describes how, prior to the 1972 amendment specifically giving the EEOC authority to sue, only the "aggrieved person" could bring suit, *even though* the EEOC *was* authorized to use " 'informal methods of conference, conciliation, and persuasion' " to eliminate unlawful employment practices, 446 U. S., at 325—an authority similar to the Director's informal settlement authority here.

The second category of interest claimed to be affected by erroneous Board rulings is the Director's ability to fulfill "important administrative and enforcement responsibilities." Brief for Petitioner 18. The Director fails, however, to identify any specific statutory duties that an erroneous Board ruling interferes with, reciting instead conjectural harms to abstract and remote concerns. She contends, for example, that "incorrect claim determinations by the Board frustrate [her] duty to administer and enforce the statutory scheme in a uniform manner." *Id.*, at 18–19. But it is impossible to

understand how a duty of uniform *administration* and *enforcement* by the Director (presumably arising out of the prohibition of arbitrary action reflected in 5 U. S. C. § 706) hinges upon correct *adjudication* by someone else. The Director does not (and we think cannot) explain, for example, how an erroneous decision by the Board affects her ability to process the underlying claim, § 919, provide information and assistance regarding coverage, compensation, and procedures, § 939(c), enforce the final award, § 921(d), or perform any other required task in a "uniform" manner.

If the correctness of adjudications were essential to the Director's performance of her assigned duties, Congress would presumably have done what it has done with many other agencies: made adjudication *her* responsibility. In fact, however, it has taken pains to *remove* adjudication from her realm. The LHWCA Amendments of 1972, 86 Stat. 1251, assigned administration to the Director, 33 U. S. C. § 939(a); assigned initial adjudication to ALJ's, § 919(d); and created the Board to consider appeals from ALJ decisions, § 921. The assertion that proper adjudication is essential to proper performance of the Director's functions is quite simply contrary to the whole structure of the Act. To make an implausible argument even worse, the Director must acknowledge that her lack of control over the adjudicative process does not even deprive her of the power to resolve legal ambiguities in the statute. She retains the rulemaking power, see § 939(a), which means that if her problem with the present decision of the Board is that it has established an erroneous rule of law, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), she has full power to alter that rule. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 476 (1992) ("[T]he [Board] is not entitled to any special deference"). Her only possible complaint, then, is that she does not agree with the outcome of this particular case. The Director also claims that precluding her from seeking review of erroneous Board rulings "would reduce

the incentive for employers to view the Director's informal resolution efforts as authoritative, because the employer could proceed to a higher level of review from which the Director could not appeal." Brief for Petitioner 19. This argument assumes that her informal resolution efforts are *supposed* to be "authoritative." We doubt that. The structure of the statute suggests that they are supposed to be facilitative—a service to both parties, rather than an imposition upon either of them. But even if the opposite were true, we doubt that the unlikely prospect that the Director will appeal *when the claimant does not* will have much of an impact upon whether the employer chooses to spurn the Director's settlement proposal and roll the dice before the Board. The statutory requirement of adverse effect or aggrievement must be based upon "something more than an ingenious academic exercise in the conceivable." *United States* v. *SCRAP*, 412 U. S., at 688.

The Director seeks to derive support for her position from Congress' later enactment of the BLBA in 1978, but it seems to us that the BLBA militates precisely *against* her position. The BLBA expressly provides that "[t]he Secretary shall be a party in any proceeding relative to a claim for benefits under this part." 30 U. S. C. § 932(k). The Director argues that since the Secretary is explicitly made a party under the BLBA, she must be meant to be a party under the LHWCA as well. That is not a form of reasoning we are familiar with. The normal conclusion one would derive from putting these statutes side by side is this: When, in a legislative scheme of this sort, Congress wants the Secretary to have standing, it says so.

Finally, the Director retreats to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes, see, *e. g., Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 268 (1977). That principle may be invoked, in case of ambiguity, to find present rather than absent elements that are essential

to operation of a legislative scheme; but it does not add features that will achieve the statutory "purposes" more effectively. Every statute purposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be. The withholding of agency authority is as significant as the granting of it, and we have no right to play favorites between the two. Construing the LHWCA as liberally as can be, we cannot find that the Director is "adversely affected or aggrieved" within the meaning of § 921(c).

* * *

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit is affirmed.

So ordered.

JUSTICE GINSBURG, concurring in the judgment.

The Court holds that the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (OWCP) lacks standing under § 21(c) of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, to seek judicial review of LHWCA claim determinations. Before amendment of the LHWCA in 1972, the Act's administrator had authority to seek review of LHWCA claim determinations in the courts of appeals. The Court reads the 1972 amendments as divesting the Act's administrator of access to federal appellate tribunals formerly open to the administrator's petitions. The practical effect of the Court's ruling is to order a disparity between two compensatory schemes—the LHWCA and the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 U. S. C. § 901 *et seq.*—measures that Congress intended to work in essentially the same way.

Significantly, however, the Court observes that our precedent "certainly establish[es] that Congress *could* have con-

ferred standing upon the [OWCP] Director without infringing Article III of the Constitution." *Ante*, at 133 (emphasis in original).[1] While I do not challenge the Court's conclusion that the Director lacks standing under the amended Act, I write separately because I am convinced that Congress did not advert to the change—the withdrawal of the LHWCA administrator's access to judicial review—wrought by the 1972 LHWCA amendments. Since no Article III impediment stands in its way, Congress may speak the final word by determining whether and how to correct its apparent oversight.

I

Before the 1972 amendments to the LHWCA, the OWCP Director's predecessors as administrators of the Act, officials called OWCP deputy commissioners, adjudicated LHWCA claims in the first instance. 33 U. S. C. §§ 919, 923 (1970 ed.); see *Kalaris* v. *Donovan*, 697 F. 2d 376, 381–382 (CADC), cert. denied, 462 U. S. 1119 (1983). A deputy commissioner's claim determination could be challenged in federal district court in an injunctive action against the deputy commissioner. 33 U. S. C. § 921(b) (1970 ed.); see *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 245 (1941). As a defending party in district courts, the deputy commissioner could appeal adverse rulings to the courts of appeals pursuant to 28 U. S. C. § 1291, even when no other party sought appeal. See *Henderson* v. *Glens Falls Indemnity Co.*, 134 F. 2d 320, 322 (CA5 1943) ("There are numerous cases in which the deputy commissioner has appealed as the sole party, and his

[1] In contrast, the Court of Appeals for the Fourth Circuit raised the standing issue in this case on its own motion because it feared that judicial review initiated by the Director would "strik[e] at the core of the constitutional limitations placed upon th[e] court by Article III of the Constitution." 8 F. 3d 175, 180, n. 1 (1993); see also *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297, 302–305 (1983) (noting but not deciding Article III issue).

right to appeal has never been questioned.") (citing, *inter alia*, *Parker*, *supra*).

The 1972 LHWCA amendments shifted the deputy commissioners' adjudicatory authority to Department of Labor administrative law judges (ALJ's). Although district directors—as deputy commissioners are now called [2]—are empowered to investigate LHWCA claims and attempt to resolve them informally, they must order a hearing before an ALJ upon a party's request. 33 U. S. C. § 919. The 1972 amendments also replaced district court injunctive actions with appeals to the newly created Benefits Review Board. Just as the deputy commissioners were parties before district courts prior to 1972, the Director—as the Secretary's delegate—is a party before the Benefits Review Board under the current scheme. 20 CFR § 801.2(a)(10) (1994). Either the Director or another party may invoke Board review of an ALJ's decision. 33 U. S. C. § 921(b)(3); 20 CFR §§ 801.102, 801.2(a)(10) (1994). As before the amendments, further review is available in the courts of appeals. 33 U. S. C. § 921(c).

The Court holds that the LHWCA, as amended in 1972, does not entitle the Director to appeal Benefits Review Board decisions to the courts of appeals. Congress surely decided to transfer adjudicative functions from the deputy commissioners to ALJ's, and from the district courts to the Benefits Review Board. But there is scant reason to believe that Congress consciously decided to strip the Act's administrator of authority that official once had to seek judicial review of claim determinations adverse to the administrator's position. In amending the LHWCA in 1972, Congress did not expressly address the standing of the Secretary of Labor or his delegate to petition for judicial review. Congress did use the standard phrase "person adversely affected or aggrieved" to describe proper petitioners to the courts of appeals. See 33 U. S. C. § 921(c). But it is doubtful that Con-

[2] 20 CFR §§ 701.301(a)(7), 702.105 (1994).

gress comprehended the full impact of that phrase: Not only does it qualify employers and injured workers to seek judicial review but, as interpreted, it ordinarily disqualifies agencies acting in a governmental capacity from petitioning for court review.[3]

II

Congress' 1978 revision of the BLBA reveals the judicial review design Congress ordered when it consciously attended to this matter. The 1978 BLBA amendments were adopted, in part, to keep adjudication of BLBA claims under the same procedural regime as the one Congress devised for LHWCA claims. In the 1978 BLBA prescriptions, Congress expressly provided for the party status of the OWCP Director. See 30 U. S. C. § 932(k) ("The Secretary [of Labor] shall be a party in any proceeding relative to a claim for [black lung] benefits.").

Congress enacted the BLBA in 1969 to afford compensation to coal miners and their survivors for death or disability caused by pneumoconiosis (black lung disease). See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 8 (1976). The BLBA generally adopts the claims adjudication scheme of the LHWCA. 30 U. S. C. § 932(a). Congress amended the BLBA in 1978 to clarify that the BLBA *continuously* incorporates LHWCA claim adjudication procedures. See § 7(a)(1), 92 Stat. 98 (amending BLBA to incorporate LHWCA "as it may be amended from time to time"); S. Rep. No. 95–209, p. 18 (1977) (BLBA amendment "makes clear that any and all amendments to the [LHWCA]" are incorporated by the BLBA, including "the 1972 amendments relating to the use of Administrative Law Judges in claims adjudication").

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[3] The law-presentation role OWCP's Director seeks to play might be compared with the role of an advocate general or *ministère public* in civil law proceedings. See generally M. Glendon, M. Gordon, & C. Osakwe, Comparative Legal Traditions 344 (2d ed. 1994); R. David, French Law 59 (1972).

In the context of assuring automatic application of LHWCA procedures to black lung claims, see H. R. Conf. Rep. No. 95–864, pp. 22–23 (1978), Congress added to the BLBA the provision for the Secretary of Labor's party status "in any proceeding relative to a claim for [black lung] benefits." See § 7(k), 92 Stat. 99. According to the Report of the Senate Committee on Human Resources:

> "Some question has arisen as to whether the adjudication procedures applicable to black lung claims incorporating various sections of the amended [LHWCA] confe[r] standing upon the Secretary of Labor or his designee to appear, present evidence, file appeals or respond to appeals filed with respect to the litigation and appeal of claims. *In establishing the [LHWCA] procedures it was the intent of this Committee to afford the Secretary the right to advance his views in the formal claims litigation context whether or not the Secretary had a direct financial interest in the outcome of the case.* The Secretary's interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the [BLBA] should be deemed sufficient to confer standing on the Secretary or such designee of the Secretary who has the responsibility for the enforcement of the [BLBA], to actively participate in the adjudication of claims before the Administrative Law Judge, Benefits Review Board, and appropriate United States Courts." S. Rep. No. 95–209, *supra*, at 21–22 (emphasis added).

Even if this passage cannot force an uncommon reading of the LHWCA words "person adversely affected or aggrieved," see *ante*, at 130, it strongly indicates that Congress considered vital to sound administration of the Act the administrator's access to court review.

The Director has been a party before this Court in nine argued cases involving the LHWCA.[4] In two of these cases,[5] the Director was a petitioner in the Court of Appeals. As this string of cases indicates, the impact of the 1972 amendments on the Director's *statutory* standing generally escaped this Court's attention just as it apparently slipped from Congress' grasp.

III

In addition to the BLBA, four other Federal Acts incorporate the LHWCA's claim adjudication procedures. See Defense Base Act, 42 U. S. C. § 1651; District of Columbia Workmen's Compensation Act, 36 D. C. Code Ann. § 501 (1973);[6] Outer Continental Shelf Lands Act, 43 U. S. C. § 1333(b); Employees of Nonappropriated Fund Instrumentalities Statute, 5 U. S. C. § 8171. Claims under the LHWCA, the BLBA, and these other Acts are handled by the same administrative

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[4] *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267 (1994); *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs*, 506 U. S. 153 (1993); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469 (1992); *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U. S. 624 (1983); *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, 459 U. S. 297 (1983); *U. S. Industries/Fed. Sheet Metal, Inc.* v. *Director, Office of Workers' Compensation Programs*, 455 U. S. 608 (1982); *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268 (1980); *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, 440 U. S. 29 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977).

[5] *Morrison-Knudsen Constr. Co.* v. *Director, Office of Workers' Compensation Programs*, 461 U. S. 624 (1983); *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, 440 U. S. 29 (1979). In neither of these cases did the Board's ruling affect the § 944 special fund. See *ante*, at 128, n. 3.

[6] This law "applies to all claims for injuries or deaths based on employment events that occurred prior to July 2[4], 1982, the effective date of the District of Columbia Workers' Compensation Act [36 D. C. Code Ann. § 36–301 *et seq.* (1981)]." 20 CFR § 701.101(b) (1994).

actors: the OWCP Director, district directors, ALJ's, and the Benefits Review Board. Because the same procedures generally apply in the administration of these benefits programs, common issues arise under the several programs. See, *e. g.*, *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 281 (1994) (invalidating "true doubt" burden of persuasion rule that Department of Labor ALJ's applied in both LHWCA and BLBA claim adjudications).

Under the Court's holding, the Director can appeal the Benefits Review Board's resolution of a BLBA claim, but not the Board's resolution of an identical issue presented in a claim under the LHWCA or the other four Acts. I concur in the Court's judgment despite the disharmony it establishes and my conviction that Congress did not intend to put the administration of the BLBA and the LHWCA out of sync. Correcting a scrivener's error is within this Court's competence, see, *e. g.*, *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439 (1993), but only Congress can correct larger oversights of the kind presented by the OWCP Director's petition.

Syllabus

ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* EDWARDS, GUARDIAN AD LITEM FOR EDWARDS, ET AL.

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

No. 93–1883. Argued January 18, 1995—Decided March 22, 1995

The federal "family filing unit rule," 42 U. S. C. § 602(a)(38), requires that all cohabiting nuclear family members be grouped into a single "assistance unit" (AU) for purposes of eligibility and benefits determinations under the Aid to Families with Dependent Children (AFDC) program. California's "non-sibling filing unit rule" (California Rule) additionally groups into a single AU all needy children who live in the same household, whether or not they are siblings, if there is only one adult caring for them. When application of the California Rule resulted in decreases in the maximum per capita AFDC benefits due respondents, who include Verna Edwards and her cohabiting dependent minor granddaughter and two grandnieces, they brought this action for declaratory and injunctive relief against petitioners, the state officials charged with administering California's AFDC program, claiming that the California Rule violates federal law. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed.

Held: Federal law does not prohibit California from grouping into a single AU all needy children living in the same household under the care of one relative. Pp. 149–158.

(a) The California Rule does not violate 45 CFR § 233.20(a)(2)(viii), an AFDC regulation prohibiting States from reducing the amount of assistance "solely because of the presence in the household of a nonlegally responsible individual." Respondents are simply wrong when they contend that, *e. g.*, it was *solely* the arrival in Mrs. Edwards' home of her grandnieces that triggered a decline in the per capita benefits that previously were paid to her granddaughter; rather, it was the grandnieces' presence *plus* their application for AFDC assistance through Mrs. Edwards. Had the grandnieces, after coming to live with Mrs. Edwards, either not applied for assistance or applied through a different caretaker relative living in the home, the California Rule would not have affected the granddaughter's benefits at all. P. 151.

Syllabus

(b) Nor does the California Rule violate 45 CFR §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1), which prohibit States from assuming that a cohabitant's income is available to a needy child absent a case-specific determination that it is actually or legally available. First, the California Rule does not necessarily reduce the benefits of all needy children when one of them receives outside income, for California may rationally assume that the caretaker will observe her duties to all of the AU's members and will take into account the receipt of any such income by one child when expending funds on behalf of the AU. Second, the California Rule simply authorizes the combination of incomes of all AU members in order to determine the amount of the AU's assistance payment. This accords with the very definition of an AU as the group of individuals whose income and resources are considered "as a unit" in determining the amount of benefits, 45 CFR § 206.10(b)(5), and is authorized by the AFDC statute itself, 42 U. S. C. § 602(a)(7)(A), which provides that a state agency "shall, in determining need, take into consideration any . . . income and resources of any child or relative claiming [AFDC assistance]." In light of the great latitude that States have in administering their AFDC programs, see, *e. g.*, *Dandridge* v. *Williams*, 397 U. S. 471, 478, that statute is reasonably construed to allow States, in determining a child's need (and therefore the amount of her assistance), to consider the income and resources of all cohabiting children and relatives also claiming assistance. The availability regulations are addressed to an entirely different problem: attempts by States to count income and resources controlled by persons outside the AU for the purpose of determining the amount of the AU's assistance. See 42 Fed. Reg. 6583–6584, and, *e. g.*, *King* v. *Smith*, 392 U. S. 309. The California Rule has no such effect. Pp. 152–155.

(c) Respondents' alternative arguments—(1) that the federal family filing unit rule occupies the field and thereby pre-empts California from adopting its Rule, and (2) that the California Rule violates 45 CFR §§ 233.10(a)(1) and 233.20(a)(1)(i), which require equitable treatment among AFDC recipients—lack merit. Pp. 156–158.

12 F. 3d 154, reversed and remanded.

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

Dennis Paul Eckhart, Supervising Deputy Attorney General of California, argued the cause for petitioners. With him on the briefs were *Daniel E. Lungren*, Attorney General, *Charlton G. Holland III*, Assistant Attorney General, and *G. Mateo Muñoz*, Deputy Attorney General.

Paul A. Engelmayer argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *William Kanter*, and *Howard S. Scher*.

Katherine E. Meiss argued the cause for respondents. With her on the brief were *Alice Bussiere*, *Patrice E. McElroy*, *Jodie Berger*, and *Paul Lee*.*

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether federal law governing the Aid to Families with Dependent Children (AFDC) program prohibits States from grouping into a single AFDC

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *LauraSue Schlatter*, Assistant Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *Richard Blumenthal* of Connecticut, *Scott Harshbarger* of Massachusetts, *G. Oliver Koppell* of New York, *Michael F. Easley* of North Carolina, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Jeffrey L. Amestoy* of Vermont, *Rosalie Simmonds Ballentine* of the Virgin Islands, and *James S. Gilmore III* of Virginia; for the State of Nevada et al. by *Frankie Sue Del Papa*, Attorney General of Nevada, and *John Albrecht*, Deputy Attorney General, *Bruce M. Botelho*, Attorney General of Alaska, *Vanesa Ruiz*, Corporation Counsel of the District of Columbia, *Robert A. Butterworth*, Attorney General of Florida, *Donald L. Paillette*, Acting Attorney General of Guam, *Robert A. Marks*, Attorney General of Hawaii, *Roland W. Burris*, Attorney General of Illinois, *Joseph P. Mazurek*, Attorney General of Montana, *Deborah T. Poritz*, Attorney General of New Jersey, *Susan B. Loving*, Attorney General of Oklahoma, *Jeffrey B. Pine*, Attorney General of Rhode Island, *Mark W. Barnett*, Attorney General of South Dakota, and *Joseph B. Meyer*, Attorney General of Wyoming; for the Council of State Governments et al. by *Richard Ruda* and *Lee Fennell;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley*.

Briefs of *amici curiae* urging affirmance were filed for the Alliance for Children's Rights et al. by *Charles N. Freiberg* and *David B. Goodwin;* and for the American Association of Retired Persons by *Steven S. Zaleznick* and *Michael Schuster*.

"assistance unit" all needy children who live in the same household under the care of one relative. Such grouping allows States to grant equal assistance to equally sized needy households, regardless of whether the children in the household are all siblings. The Court of Appeals for the Ninth Circuit concluded that federal law forbids States to equalize assistance in this manner. We disagree and accordingly reverse.

I

AFDC is a joint federal-state public assistance program authorized by Title IV–A of the Social Security Act, 49 Stat. 627, 42 U. S. C. § 601 *et seq.* (1988 ed. and Supp. V). As its name indicates, the AFDC program "is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them." *Shea* v. *Vialpando*, 416 U. S. 251, 253 (1974). The program "reimburses each State which chooses to participate with a percentage of the funds it expends," so long as the State "administer[s] its assistance program pursuant to a state plan that conforms to applicable federal statutes and regulations." *Heckler* v. *Turner*, 470 U. S. 184, 189 (1985) (citing 42 U. S. C. §§ 602, 603).

One applicable federal rule requires state plans to provide that all members of a nuclear family who live in the same household must apply for AFDC assistance if any one of them applies; in addition, the income of all of these applicants must be aggregated in determining their eligibility and the amount of their monthly benefits. See 42 U. S. C. § 602(a)(38) (1988 ed., Supp. V); 45 CFR § 206.10(a)(1)(vii) (1993). See generally *Bowen* v. *Gilliard*, 483 U. S. 587 (1987) (upholding rule against constitutional challenges). This "family filing unit rule" requires that all cohabiting nuclear family members be grouped into a single AFDC "assistance unit" (AU), defined by federal law as "the group of individuals whose income, resources and needs are considered as a unit for purposes of determining eligibility and the amount

of payment." 45 CFR §206.10(b)(5) (1993). The regulation at issue in this case—California's "non-sibling filing unit rule" (California Rule)—goes even further in this regard. It provides: "Two or more AUs in the same home shall be combined into one AU when . . . [t]here is only one [adult] caretaker relative." Cal. Dept. of Social Servs., Manual of Policies & Procedures §82–824.1.13, App. to Pet. for Cert. 52. In other words, the California Rule groups into a single AU all needy children who live in the same household, whether or not they are siblings, if there is only one adult caring for all of them.

The consolidation of two or more AU's into a single AU pursuant to the California Rule results in a decrease in the maximum per capita AFDC benefits for which the affected individuals are eligible. This occurs because, while California (like many States) increases the amount of assistance for each additional person added to an AU, the increase is not proportional. Thus, as the number of persons in the AU increases, the per capita payment to the AU decreases.[1]

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[1] Between July 1, 1989, and August 31, 1991, California adhered to the following schedule of maximum monthly AFDC payments:

Number of persons in AU	*Maximum aid payment*	*Per capita payment*
1	$ 341	$341.00
2	560	280.00
3	694	231.33
4	824	206.00
5	940	188.00
6	1,057	176.17
7	1,160	165.71
8	1,265	158.13
9	1,366	151.78
10 or more	1,468	146.80

Joint Statement of Undisputed Material Facts in Support of Plaintiffs' Motion for Summary Judgment in No. CV–S 91 1473 (ED Cal.), p. 7 (Feb. 13, 1992). Cf. *Dandridge* v. *Williams*, 397 U. S. 471, 488 (1970) (reproducing similar Maryland schedule.) The current schedule is set forth in

See, *e. g., Dandridge* v. *Williams,* 397 U. S. 471, 473–474 (1970) (sustaining a Maryland AFDC regulation under which "the standard of need increases with each additional person in the household, but the increments become proportionately smaller").

The situation of respondent Verna Edwards and her relatives illustrates the operation of these two rules. Initially, Mrs. Edwards received AFDC assistance on behalf of her granddaughter, for whom she is the sole caretaker.[2] As a one-person AU, the granddaughter was eligible to receive a "maximum aid payment" of $341 per month prior to September 1991. See n. 1, *supra.* Later, Mrs. Edwards began caring for her two grandnieces, who are siblings. Pursuant to the federal family filing unit rule, the grandnieces are grouped together in a two-person AU, which was eligible to receive $560 per month in benefits prior to September 1991. See *ibid.* Because none of these children received any outside income, Mrs. Edwards received $901 per month in AFDC assistance on behalf of the three girls. In June 1991, however, Mrs. Edwards received notice that pursuant to the California Rule, her granddaughter and two grandnieces would be grouped together into a single three-person AU, which was eligible to receive only $694 per month. See *ibid.* The California Rule thus reduced AFDC payments to the Edwards household by $207 per month.

On behalf of themselves and others similarly situated, Mrs. Edwards, her three relatives, and other respondents brought this action against petitioners, the state officials charged with administering California's AFDC program, in the Dis-

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Cal. Welf. & Inst. Code Ann. § 11450(a)(1) (West Supp. 1994), as modified by §§ 11450.01(a), (b) and 11450.015(a).

[2] Mrs. Edwards does not receive AFDC assistance for herself. As explained in the text, the family filing unit rule requires parents to apply for assistance along with their children. But apart from this rule, caretaker relatives need not apply for assistance along with the needy children for whom they care, although they may do so.

trict Court for the Eastern District of California. Pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, respondents sought a declaration that the California Rule violates federal law and an injunction prohibiting petitioners from enforcing it. On cross-motions for summary judgment, the District Court granted the requested relief. It found the California Rule indistinguishable in relevant respects from the Washington regulation invalidated in *Beaton* v. *Thompson*, 913 F. 2d 701 (CA9 1990).

In a brief opinion, the Court of Appeals for the Ninth Circuit affirmed. It found the California Rule "virtually identical" to the Washington regulation that *Beaton* had held to be "inconsistent with federal law and regulation." *Edwards* v. *Healy*, 12 F. 3d 154, 155 (1993). Since the Court of Appeals issued its decision, the Department of Health and Human Services (HHS)—which administers the AFDC program on the federal level—determined that its own AFDC regulations "do not conflict with the State policy option to consolidate assistance units in the same household." Transmittal No. ACF–AT–94–6 (Mar. 16, 1994), App. to Pet. for Cert. 37. Moreover, a number of Federal Courts of Appeals and state courts of last resort have recently issued rulings at odds with the decision below.[3] We granted certiorari to resolve this conflict, 512 U. S. 1288 (1994), and we now reverse.

II

In *Beaton*, the Ninth Circuit ruled that grouping into the same AU all needy children (both siblings and nonsiblings alike) who live in the same household is inconsistent with three different federal AFDC regulations, namely, 45 CFR §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1)

[3] See *Bray* v. *Dowling*, 25 F. 3d 135 (CA2 1994) (New York policy), cert. pending, No. 94–5845; *Wilkes* v. *Gomez*, 32 F. 3d 1324 (CA8 1994) (Minnesota rule), cert. pending, No. 94–6929; *MacInnes* v. *Commissioner of Public Welfare*, 412 Mass. 790, 593 N. E. 2d 222 (1992); *Morrell* v. *Flaherty*, 338 N. C. 230, 449 S. E. 2d 175 (1994).

(1993).[4] See *Beaton*, *supra*, at 704. Respondents rely principally on these three regulations in their submission here.

As we examine the regulations, we keep in mind that in AFDC cases, "the starting point of the . . . analysis must be a recognition that . . . federal law gives each State great latitude in dispensing its available funds." *Dandridge*, *supra*, at 478. Accord, *Shea*, 416 U. S., at 253 (States "are given broad discretion in determining both the standard of need and the level of benefits"). In light of this cardinal

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[4] Section 233.20(a)(2)(viii) provides:

"[T]he money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the [state] agency will not assume any contribution from such individual for the support of the assistance unit . . . ."

Section 233.20(a)(3)(ii) provides in part:

"[I]n determining need and the amount of the assistance payment, . . . :

. . . . . .

"(D) Income . . . and resources available for current use shall be considered. To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance."

Section 233.90(a)(1) provides:

"The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or [adoptive] parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State . . . ."

principle, we conclude that the federal regulations do not preclude the adoption of the California Rule.

A

According to § 233.20(a)(2)(viii), States may not reduce the amount of assistance for which AFDC applicants are eligible "solely because of the presence in the household of a non-legally responsible individual." Using the example of Mrs. Edwards and her relatives, respondents observe that, although the granddaughter received AFDC benefits of $341 per month before the two grandnieces came to live in Mrs. Edwards' household, she received only one-third of $694, or $231.33, per month after the grandnieces arrived and the California Rule took effect. See Brief for Respondents 6, 22. This reduction in the granddaughter's per capita benefits occurred, according to respondents, "solely because of the presence in the household of" the grandnieces, who are "non-legally responsible individual[s]" in relation to the granddaughter.

Respondents are simply wrong. It was not *solely* the presence of the grandnieces that triggered the decline in per capita benefits paid to the granddaughter; rather, it was the grandnieces' presence *plus* their application for AFDC assistance through Mrs. Edwards. Had the two grandnieces, after coming to live in Mrs. Edwards' home, either not applied for assistance or applied through a different caretaker relative living in that home, the California Rule would not have affected the granddaughter's benefits at all.[5]

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[5] Although needy children will receive less in per capita benefits under the California Rule, this reduction affects only children who share a household. California is simply recognizing the economies of scale that inhere in such living arrangements. See, *e. g.*, *Bowen* v. *Gilliard*, 483 U. S. 587, 599 (1987) (crediting "'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared'" (quoting *Termini* v. *Califano*, 611 F. 2d 367, 370 (CA2 1979))).

B

Respondents also argue that the California Rule violates the "availability" principle, which is implemented, in one form or another, by all three federal regulations. Section 233.90(a)(1) provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than [the child's parent] is not an acceptable basis for . . . assuming the availability of income" to a needy child. Likewise, § 233.20(a)(2)(viii) provides that States may "not assume any contribution from [a nonlegally responsible] individual for the support of the assistance unit." Finally, § 233.20(a)(3)(ii)(D) provides generally that States shall, "in determining need and the amount of the assistance payment," count only "[i]ncome . . . and resources available for current use"; the regulation adds that "income and resources are considered available both when actually available and when [legally available]."

According to respondents, the California Rule assumes that income from relatives is contributed to, or otherwise available to, a needy child without a determination that it is actually available. If Mrs. Edwards' granddaughter were to begin receiving $75 per month in outside income, for example, the AU of which she is a part would receive $75 less in monthly AFDC benefits, and the two grandnieces would each accordingly receive $25 less in per capita monthly benefits. Thus, the California Rule assertedly "assumes," in violation of all three federal regulations, that the granddaughter will contribute $25 per month of her outside income to each grandniece and also that such income will therefore be available to each grandniece—without a case-specific determination that such contribution will in fact occur.

Respondents' argument fails for at least two reasons. First, its premise is questionable. Although in this example, the grandnieces each will *nominally* receive $25 less in per capita monthly benefits, they will *actually* receive less in benefits only if one assumes that Mrs. Edwards will expend

an equal amount of AFDC assistance on each of the three children—without regard to any other relevant circumstances, such as whether one of them receives outside income. Not only would such assumption fail to reflect reality, see, *e. g.*, *Gilliard*, 483 U. S., at 600, n. 14, it would also be inconsistent with the duty imposed on caretakers by federal law to spend AFDC payments "in the best interests of the child[ren]" for whom they care, 42 U. S. C. § 605, a duty specifically implemented by California law, see, *e. g.*, Cal. Welf. & Inst. Code Ann. §§ 11005.5, 11480 (West 1991). Thus, California may rationally assume that a caretaker will observe her duties to all the members of the AU and will take into account the receipt of any outside income by one child when expending funds on behalf of the AU.

Second, respondents' argument misperceives the operation of the California Rule. In the foregoing example, California would simply add the monthly income of all members of the AU—$75 (granddaughter) plus $0 (first grandniece) plus $0 (second grandniece) for a total of $75—and reduce the monthly assistance payment to the Edwards family AU accordingly. It should be clear from this example that the monthly payment to the AU is reduced not because the California Rule "assumes" that any income is available to the grandnieces, but because it places the two grandnieces into the same AU as the granddaughter (whose income is actually available to herself). What respondents are really attacking is the rule that the income of all members of the AU is combined in order to determine the amount of the assistance payment to the AU. This attack ignores the very definition of an AU: the group of individuals whose income and resources are considered "as a unit" for purposes of determining the amount of the assistance payment. 45 CFR § 206.10(b)(5) (1993). Accord, Brief for Respondents 4 ("All of the income and resources of everyone in the assistance unit are taken into consideration in establishing the benefit payment").

Perhaps respondents are arguing that the regulations simply forbid California to combine the incomes of all needy children in a household—whether by grouping them into the same AU or otherwise. But whatever are the limits that federal law imposes on States' authority in this regard, the combination of incomes effected by the California Rule is authorized by the AFDC statute itself, which provides that a state agency "shall, in determining need, take into consideration any . . . income and resources of any child or relative claiming [AFDC assistance]." 42 U. S. C. § 602(a)(7)(A) (1988 ed. and Supp. V). In light of the "great latitude," *Dandridge*, 397 U. S., at 478, and the "broad discretion," *Shea*, 416 U. S., at 253, that States have in administering their AFDC programs, this statute is reasonably construed to allow States, in determining a child's need (and therefore how much assistance she will receive), to take into consideration the income and resources of all cohabiting children and relatives also claiming AFDC assistance.

The availability regulations are addressed to an entirely different problem, namely, the counting of income and resources controlled by persons outside the AU for the purpose of determining the amount of assistance to be provided to the AU. The regulations were adopted to implement our decisions in three AFDC cases. See 42 Fed. Reg. 6583–6584 (1977) (citing *King* v. *Smith*, 392 U. S. 309 (1968); *Lewis* v. *Martin*, 397 U. S. 552 (1970); *Van Lare* v. *Hurley*, 421 U. S. 338 (1975)). In all three cases, the State had counted as available to the AU income that was not actually or legally available because it was controlled by a person who was not a member of the AU and who was not applying for AFDC assistance. See *King*, *supra*, at 311 (a "'substitute father,'" defined as any able-bodied man who cohabited with the mother of the needy children in or outside her home); *Lewis*, *supra*, at 554 ("an adult male person assuming the role of spouse to the mother," such as a common-law husband, or a

nonadopting stepfather not legally obligated to support the children); *Van Lare*, *supra*, at 339, 340 (a "nonpaying lodge[r]," who was "a person not a recipient of AFDC"). Accord, *Bray* v. *Dowling*, 25 F. 3d 135, 144 (CA2 1994) (the federal availability regulations "were established to address specific concerns regarding the imputation of income from non-AFDC sources"), cert. pending, No. 94–5845.

The California Rule has no such effect. The combined income of the three-person AU comprising the granddaughter and two grandnieces of Mrs. Edwards is not calculated with reference to the income either of Mrs. Edwards herself or of anyone else inside or outside the Edwards household who is not a member of the AU and who is not applying for AFDC assistance. In sum, the California Rule does not violate any of the three federal regulations on which the Court of Appeals relied.[6]

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[6] We are aware that in certain situations in which a member of a consolidated AU begins to receive outside income (such as monthly child support payments, an inheritance, or even lottery winnings), the household would receive a larger AFDC monthly payment if the recipient (along with all members of her nuclear family, as required by the federal family filing unit rule) terminated her participation in the AFDC program. See, *e. g.*, *Gilliard*, 483 U. S., at 591 (citing example from prior to federal rule's adoption). Were California law to forbid a person to "opt out" of the AFDC program in these situations, it might be said that the State had reduced AFDC assistance to the AU's remaining members based solely on the presence or the income of a person who is not applying for such assistance.

We find it unnecessary to determine whether California law ever forbids a person who begins receiving outside income to opt out of the AFDC program. Certainly, nothing in the California Rule itself speaks to this issue. Furthermore, because respondents challenged the California Rule on its face by seeking to enjoin its enforcement altogether, see First Amended Complaint in No. CV–S 91 1473 (ED Cal.), pp. 16–17 (Jan. 10, 1992), they could not sustain their burden even if they showed that a possible application of the rule (in concert with another statute or regulation) violated federal law. See *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances ex-

III

Respondents offer two alternative grounds to support the judgment below. Neither has merit, and we may dispose of them quickly.

First, respondents argue that the California Rule is an invalid expansion of the family filing unit rule, 42 U. S. C. § 602(a)(38). According to respondents, when Congress decreed that all members of a nuclear family must be grouped together in a single AU, it intended to prevent States from including any additional persons in that AU (as does the California Rule). We reject the notion that Congress' directive regarding the composition of assistance units "occupied the field" and thereby pre-empted States from adopting any additional rules touching this area. What we said about "workfare" in *New York State Dept. of Social Servs.* v. *Dublino,* 413 U. S. 405, 414 (1973), applies here as well: "If Congress had intended to pre-empt state plans and efforts in such an important dimension of the AFDC program . . . , such intentions would in all likelihood have been expressed in direct and unambiguous language." The language of § 602(a)(38) requires States to embrace the family filing unit rule; it does not further limit States' discretion in a direct or unambiguous manner.

Second, respondents argue that the California Rule violates two other federal regulations that require equitable treatment among AFDC recipients. See 45 CFR § 233.10(a)(1) (1993) ("[T]he eligibility conditions imposed . . . must not result in inequitable treatment of individuals or groups"); § 233.20(a)(1)(i) ("[T]he determination of need and amount of assistance for all applicants [must] be made on an objective and equitable basis"). Assuming that these provisions even "creat[e] a 'federal right' that is enforceable under

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ists under which the [rule] would be valid"). Though an as-applied challenge that presented the opt-out issue in a concrete factual setting might require a court to decide it, such a challenge is not now before us.

[42 U. S. C.] § 1983," *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509 (1990), we find that the California Rule affirmatively fosters equitable treatment among AFDC recipients.

For example, prior to September 1991 a caretaker relative responsible for three brothers having no outside income would have received AFDC benefits of $694 per month on their behalf. Yet before the California Rule was applied to her household, Mrs. Edwards received monthly benefits of $901 for the three girls for whom she cared. See *supra*, at 148. The $207 difference is due solely to the fact that in one household all of the children are siblings, while in the other they are not. The potential *in*equities in the absence of the California Rule are even greater. Six needy siblings living in the same household in California could have received up to $1,057 per month in benefits before September 1991. But prior to the California Rule's adoption, six needy nonsiblings who lived in the same household could have received as much as $2,046, or almost double. See n. 1, *supra*. The California Rule sensibly and equitably eliminates these disparities by providing that equally sized and equally needy households will receive equal AFDC assistance. Thus, the rule does not violate the equitable treatment regulations.[7]

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[7] In its 1994 Transmittal, see *supra*, at 149, HHS examined all of the federal AFDC rules at issue in this case—the three availability regulations, the statutory family filing unit rule, and the equitable treatment regulations. The agency concluded: "Apart from complying with [the family filing unit rule and a related rule], States are authorized to set the State-wide policy, to be applied in all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." App. to Pet. for Cert. 35. Because we have independently reached the same conclusion, we have no occasion to decide whether we must defer to the agency's position. Cf. *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 150 (1991) ("It is well established 'that an agency's construction of its own regulations is entitled to substantial deference'" (quoting *Lyng* v. *Payne*, 476 U. S. 926, 939 (1986))).

* * *

For the foregoing reasons, we conclude that the California Rule does not violate federal law. Accordingly, the judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

QUALITEX CO. *v.* JACOBSON PRODUCTS CO., INC.

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

No. 93–1577. Argued January 9, 1995—Decided March 28, 1995

Petitioner Qualitex Company has for years colored the dry cleaning press pads it manufactures with a special shade of green gold. After respondent Jacobson Products (a Qualitex rival) began to use a similar shade on its own press pads, Qualitex registered its color as a trademark and added a trademark infringement count to the suit it had previously filed challenging Jacobson's use of the green-gold color. Qualitex won in the District Court, but the Ninth Circuit set aside the judgment on the infringement claim because, in its view, the Trademark Act of 1946 (Lanham Act) does not permit registration of color alone as a trademark.

Held: The Lanham Act permits the registration of a trademark that consists, purely and simply, of a color. Pp. 162–174.

(a) That color alone can meet the basic legal requirements for use as a trademark is demonstrated both by the language of the Act, which describes the universe of things that can qualify as a trademark in the broadest of terms, 15 U. S. C. § 1127, and by the underlying principles of trademark law, including the requirements that the mark "identify and distinguish [the seller's] goods . . . from those manufactured or sold by others and to indicate [their] source," *ibid.*, and that it not be "functional," see, *e. g.*, *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 850, n. 10. The District Court's findings (accepted by the Ninth Circuit and here undisputed) show Qualitex's green-gold color has met these requirements. It acts as a symbol. Because customers identify the color as Qualitex's, it has developed secondary meaning, see, *e. g.*, *id.*, at 851, n. 11, and thereby identifies the press pads' source. And, the color serves no other function. (Although it is important to use *some* color on press pads to avoid noticeable stains, the court found no competitive need in the industry for the green-gold color, since other colors are equally usable.) Accordingly, unless there is some special reason that convincingly militates against the use of color alone as a trademark, trademark law protects Qualitex's use of its green-gold color. Pp. 162–166.

(b) Jacobson's various special reasons why the law should forbid the use of color alone as a trademark—that a contrary holding (1) will produce uncertainty and unresolvable court disputes about what shades of a color a competitor may lawfully use; (2) is unworkable in light of

the limited supply of colors that will soon be depleted by competitors; (3) is contradicted by many older cases, including decisions of this Court interpreting pre-Lanham Act trademark law; and (4) is unnecessary because firms already may use color as part of a trademark and may rely on "trade dress" protection—are unpersuasive. Pp. 166–174.

13 F. 3d 1297, reversed.

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

Donald G. Mulack argued the cause for petitioner. With him on the briefs were *Christopher A. Bloom*, *Edward J. Chalfie*, *Heather C. Steinmeyer*, and *Ava B. Campagna.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *Assistant Attorneys General Hunger* and *Bingaman*, *Diane P. Wood*, *James A. Feldman*, *William Kanter*, *Marc Richman*, *Nancy J. Linck*, *Albin F. Drost*, *Nancy C. Slutter*, and *Linda Moncys Isacson.*

Laurence D. Strick argued the cause and filed a brief for respondent.*

JUSTICE BREYER delivered the opinion of the Court.

The question in this case is whether the Trademark Act of 1946 (Lanham Act), 15 U. S. C. §§ 1051–1127 (1988 ed. and Supp. V), permits the registration of a trademark that con-

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*Briefs of *amici curiae* urging reversal were filed for the Bar Association of the District of Columbia by *Bruce T. Wieder*, *Sheldon H. Klein*, and *Linda S. Paine-Powell;* for B. F. Goodrich Co. by *Lawrence S. Robbins* and *Mary Ann Tucker;* for the Crosby Group, Inc., by *Robert D. Yeager;* for Dr Pepper/Seven-Up Corp. by *David C. Gryce;* for the Hand Tools Institute et al. by *James E. Siegel*, *Witold A. Ziarno*, and *Rosemarie Biondi-Tofano;* for Intellectual Property Owners by *George R. Powers*, *Neil A. Smith*, and *Herbert C. Wamsley;* for the International Trademark Association by *Christopher C. Larkin*, *Joan L. Dillon*, and *Morton David Goldberg;* and for Owens-Corning Fiberglas Corp. by *Michael W. Schwartz* and *Marc Wolinsky.*

Arthur M. Handler filed a brief for the Private Label Manufacturers Association as *amicus curiae* urging affirmance.

sists, purely and simply, of a color. We conclude that, sometimes, a color will meet ordinary legal trademark requirements. And, when it does so, no special legal rule prevents color alone from serving as a trademark.

I

The case before us grows out of petitioner Qualitex Company's use (since the 1950's) of a special shade of green-gold color on the pads that it makes and sells to dry cleaning firms for use on dry cleaning presses. In 1989, respondent Jacobson Products (a Qualitex rival) began to sell its own press pads to dry cleaning firms; and it colored those pads a similar green gold. In 1991, Qualitex registered the special green-gold color on press pads with the Patent and Trademark Office as a trademark. Registration No. 1,633,711 (Feb. 5, 1991). Qualitex subsequently added a trademark infringement count, 15 U. S. C. § 1114(1), to an unfair competition claim, § 1125(a), in a lawsuit it had already filed challenging Jacobson's use of the green-gold color.

Qualitex won the lawsuit in the District Court. 21 U. S. P. Q. 2d 1457 (CD Cal. 1991). But, the Court of Appeals for the Ninth Circuit set aside the judgment in Qualitex's favor on the trademark infringement claim because, in that Circuit's view, the Lanham Act does not permit Qualitex, or anyone else, to register "color alone" as a trademark. 13 F. 3d 1297, 1300, 1302 (1994).

The Courts of Appeals have differed as to whether or not the law recognizes the use of color alone as a trademark. Compare *NutraSweet Co.* v. *Stadt Corp.*, 917 F. 2d 1024, 1028 (CA7 1990) (absolute prohibition against protection of color alone), with *In re Owens-Corning Fiberglas Corp.*, 774 F. 2d 1116, 1128 (CA Fed. 1985) (allowing registration of color pink for fiberglass insulation), and *Master Distributors, Inc.* v. *Pako Corp.*, 986 F. 2d 219, 224 (CA8 1993) (declining to establish *per se* prohibition against protecting color alone as a trademark). Therefore, this Court granted certiorari. 512

U. S. 1287 (1994). We now hold that there is no rule absolutely barring the use of color alone, and we reverse the judgment of the Ninth Circuit.

II

The Lanham Act gives a seller or producer the exclusive right to "register" a trademark, 15 U. S. C. § 1052 (1988 ed. and Supp. V), and to prevent his or her competitors from using that trademark, § 1114(1). Both the language of the Act and the basic underlying principles of trademark law would seem to include color within the universe of things that can qualify as a trademark. The language of the Lanham Act describes that universe in the broadest of terms. It says that trademarks "includ[e] any word, name, symbol, or device, or any combination thereof." § 1127. Since human beings might use as a "symbol" or "device" almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive. The courts and the Patent and Trademark Office have authorized for use as a mark a particular shape (of a Coca-Cola bottle), a particular sound (of NBC's three chimes), and even a particular scent (of plumeria blossoms on sewing thread). See, *e. g.*, Registration No. 696,147 (Apr. 12, 1960); Registration Nos. 523,616 (Apr. 4, 1950) and 916,522 (July 13, 1971); *In re Clarke*, 17 U. S. P. Q. 2d 1238, 1240 (TTAB 1990). If a shape, a sound, and a fragrance can act as symbols why, one might ask, can a color not do the same?

A color is also capable of satisfying the more important part of the statutory definition of a trademark, which requires that a person "us[e]" or "inten[d] to use" the mark

> "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." 15 U. S. C. § 1127.

True, a product's color is unlike "fanciful," "arbitrary," or "suggestive" words or designs, which almost *automatically*

tell a customer that they refer to a brand. *Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 9–10 (CA2 1976) (Friendly, J.); see *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 768 (1992). The imaginary word "Suntost," or the words "Suntost Marmalade," on a jar of orange jam immediately would signal a brand or a product "source"; the jam's orange color does not do so. But, over time, customers may come to treat a particular color on a product or its packaging (say, a color that in context seems unusual, such as pink on a firm's insulating material or red on the head of a large industrial bolt) as signifying a brand. And, if so, that color would have come to identify and distinguish the goods—*i. e.*, "to indicate" their "source"—much in the way that descriptive words on a product (say, "Trim" on nail clippers or "Car-Freshner" on deodorizer) can come to indicate a product's origin. See, *e. g., J. Wiss & Sons Co.* v. *W. E. Bassett Co.*, 59 C. C. P. A. 1269, 1271 (Pat.), 462 F. 2d 567, 569 (1972); *Car-Freshner Corp.* v. *Turtle Wax, Inc.*, 268 F. Supp. 162, 164 (SDNY 1967). In this circumstance, trademark law says that the word (*e. g.*, "Trim"), although not inherently distinctive, has developed "secondary meaning." See *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 851, n. 11 (1982) ("[S]econdary meaning" is acquired when "in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself"). Again, one might ask, if trademark law permits a descriptive word with secondary meaning to act as a mark, why would it not permit a color, under similar circumstances, to do the same?

We cannot find in the basic objectives of trademark law any obvious theoretical objection to the use of color alone as a trademark, where that color has attained "secondary meaning" and therefore identifies and distinguishes a particular brand (and thus indicates its "source"). In principle, trademark law, by preventing others from copying a source-identifying mark, "reduce[s] the customer's costs of shopping

and making purchasing decisions," 1 J. McCarthy, McCarthy on Trademarks and Unfair Competition § 2.01[2], p. 2–3 (3d ed. 1994) (hereinafter McCarthy), for it quickly and easily assures a potential customer that *this* item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past. At the same time, the law helps assure a producer that it (and not an imitating competitor) will reap the financial, reputation-related rewards associated with a desirable product. The law thereby "encourage[s] the production of quality products," *ibid.*, and simultaneously discourages those who hope to sell inferior products by capitalizing on a consumer's inability quickly to evaluate the quality of an item offered for sale. See, *e. g.*, 3 L. Altman, Callmann on Unfair Competition, Trademarks and Monopolies § 17.03 (4th ed. 1983); Landes & Posner, The Economics of Trademark Law, 78 T. M. Rep. 267, 271–272 (1988); *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985); S. Rep. No. 100–515, p. 4 (1988). It is the source-distinguishing ability of a mark—not its ontological status as color, shape, fragrance, word, or sign—that permits it to serve these basic purposes. See Landes & Posner, Trademark Law: An Economic Perspective, 30 J. Law & Econ. 265, 290 (1987). And, for that reason, it is difficult to find, in basic trademark objectives, a reason to disqualify absolutely the use of a color as a mark.

Neither can we find a principled objection to the use of color as a mark in the important "functionality" doctrine of trademark law. The functionality doctrine prevents trademark law, which seeks to promote competition by protecting a firm's reputation, from instead inhibiting legitimate competition by allowing a producer to control a useful product feature. It is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time, 35 U. S. C. §§ 154, 173, after which competitors are free to use the innovation. If a product's functional features could be

used as trademarks, however, a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever (because trademarks may be renewed in perpetuity). See *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 119–120 (1938) (Brandeis, J.); *Inwood Laboratories, Inc.*, *supra*, at 863 (White, J., concurring in result) ("A functional characteristic is 'an important ingredient in the commercial success of the product,' and, after expiration of a patent, it is no more the property of the originator than the product itself") (citation omitted). Functionality doctrine therefore would require, to take an imaginary example, that even if customers have come to identify the special illumination-enhancing shape of a new patented light bulb with a particular manufacturer, the manufacturer may not use that shape as a trademark, for doing so, after the patent had expired, would impede competition—not by protecting the reputation of the original bulb maker, but by frustrating competitors' legitimate efforts to produce an equivalent illumination-enhancing bulb. See, *e. g.*, *Kellogg Co.*, *supra*, at 119–120 (trademark law cannot be used to extend monopoly over "pillow" shape of shredded wheat biscuit after the patent for that shape had expired). This Court consequently has explained that, "[i]n general terms, a product feature is functional," and cannot serve as a trademark, "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article," that is, if exclusive use of the feature would put competitors at a significant non-reputation-related disadvantage. *Inwood Laboratories, Inc.*, *supra*, at 850, n. 10. Although sometimes color plays an important role (unrelated to source identification) in making a product more desirable, sometimes it does not. And, this latter fact—the fact that sometimes color is not essential to a product's use or purpose and does not affect cost or quality—indicates that the doctrine of "functionality" does not create an absolute bar to the use of color alone as a mark. See *Owens-Corning*, 774 F. 2d, at 1123 (pink color of insulation in wall "performs no non-trademark function").

It would seem, then, that color alone, at least sometimes, can meet the basic legal requirements for use as a trademark. It can act as a symbol that distinguishes a firm's goods and identifies their source, without serving any other significant function. See U. S. Dept. of Commerce, Patent and Trademark Office, Trademark Manual of Examining Procedure § 1202.04(e), p. 1202–13 (2d ed. May, 1993) (hereinafter PTO Manual) (approving trademark registration of color alone where it "has become distinctive of the applicant's goods in commerce," provided that "there is [no] competitive need for colors to remain available in the industry" and the color is not "functional"); see also 1 McCarthy §§ 3.01[1], 7.26, pp. 3–2, 7–113 ("requirements for qualification of a word or symbol as a trademark" are that it be (1) a "symbol," (2) "use[d] . . . as a mark," (3) "to identify and distinguish the seller's goods from goods made or sold by others," but that it not be "functional"). Indeed, the District Court, in this case, entered findings (accepted by the Ninth Circuit) that show Qualitex's green-gold press pad color has met these requirements. The green-gold color acts as a symbol. Having developed secondary meaning (for customers identified the green-gold color as Qualitex's), it identifies the press pads' source. And, the green-gold color serves no other function. (Although it is important to use *some* color on press pads to avoid noticeable stains, the court found "no competitive need in the press pad industry for the green-gold color, since other colors are equally usable." 21 U. S. P. Q. 2d, at 1460.) Accordingly, unless there is some special reason that convincingly militates against the use of color alone as a trademark, trademark law would protect Qualitex's use of the green-gold color on its press pads.

III

Respondent Jacobson Products says that there are four special reasons why the law should forbid the use of color

alone as a trademark. We shall explain, in turn, why we, ultimately, find them unpersuasive.

First, Jacobson says that, if the law permits the use of color as a trademark, it will produce uncertainty and unresolvable court disputes about what shades of a color a competitor may lawfully use. Because lighting (morning sun, twilight mist) will affect perceptions of protected color, competitors and courts will suffer from "shade confusion" as they try to decide whether use of a similar color on a similar product does, or does not, confuse customers and thereby infringe a trademark. Jacobson adds that the "shade confusion" problem is "more difficult" and "far different from" the "determination of the similarity of words or symbols." Brief for Respondent 22.

We do not believe, however, that color, in this respect, is special. Courts traditionally decide quite difficult questions about whether two words or phrases or symbols are sufficiently similar, in context, to confuse buyers. They have had to compare, for example, such words as "Bonamine" and "Dramamine" (motion-sickness remedies); "Huggies" and "Dougies" (diapers); "Cheracol" and "Syrocol" (cough syrup); "Cyclone" and "Tornado" (wire fences); and "Mattres" and "1–800–Mattres" (mattress franchisor telephone numbers). See, *e. g.*, *G. D. Searle & Co.* v. *Chas. Pfizer & Co.*, 265 F. 2d 385, 389 (CA7 1959); *Kimberly-Clark Corp.* v. *H. Douglas Enterprises, Ltd.*, 774 F. 2d 1144, 1146–1147 (CA Fed. 1985); *Upjohn Co.* v. *Schwartz*, 246 F. 2d 254, 262 (CA2 1957); *Hancock* v. *American Steel & Wire Co. of N. J.*, 40 C. C. P. A. (Pat.) 931, 935, 203 F. 2d 737, 740–741 (1953); *Dial-A-Mattress Franchise Corp.* v. *Page*, 880 F. 2d 675, 678 (CA2 1989). Legal standards exist to guide courts in making such comparisons. See, *e. g.*, 2 McCarthy § 15.08; 1 McCarthy §§ 11.24–11.25 ("[S]trong" marks, with greater secondary meaning, receive broader protection than "weak" marks). We do not see why courts could not apply those standards to a color, replicating, if necessary, lighting conditions under

which a colored product is normally sold. See Ebert, Trademark Protection in Color: Do It By the Numbers!, 84 T. M. Rep. 379, 405 (1994). Indeed, courts already have done so in cases where a trademark consists of a color plus a design, *i. e.*, a colored symbol such as a gold stripe (around a sewer pipe), a yellow strand of wire rope, or a "brilliant yellow" band (on ampules). See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Tallman Conduit Co.*, 149 U. S. P. Q. 656, 657 (TTAB 1966); *Amstead Industries, Inc.* v. *West Coast Wire Rope & Rigging Inc.*, 2 U. S. P. Q. 2d 1755, 1760 (TTAB 1987); *In re Hodes-Lange Corp.*, 167 U. S. P. Q. 255, 256 (TTAB 1970).

Second, Jacobson argues, as have others, that colors are in limited supply. See, *e. g.*, *NutraSweet Co.*, 917 F. 2d, at 1028; *Campbell Soup Co.* v. *Armour & Co.*, 175 F. 2d 795, 798 (CA3 1949). Jacobson claims that, if one of many competitors can appropriate a particular color for use as a trademark, and each competitor then tries to do the same, the supply of colors will soon be depleted. Put in its strongest form, this argument would concede that "[h]undreds of color pigments are manufactured and thousands of colors can be obtained by mixing." L. Cheskin, Colors: What They Can Do For You 47 (1947). But, it would add that, in the context of a particular product, only some colors are usable. By the time one discards colors that, say, for reasons of customer appeal, are not usable, and adds the shades that competitors cannot use lest they risk infringing a similar, registered shade, then one is left with only a handful of possible colors. And, under these circumstances, to permit one, or a few, producers to use colors as trademarks will "deplete" the supply of usable colors to the point where a competitor's inability to find a suitable color will put that competitor at a significant disadvantage.

This argument is unpersuasive, however, largely because it relies on an occasional problem to justify a blanket prohibition. When a color serves as a mark, normally alternative colors will likely be available for similar use by others. See, *e. g.*, *Owens-Corning*, 774 F. 2d, at 1121 (pink insulation).

Moreover, if that is not so—if a "color depletion" or "color scarcity" problem does arise—the trademark doctrine of "functionality" normally would seem available to prevent the anticompetitive consequences that Jacobson's argument posits, thereby minimizing that argument's practical force.

The functionality doctrine, as we have said, forbids the use of a product's feature as a trademark where doing so will put a competitor at a significant disadvantage because the feature is "essential to the use or purpose of the article" or "affects [its] cost or quality." *Inwood Laboratories, Inc.*, 456 U. S., at 850, n. 10. The functionality doctrine thus protects competitors against a disadvantage (unrelated to recognition or reputation) that trademark protection might otherwise impose, namely, their inability reasonably to replicate important non-reputation-related product features. For example, this Court has written that competitors might be free to copy the color of a medical pill where that color serves to identify the kind of medication (*e. g.*, a type of blood medicine) in addition to its source. See *id.*, at 853, 858, n. 20 ("[S]ome patients commingle medications in a container and rely on color to differentiate one from another"); see also J. Ginsburg, D. Goldberg, & A. Greenbaum, Trademark and Unfair Competition Law 194–195 (1991) (noting that drug color cases "have more to do with public health policy" regarding generic drug substitution "than with trademark law"). And, the federal courts have demonstrated that they can apply this doctrine in a careful and reasoned manner, with sensitivity to the effect on competition. Although we need not comment on the merits of specific cases, we note that lower courts have permitted competitors to copy the green color of farm machinery (because customers wanted their farm equipment to match) and have barred the use of black as a trademark on outboard boat motors (because black has the special functional attributes of decreasing the apparent size of the motor and ensuring compatibility with many different boat colors). See *Deere & Co.* v. *Farmhand, Inc.*, 560

F. Supp. 85, 98 (SD Iowa 1982), aff'd, 721 F. 2d 253 (CA8 1983); *Brunswick Corp.* v. *British Seagull Ltd.*, 35 F. 3d 1527, 1532 (CA Fed. 1994), cert. pending, No. 94–1075; see also *Nor-Am Chemical* v. *O. M. Scott & Sons Co.*, 4 U. S. P. Q. 2d 1316, 1320 (ED Pa. 1987) (blue color of fertilizer held functional because it indicated the presence of nitrogen). The Restatement (Third) of Unfair Competition adds that, if a design's "aesthetic value" lies in its ability to "confe[r] a significant benefit that cannot practically be duplicated by the use of alternative designs," then the design is "functional." Restatement (Third) of Unfair Competition § 17, Comment *c*, pp. 175–176 (1993). The "ultimate test of aesthetic functionality," it explains, "is whether the recognition of trademark rights would significantly hinder competition." *Id.*, at 176.

The upshot is that, where a color serves a significant nontrademark function—whether to distinguish a heart pill from a digestive medicine or to satisfy the "noble instinct for giving the right touch of beauty to common and necessary things," G. Chesterton, Simplicity and Tolstoy 61 (1912)—courts will examine whether its use as a mark would permit one competitor (or a group) to interfere with legitimate (nontrademark-related) competition through actual or potential exclusive use of an important product ingredient. That examination should not discourage firms from creating esthetically pleasing mark designs, for it is open to their competitors to do the same. See, *e. g., W. T. Rogers Co.* v. *Keene*, 778 F. 2d 334, 343 (CA7 1985) (Posner, J.). But, ordinarily, it should prevent the anticompetitive consequences of Jacobson's hypothetical "color depletion" argument, when, and if, the circumstances of a particular case threaten "color depletion."

Third, Jacobson points to many older cases—including Supreme Court cases—in support of its position. In 1878, this Court described the common-law definition of trademark rather broadly to "consist of a name, symbol, figure, letter, form, or device, if adopted and used by a manufacturer or

merchant in order to designate the goods he manufactures or sells to distinguish the same from those manufactured or sold by another." *McLean* v. *Fleming*, 96 U. S. 245, 254. Yet, in interpreting the Trademark Acts of 1881 and 1905, 21 Stat. 502, 33 Stat. 724, which retained that common-law definition, the Court questioned "[w]hether mere color can constitute a valid trade-mark," *A. Leschen & Sons Rope Co.* v. *Broderick & Bascom Rope Co.*, 201 U. S. 166, 171 (1906), and suggested that the "product including the coloring matter is free to all who make it," *Coca-Cola Co.* v. *Koke Co. of America*, 254 U. S. 143, 147 (1920). Even though these statements amounted to dicta, lower courts interpreted them as forbidding protection for color alone. See, *e. g.*, *Campbell Soup Co.*, 175 F. 2d, at 798, and n. 9; *Life Savers Corp.* v. *Curtiss Candy Co.*, 182 F. 2d 4, 9 (CA7 1950) (quoting *Campbell Soup*, *supra*, at 798).

These Supreme Court cases, however, interpreted trademark law as it existed *before* 1946, when Congress enacted the Lanham Act. The Lanham Act significantly changed and liberalized the common law to "dispense with mere technical prohibitions," S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946), most notably, by permitting trademark registration of descriptive words (say, "U-Build-It" model airplanes) where they had acquired "secondary meaning." See *Abercrombie & Fitch Co.*, 537 F. 2d, at 9 (Friendly, J.). The Lanham Act extended protection to descriptive marks by making clear that (with certain explicit exceptions not relevant here)

> "nothing . . . shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce." 15 U. S. C. § 1052(f) (1988 ed., Supp. V).

This language permits an ordinary word, normally used for a nontrademark purpose (*e. g.*, description), to act as a trademark where it has gained "secondary meaning." Its logic

would appear to apply to color as well. Indeed, in 1985, the Federal Circuit considered the significance of the Lanham Act's changes as they related to color and held that trademark protection for color was consistent with the

> "jurisprudence under the Lanham Act developed in accordance with the statutory principle that if a mark is capable of being or becoming distinctive of [the] applicant's goods in commerce, then it is capable of serving as a trademark." *Owens-Corning*, 774 F. 2d, at 1120.

In 1988, Congress amended the Lanham Act, revising portions of the definitional language, but left unchanged the language here relevant. § 134, 102 Stat. 3946, 15 U. S. C. § 1127. It enacted these amendments against the following background: (1) the Federal Circuit had decided *Owens-Corning;* (2) the Patent and Trademark Office had adopted a clear policy (which it still maintains) permitting registration of color as a trademark, see PTO Manual § 1202.04(e) (at p. 1200–12 of the January 1986 edition and p. 1202–13 of the May 1993 edition); and (3) the Trademark Commission had written a report, which recommended that "the terms 'symbol, or device' . . . not be deleted or narrowed to preclude registration of such things as a color, shape, smell, sound, or configuration which functions as a mark," The United States Trademark Association Trademark Review Commission Report and Recommendations to USTA President and Board of Directors, 77 T. M. Rep. 375, 421 (1987); see also 133 Cong. Rec. 32812 (1987) (statement of Sen. DeConcini) ("The bill I am introducing today is based on the Commission's report and recommendations"). This background strongly suggests that the language "any word, name, symbol, or device," 15 U. S. C. § 1127, had come to include color. And, when it amended the statute, Congress retained these terms. Indeed, the Senate Report accompanying the Lanham Act revision explicitly referred to this background understanding, in saying that the "revised definition intentionally retains . . .

the words 'symbol or device' so as not to preclude the registration of colors, shapes, sounds or configurations where they function as trademarks." S. Rep. No. 100–515, at 44. (In addition, the statute retained language providing that "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration . . . on account of its nature" (except for certain specified reasons not relevant here). 15 U. S. C. § 1052 (1988 ed., Supp. V).)

This history undercuts the authority of the precedent on which Jacobson relies. Much of the pre-1985 case law rested on statements in Supreme Court opinions that interpreted pre-Lanham Act trademark law and were not directly related to the holdings in those cases. Moreover, we believe the Federal Circuit was right in 1985 when it found that the 1946 Lanham Act embodied crucial legal changes that liberalized the law to permit the use of color alone as a trademark (under appropriate circumstances). At a minimum, the Lanham Act's changes left the courts free to reevaluate the preexisting legal precedent which had absolutely forbidden the use of color alone as a trademark. Finally, when Congress reenacted the terms "word, name, symbol, or device" in 1988, it did so against a legal background in which those terms had come to include color, and its statutory revision embraced that understanding.

Fourth, Jacobson argues that there is no need to permit color alone to function as a trademark because a firm already may use color as part of a trademark, say, as a colored circle or colored letter or colored word, and may rely upon "trade dress" protection, under § 43(a) of the Lanham Act, if a competitor copies its color and thereby causes consumer confusion regarding the overall appearance of the competing products or their packaging, see 15 U. S. C. § 1125(a) (1988 ed., Supp. V). The first part of this argument begs the question. One can understand why a firm might find it difficult to place a usable symbol or word on a product (say, a large industrial

bolt that customers normally see from a distance); and, in such instances, a firm might want to use color, pure and simple, instead of color as part of a design. Neither is the second portion of the argument convincing. Trademark law helps the holder of a mark in many ways that "trade dress" protection does not. See 15 U. S. C. § 1124 (ability to prevent importation of confusingly similar goods); § 1072 (constructive notice of ownership); § 1065 (incontestible status); § 1057(b) (prima facie evidence of validity and ownership). Thus, one can easily find reasons why the law might provide trademark protection in addition to trade dress protection.

IV

Having determined that a color may sometimes meet the basic legal requirements for use as a trademark and that respondent Jacobson's arguments do not justify a special legal rule preventing color alone from serving as a trademark (and, in light of the District Court's here undisputed findings that Qualitex's use of the green-gold color on its press pads meets the basic trademark requirements), we conclude that the Ninth Circuit erred in barring Qualitex's use of color as a trademark. For these reasons, the judgment of the Ninth Circuit is

Reversed.

Syllabus

OKLAHOMA TAX COMMISSION *v.* JEFFERSON LINES, INC.

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

No. 93–1677. Argued November 28, 1994—Decided April 3, 1995

Respondent Jefferson Lines, Inc., a common carrier, did not collect or remit to Oklahoma the state sales tax on bus tickets sold in Oklahoma for interstate travel originating there, although it did so for tickets sold for intrastate travel. After Jefferson filed for bankruptcy, petitioner, Oklahoma Tax Commission, filed proof of claims for the uncollected taxes, but the Bankruptcy Court found that the tax was inconsistent with the Commerce Clause in that it imposed an undue burden on interstate commerce and presented a danger of multiple taxation. The District Court affirmed. The Court of Appeals also affirmed, holding that the tax was not fairly apportioned. Rejecting the Commission's position that a bus ticket sale is a wholly local transaction justifying a State's sales tax on the ticket's full value, the court reasoned that such a tax is indistinguishable from New York's unapportioned tax on an interstate bus line's gross receipts struck down by this Court in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653.

Held: Oklahoma's tax on the sale of transportation services is consistent with the Commerce Clause. Pp. 179–200.

(a) Under *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, Oklahoma's tax is valid if it is applied to an activity with a substantial nexus with the State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. The activity here clearly has a nexus with Oklahoma, the State where the ticket is purchased and the service originates. Pp. 179–184.

(b) The purpose of the second prong of *Complete Auto*'s test is to ensure that each State taxes only its fair share of an interstate transaction. A properly apportioned tax must be both internally and externally consistent. Internal consistency looks to whether a tax's identical application by every State would place interstate commerce at a disadvantage as compared with intrastate commerce. There is no failure of such consistency in this case, for if every State were to impose a tax identical to Oklahoma's—*i. e.*, a tax on ticket sales within the State for travel originating there—no sale would be subject to more than one State's tax. External consistency, on the other hand, looks to the economic justification for the State's claim upon the value taxed, to discover

whether the tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing State. Pp. 184–185.

(c) Where taxation of income from interstate business is in issue, apportionment disputes have often focused on slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable income. When examining the taxation of a sale of goods, however, the sale is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which interstate activity affects the value on which a buyer is taxed. Thus, taxation of sales has been consistently approved without any division of the tax base among different States and has been found properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. Therefore, an internally consistent, conventional sales tax has long been held to be externally consistent as well. Pp. 186–188.

(d) A sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery. Sales of services with performance wholly in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller. Even where interstate activity contributes to the value of the service performed, sales with performance in the taxing State justify that State's taxation of the seller's entire gross receipts. See, *e. g.*, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250. In this case, although the service is performed only partially within the taxing State, the buyer is no more subject to double taxation on the sale of services than the buyer of goods would be. The taxable event here comprises agreement, payment, and delivery of some of the services in the taxing State. No other State can claim to be the site of the same combination, and these combined events are commonly understood to suffice for a sale. *Central Greyhound*, *supra*, distinguished. Pp. 188–191.

(e) Jefferson offers no convincing reasons to reconsider whether this internally consistent tax on sales of services could fail the external consistency test for lack of further apportionment. It has raised no specter of successive taxation so closely related to the transaction as to indicate potential unfairness of Oklahoma's tax on the sale's full amount. Nor is the fact that Oklahoma could feasibly apportion its tax on the basis of mileage, as New York was required to do in *Central Greyhound*, *supra*, a sufficient reason to conclude that the tax exceeds Oklahoma's fair share. Pp. 191–196.

(f) The tax also meets the remaining two prongs of *Complete Auto*'s test. No argument has been made that Oklahoma discriminates against

out-of-state enterprises, and there is no merit in the argument that the tax discriminates against interstate activity, *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, distinguished. The tax is also fairly related to the taxpayer's presence or activities in the State. It falls on a sale that takes place wholly inside Oklahoma and is measured by the value of the service purchased. Pp. 197–200.

15 F. 3d 90, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 200. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 201.

Stanley P. Johnston argued the cause and filed a brief for petitioner.

Steven D. DeRuyter argued the cause for respondent. With him on the brief was *Loren A. Unterseher.**

JUSTICE SOUTER delivered the opinion of the Court.

This case raises the question whether Oklahoma's sales tax on the full price of a ticket for bus travel from Oklahoma to another State is consistent with the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3. We hold that it is.

I

Oklahoma taxes sales in the State of certain goods and services, including transportation for hire. Okla. Stat., Tit. 68, § 1354(1)(C) (Supp. 1988).[1] The buyers of the taxable

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**Richard Ruda* and *Lee Fennell* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Bus Association by *Richard A. Allen;* and for Greyhound Lines, Inc., by *John B. Turner, Rebecca M. Fowler, Oscar R. Cantu,* and *Debra A. Dandeneau.*

[1] At the time relevant to the taxes at issue here, § 1354 provided as follows: "There is hereby levied upon all sales . . . an excise tax of four percent (4%) of the gross receipts or gross proceeds of each sale of the following . . . (C) Transportation for hire to persons by common carriers,

goods and services pay the taxes, which must be collected and remitted to the State by sellers. § 1361.

Respondent Jefferson Lines, Inc., is a Minnesota corporation that provided bus services as a common carrier in Oklahoma from 1988 to 1990. Jefferson did not collect or remit the sales taxes for tickets it had sold in Oklahoma for bus travel from Oklahoma to other States, although it did collect and remit the taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that State.

After Jefferson filed for bankruptcy protection on October 27, 1989, petitioner, Oklahoma Tax Commission, filed proof of claims in Bankruptcy Court for the uncollected taxes for tickets for interstate travel sold by Jefferson.[2] Jefferson cited the Commerce Clause in objecting to the claims, and argued that the tax imposes an undue burden on interstate commerce by permitting Oklahoma to collect a percentage of the full purchase price of all tickets for interstate bus travel, even though some of that value derives from bus travel through other States. The tax also presents the danger of multiple taxation, Jefferson claimed, because any other State through which a bus travels while providing the services sold in Oklahoma will be able to impose taxes of their own upon Jefferson or its passengers for use of the roads.

The Bankruptcy Court agreed with Jefferson, the District Court affirmed, and so did the United States Court of Appeals for the Eighth Circuit. *In re Jefferson Lines, Inc.*, 15

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including railroads both steam and electric, motor transportation companies, taxicab companies, pullman car companies, airlines, and other means of transportation for hire." As a result of recent amendments, the statute presently provides for a 4½ percent tax rate.

[2] The parties have stipulated that the dispute concerns only those taxes for Jefferson's in-state sales of tickets for travel starting in Oklahoma and ending in another State. App. 5; Tr. of Oral Arg. 3–4. The Commission does not seek to recover any taxes for tickets sold in Oklahoma for travel wholly outside of the State or for travel on routes originating in other States and terminating in Oklahoma. Accordingly, the validity of such taxes is not before us.

F. 3d 90 (1994). The Court of Appeals held that Oklahoma's tax was not fairly apportioned, as required under the established test for the constitutionality of a state tax on interstate commerce. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). The Court of Appeals understood its holding to be compelled by our decision in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), which held unconstitutional an unapportioned state tax on the gross receipts[3] of a company that sold tickets for interstate bus travel. The Court of Appeals rejected the Commission's position that the sale of a bus ticket is a wholly local transaction justifying a sales tax on the ticket's full value in the State where it is sold, reasoning that such a tax is indistinguishable from the unapportioned tax on gross receipts from interstate travel struck down in *Central Greyhound*. 15 F. 3d, at 92–93. We granted certiorari, 512 U. S. 1204 (1994), and now reverse.

II

Despite the express grant to Congress of the power to "regulate Commerce . . . among the several States," U. S. Const., Art. I, § 8, cl. 3, we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject. *Quill Corp.* v. *North Dakota*, 504 U. S. 298, 309 (1992); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450, 458 (1959); *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 534–535 (1949); cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824) (Marshall, C. J.) (dictum). We have understood this construction to serve the Commerce Clause's purpose of

[3] We follow standard usage, under which gross receipts taxes are on the gross receipts from sales payable by the seller, in contrast to sales taxes, which are also levied on the gross receipts from sales but are payable by the buyer (although they are collected by the seller and remitted to the taxing entity). P. Hartman, Federal Limitations on State and Local Taxation §§ 8:1, 10:1 (1981).

preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus "'reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1, 7 (1986), quoting *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979); see also The Federalist Nos. 42 (J. Madison), 7 (A. Hamilton), 11 (A. Hamilton).

The command has been stated more easily than its object has been attained, however, and the Court's understanding of the dormant Commerce Clause has taken some turns. In its early stages, see 1 J. Hellerstein & W. Hellerstein, State Taxation ¶¶ 4.05–4.08 (2d ed. 1993) (hereinafter Hellerstein & Hellerstein); Hartman, *supra* n. 3, §§ 2:9–2:16, the Court held the view that interstate commerce was wholly immune from state taxation "in any form," *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648 (1888), "even though the same amount of tax should be laid on [intrastate] commerce," *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 497 (1887); see also *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852); *Brown* v. *Maryland*, 12 Wheat. 419 (1827). This position gave way in time to a less uncompromising but formal approach, according to which, for example, the Court would invalidate a state tax levied on gross receipts from interstate commerce, *New Jersey Bell Telephone Co.* v. *State Bd. of Taxes and Assessments of N. J.*, 280 U. S. 338 (1930); *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298 (1912), or upon the "freight carried" in interstate commerce, *Case of the State*

Freight Tax, 15 Wall. 232, 278 (1873), but would allow a tax merely measured by gross receipts from interstate commerce as long as the tax was formally imposed upon franchises, *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (1891), or "'in lieu of all taxes upon [the taxpayer's] property,'" *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 346 (1912).[4] See generally Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40, 43–66 (1943) (hereinafter Lockhart). Dissenting from this formal approach in 1927, Justice Stone remarked that it was "too mechanical, too uncertain in its application, and too remote from actualities, to be of value." *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 44 (1927) (dissenting opinion).

In 1938, the old formalism began to give way with Justice Stone's opinion in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, which examined New Mexico's franchise tax, measured by gross receipts, as applied to receipts from out-of-state advertisers in a journal produced by taxpayers in New Mexico but circulated both inside and outside the State. Although the assessment could have been sustained solely on prior precedent, see *id.*, at 258; Lockhart 66, and n. 122, Justice Stone added a dash of the pragmatism that, with a brief interlude, has since become our aspiration in this quarter of the law. The Court had no trouble rejecting the claim that the "mere formation of the contract between persons in different states" insulated the receipts from taxation, *Western Live Stock*, 303 U. S., at 253, and it saw the business of "preparing, printing and publishing magazine advertising [as] peculiarly local" and therefore subject to taxation by the

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[4] The Court had indeed temporarily adhered to an additional distinction between taxes upon interstate commerce such as that struck down in the *Case of State Freight Tax*, and taxes upon gross receipts from such commerce, which were upheld that same Term in *State Tax on Railway Gross Receipts*, 15 Wall. 284 (1873). This nice distinction was abandoned prior to the *New Jersey Bell* case in *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 (1887).

State within which the business operated. *Id.*, at 258. The more "vexed question," however, was one that today we would call a question of apportionment: whether the interstate circulation of the journal barred taxation of receipts from advertisements enhanced in value by the journal's wide dissemination. *Id.*, at 254. After rebuffing any such challenge on the ground that the burden on interstate commerce was "too remote and too attenuated" in the light of analogous taxation of railroad property, *id.*, at 259, Justice Stone provided an "added reason" for sustaining the tax:

> "So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.*, at 260.

The Court explained that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Id.*, at 254. Soon after *Western Live Stock*, the Court expressly rested the invalidation of an unapportioned gross receipts tax on the ground that it violated the prohibition against multiple taxation:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured." *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311 (1938).

See also *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438–439 (1939).

After a brief resurgence of the old absolutism that proscribed all taxation formally levied upon interstate commerce, see *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), the Court returned to *Western Live Stock*'s multiple taxation rule in *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959), and we categorically abandoned the latter-day formalism when *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274 (1977), overruled *Spector* and *Freeman*. In *Complete Auto*, a business engaged in transporting cars manufactured outside the taxing State to dealers within it challenged a franchise tax assessed equally on all gross income derived from transportation for hire within the State. The taxpayer's challenge resting solely on the fact that the State had taxed the privilege of engaging in an interstate commercial activity was turned back, and in sustaining the tax, we explicitly returned to our prior decisions that

> "considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U. S., at 279.

Since then, we have often applied, and somewhat refined, what has come to be known as *Complete Auto*'s four-part test. See, *e. g.*, *Goldberg* v. *Sweet*, 488 U. S. 252 (1989) (tax on telephone calls); *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24 (1988) (use tax); *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159 (1983) (franchise tax); *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981) (severance tax). We apply its criteria to the tax before us today.

III

A

It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940) (upholding tax on sale of coal shipped into taxing State by seller). So, too, in addressing the interstate provision of services, we recently held that a State in which an interstate telephone call originates or terminates has the requisite Commerce Clause nexus to tax a customer's purchase of that call as long as the call is billed or charged to a service address, or paid by an addressee, within the taxing State. *Goldberg*, *supra*, at 263. Oklahoma's tax falls comfortably within these rules. Oklahoma is where the ticket is purchased, and the service originates there. These facts are enough for concluding that "[t]here is 'nexus' aplenty here." See *D. H. Holmes*, *supra*, at 33. Indeed, the taxpayer does not deny Oklahoma's substantial nexus to the in-state portion of the bus service, but rather argues that nexus to the State is insufficient as to the portion of travel outside its borders. This point, however, goes to the second prong of *Complete Auto*, to which we turn.

B

The difficult question in this case is whether the tax is properly apportioned within the meaning of the second prong of *Complete Auto*'s test, "the central purpose [of which] is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, *supra*, at 260–261. This principle of fair share is the lineal descendant of *Western Live Stock*'s prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which

one State exceeded its fair share would be taxed again by a State properly laying claim to it.

For over a decade now, we have assessed any threat of malapportionment by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. See *Goldberg*, *supra*, at 261; *Container Corp.*, *supra*, at 169. Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. See *Gwin, White & Prince*, 305 U. S., at 439. There is no failure of it in this case, however. If every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax.

External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. See *Goldberg*, *supra*, at 262; *Container Corp.*, *supra*, at 169–170. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching. It is to this less tidy world of real taxation that we turn now, and at length.

1

The very term "apportionment" tends to conjure up allocation by percentages, and where taxation of income from interstate business is in issue, apportionment disputes have often centered around specific formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value. In *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267 (1978), for example, we considered whether Iowa could measure an interstate corporation's taxable income by attributing income to business within the State "'in that proportion which the gross sales made within the state bear to the total gross sales.'" *Id.*, at 270. We held that it could. In *Container Corp.*, we decided whether California could constitutionally compute taxable income assignable to a multijurisdictional enterprise's in-state activity by apportioning its combined business income according to a formula "based, in equal parts, on the proportion of [such] business' total payroll, property, and sales which are located in the taxing State." 463 U. S., at 170. Again, we held that it could. Finally, in *Central Greyhound,* we held that New York's taxation of an interstate bus line's gross receipts was constitutionally limited to that portion reflecting miles traveled within the taxing jurisdiction. 334 U. S., at 663.

In reviewing sales taxes for fair share, however, we have had to set a different course. A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future. See, *e. g.*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra.*

Such has been the rule even when the parties to a sales contract specifically contemplated interstate movement of the goods either immediately before, or after, the transfer of ownership. See, *e. g.*, *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1 (1986) (upholding sales tax on airplane fuel); *State Tax Comm'n of Utah* v. *Pacific States Cast Iron Pipe Co.*, 372 U. S. 605 (1963) *(per curiam)* (upholding tax on sale that contemplated purchaser's interstate shipment of goods immediately after sale). The sale, we held, was "an activity which . . . is subject to the state taxing power" so long as taxation did not "discriminat[e]" against or "obstruc[t]" interstate commerce, *Berwind-White*, 309 U. S., at 58, and we found a sufficient safeguard against the risk of impermissible multiple taxation of a sale in the fact that it was consummated in only one State. As we put it in *Berwind-White*, a necessary condition for imposing the tax was the occurrence of "a local activity, delivery of goods within the State upon their purchase for consumption." *Ibid.* So conceived, a sales tax on coal, for example, could not be repeated by other States, for the same coal was not imagined ever to be delivered in two States at once. Conversely, we held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier. *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944). The out-of-state seller in that case "was through selling" outside the taxing State. *Id.*, at 330. In other words, the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place, insulated the buyer from any threat of further taxation of the transaction.

In deriving this rule covering taxation to a buyer on sales of goods we were not, of course, oblivious to the possibility of successive taxation of related events up and down the stream of commerce, and our cases are implicit with the understanding that the Commerce Clause does not forbid the

actual assessment of a succession of taxes by different States on distinct events as the same tangible object flows along. Thus, it is a truism that a sales tax to the buyer does not preclude a tax to the seller upon the income earned from a sale, and there is no constitutional trouble inherent in the imposition of a sales tax in the State of delivery to the customer, even though the State of origin of the thing sold may have assessed a property or severance tax on it. See *Berwind-White*, 309 U. S., at 53; cf. *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609 (1981) (upholding severance tax on coal mined within the taxing State). In light of this settled treatment of taxes on sales of goods and other successive taxes related through the stream of commerce, it is fair to say that because the taxable event of the consummated sale of goods has been found to be properly treated as unique, an internally consistent, conventional sales tax has long been held to be externally consistent as well.

2

A sale of services can ordinarily be treated as a local state event just as readily as a sale of tangible goods can be located solely within the State of delivery. Cf. *Goldberg* v. *Sweet*, 488 U. S. 252 (1989). Although our decisional law on sales of services is less developed than on sales of goods, one category of cases dealing with taxation of gross sales receipts in the hands of a seller of services supports the view that the taxable event is wholly local. Thus we have held that the entire gross receipts derived from sales of services to be performed wholly in one State are taxable by that State, notwithstanding that the contract for performance of the services has been entered into across state lines with customers who reside outside the taxing State. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). So, too, as we have already noted, even where interstate circulation contributes to the value of magazine advertising purchased by the customer, we have held that the Commerce Clause does not preclude a tax on its full value by the State

of publication. *Id.*, at 254, 258–259. And where the services are performed upon tangible items retrieved from and delivered to out-of-state customers, the business performing the services may be taxed on the full gross receipts from the services, because they were performed wholly within the taxing State. *Department of Treasury of Ind.* v. *Ingram-Richardson Mfg. Co. of Ind.*, 313 U. S. 252 (1941). Interstate activity may be essential to a substantial portion of the value of the services in the first case and essential to performance of the services in the second, but sales with at least partial performance in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller. On the analogy sometimes drawn between sales and gross receipts taxes, see *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 347–348 (1944); but see *Norton Co.* v. *Department of Revenue of Ill.*, 340 U. S. 534, 537 (1951), there would be no reason to suppose that a different apportionment would be feasible or required when the tax falls not on the seller but on the buyer.

Cases on gross receipts from sales of services include one falling into quite a different category, however, and it is on this decision that the taxpayer relies for an analogy said to control the resolution of the case before us. In 1948, the Court decided *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, striking down New York's gross receipts tax on transportation services imposed without further apportionment on the total receipts from New York sales of bus services, almost half of which were actually provided by carriage through neighboring New Jersey and Pennsylvania. The Court held the statute fatally flawed by the failure to apportion taxable receipts in the same proportions that miles traveled through the various States bore to the total. The similarity of *Central Greyhound* to this case is, of course, striking, and on the assumption that the economic significance of a gross receipts tax is indistinguishable from a tax on sales the Court of Appeals held that a similar mileage

apportionment is required here, see 15 F. 3d, at 92–93, as the taxpayer now argues.

We, however, think that *Central Greyhound* provides the wrong analogy for answering the sales tax apportionment question here. To be sure, the two cases involve the identical services, and apportionment by mileage per State is equally feasible in each. But the two diverge crucially in the identity of the taxpayers and the consequent opportunities that are understood to exist for multiple taxation of the same taxpayer. *Central Greyhound* did not rest simply on the mathematical and administrative feasibility of a mileage apportionment, but on the Court's express understanding that the seller-taxpayer was exposed to taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety. The Court thus understood the gross receipts tax to be simply a variety of tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned. This understanding is presumably the reason that the *Central Greyhound* Court said nothing about the arguably local character of the levy on the sales transaction.[5] Instead, the Court heeded *Berwind-White*'s warning about "[p]rivilege taxes requiring a percentage of the gross receipts from interstate transportation," which "if sustained, could be imposed wherever the interstate activity occurs . . . ." 309 U. S., at 45–46, n. 2.

Here, in contrast, the tax falls on the buyer of the services, who is no more subject to double taxation on the sale of these services than the buyer of goods would be. The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination. The economic activity represented by the receipt of the ticket for "consumption" in the form of commencement and partial provision of the

[5] Although New York's tax reached the gross receipts only from ticket sales within New York State, 334 U. S., at 664, 666 (Murphy, J., dissenting), the majority makes no mention of this fact.

transportation thus closely resembles *Berwind-White*'s "delivery of goods within the State upon their purchase for consumption," *id.*, at 58, especially given that full "consumption" or "use" of the purchased goods within the taxing State has never been a condition for taxing a sale of those goods. Although the taxpayer seeks to discount these resemblances by arguing that sale does not occur until delivery is made, nothing in our case law supports the view that when delivery is made by services provided over time and through space a separate sale occurs at each moment of delivery, or when each State's segment of transportation State by State is complete. The analysis should not lose touch with the common understanding of a sale, see *Goldberg*, 488 U. S., at 262; the combined events of payment for a ticket and its delivery for present commencement of a trip are commonly understood to suffice for a sale.

In sum, the sales taxation here is not open to the double taxation analysis on which *Central Greyhound* turned, and that decision does not control. Before we classify the Oklahoma tax with standard taxes on sales of goods, and with the taxes on less complicated sales of services, however, two questions may helpfully be considered.

3

Although the sale with partial delivery cannot be duplicated as a taxable event in any other State, and multiple taxation under an identical tax is thus precluded, is there a possibility of successive taxation so closely related to the transaction as to indicate potential unfairness of Oklahoma's tax on the full amount of sale? And if the answer to that question is no, is the very possibility of apportioning by mileage a sufficient reason to conclude that the tax exceeds the fair share of the State of sale?

a

The taxpayer argues that anything but a *Central Greyhound* mileage apportionment by State will expose it to the

same threat of multiple taxation assumed to exist in that case: further taxation, that is, of some portion of the value already taxed, though not under a statute in every respect identical to Oklahoma's. But the claim does not hold up. The taxpayer has failed to raise any specter of successive taxes that might require us to reconsider whether an internally consistent tax on sales of services could fail the external consistency test for lack of further apportionment (a result that no sales tax has ever suffered under our cases).

If, for example, in the face of Oklahoma's sales tax, Texas were to levy a sustainable, apportioned gross receipts tax on the Texas portion of travel from Oklahoma City to Dallas, interstate travel would not be exposed to multiple taxation in any sense different from coal for which the producer may be taxed first at point of severance by Montana and the customer may later be taxed upon its purchase in New York. The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions." Lockhart 75; See *Moorman Mfg. Co.*, 437 U. S., at 277.[6]

[6] Any additional gross receipts tax imposed upon the interstate bus line would, of course, itself have to respect well-understood constitutional strictures. Thus, for example, Texas could not tax the bus company on the full value of the bus service from Oklahoma City to Dallas when the ticket is sold in Oklahoma, because that tax would, among other things, be internally inconsistent. And if Texas were to impose a tax upon the bus company measured by the portion of gross receipts reflecting in-state travel, it would have to impose taxes on intrastate and interstate journeys alike. In the event Texas chose to limit the burden of successive taxes attributable to the same transaction by combining an apportioned gross receipts tax with a credit for sales taxes paid to Texas, for example, it would have to give equal treatment to service into Texas purchased subject to a sales tax in another State, which it could do by granting a credit for sales taxes paid to any State. See, *e. g., Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583–584 (1937) (upholding use tax which provided credit for sales taxes paid to any State); *Halliburton Oil Well Cementing Co.* v.

Nor has the taxpayer made out a case that Oklahoma's sales tax exposes any buyer of a ticket in Oklahoma for travel into another State to multiple taxation from taxes imposed upon passengers by other States of passage. Since a use tax, or some equivalent on the consumption of services, is generally levied to compensate the taxing State for its

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Reily, 373 U. S. 64, 70 (1963) ("[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"); *Maryland* v. *Louisiana*, 451 U. S. 725, 759 (1981) (striking down Louisiana's "first use" tax on imported gas because "the pattern of credits and exemptions allowed under the . . . statute undeniably violates this principle of equality"); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 240–248 (1987) (striking down Washington's gross receipts wholesaling tax exempting in-state, but not out-of-state, manufacturers); see also *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 331–332 (1977).

Although we have not held that a State imposing an apportioned gross receipts tax that grants a credit for sales taxes paid in state must also extend such a credit to sales taxes paid out of state, see, *e. g.*, *Halliburton*, *supra*, at 77 (Brennan, J., concurring); *Silas Mason*, *supra*, at 587; see also *Williams* v. *Vermont*, 472 U. S. 14, 21–22 (1985), we have noted that equality of treatment of interstate and intrastate activity has been the common theme among the paired (or "compensating") tax schemes that have passed constitutional muster, see, *e. g.*, *Boston Stock Exchange*, *supra*, at 331–332. We have indeed never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes. To the contrary, in upholding tax schemes providing credits for taxes paid in state and occasioned by the same transaction, we have often pointed to the concomitant credit provisions for taxes paid out of state as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike. See, *e. g.*, *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U. S. 60, 74 (1993); *D. H. Holmes Co.* v. *McNamara*, 486 U. S. 24, 31 (1988) ("The . . . taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States"); *General Trading Co.* v. *State Tax Comm'n of Iowa*, 322 U. S. 335 (1944); *Silas Mason*, *supra*, at 584. A general requirement of equal treatment is thus amply clear from our precedent. We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party. See *Darnell* v. *Indiana*, 226 U. S. 390 (1912).

incapacity to reach the corresponding sale, it is commonly paired with a sales tax, see, *e. g.*, *D. H. Holmes*, 486 U. S., at 31; *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 331–332 (1977); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937), being applicable only when no sales tax has been paid or subject to a credit for any such tax paid. Since any use tax would have to comply with Commerce Clause requirements, the tax scheme could not apply differently to goods and services purchased out of state from those purchased domestically. Presumably, then, it would not apply when another State's sales tax had previously been paid, or would apply subject to credit for such payment. In either event, the Oklahoma ticket purchaser would be free from multiple taxation.

True, it is not Oklahoma that has offered to provide a credit for related taxes paid elsewhere, but in taxing sales Oklahoma may rely upon use-taxing States to do so. This is merely a practical consequence of the structure of use taxes as generally based upon the primacy of taxes on sales, in that use of goods is taxed only to the extent that their prior sale has escaped taxation. Indeed the District of Columbia and 44 of the 45 States that impose sales and use taxes permit such a credit or exemption for similar taxes paid to other States. See 2 Hellerstein & Hellerstein ¶ 18.08, p. 18–48; 1 All States Tax Guide ¶ 256 (1994). As one state court summarized the provisions in force:

> "These credit provisions create a national system under which the first state of purchase or use imposes the tax. Thereafter, no other state taxes the transaction unless there has been no prior tax imposed . . . or if the tax rate of the prior taxing state is less, in which case the subsequent taxing state imposes a tax measured only by the differential rate." *KSS Transportation Corp.* v. *Baldwin*, 9 N. J. Tax 273, 285 (1987).

The case of threatened multiple taxation where a sales tax is followed by a use tax is thus distinguishable from the case of simultaneous sales taxes considered in *Goldberg,* where we were reassured to some degree by the provision of a credit in the disputed tax itself for similar taxes placed upon the taxpayer by other States. See *Goldberg,* 488 U. S., at 264 ("To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the [t]ax [a]ct operates to avoid actual multiple taxation"). In that case, unlike the sales and use schemes posited for the sake of argument here, each of the competing sales taxes would presumably have laid an equal claim on the taxpayer's purse.

b

Finally, Jefferson points to the fact that in this case, unlike the telephone communication tax at issue in *Goldberg,* Oklahoma could feasibly apportion its sales tax on the basis of mileage as we required New York's gross receipts tax to do in *Central Greyhound.* Although *Goldberg* indeed noted that "[a]n apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers," 488 U. S., at 264–265, and although we agree that no comparable barriers exist here, we nonetheless reject the idea that a particular apportionment formula must be used simply because it would be possible to use it. We have never required that any particular apportionment formula or method be used, and when a State has chosen one, an objecting taxpayer has the burden to demonstrate by "'clear and cogent evidence,'" that "'the income attributed to the State is in fact out of all appropriate proportions to the business transacted . . . in that State, or has led to a grossly distorted result.'" *Container Corp.,* 463 U. S., at 170, quoting *Moorman Mfg. Co.,* 437 U. S., at 274 (internal quotation marks omitted; citations omitted). That is too much for Jefferson

to bear in this case. It fails to show that Oklahoma's tax on the sale of transportation imputes economic activity to the State of sale in any way substantially different from that imputed by the garden-variety sales tax, which we have perennially sustained, even though levied on goods that have traveled in interstate commerce to the point of sale or that will move across state lines thereafter. See, *e. g., Wardair Canada Inc.* v. *Florida Dept. of Revenue,* 477 U. S. 1 (1986); *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940); *State Tax Comm'n of Utah* v. *Pacific States Cast Iron Pipe Co.,* 372 U. S. 605 (1963); see also *Western Live Stock*, 303 U. S., at 259 (upholding tax where measure of the tax "include[s] the augmentation attributable to the [interstate] commerce in which [the object of the tax] is employed"); *Goldberg,* 488 U. S., at 262 (upholding tax upon the purchase of an interstate telephone call which had "many of the characteristics of a sales tax . . . [e]ven though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States"). Nor does Oklahoma's tax raise any greater threat of multiple taxation than those sales taxes that have passed muster time and again. There is thus no reason to leave the line of longstanding precedent and lose the simplicity of our general rule sustaining sales taxes measured by full value, simply to carve out an exception for the subcategory of sales of interstate transportation services. We accordingly conclude that Oklahoma's tax on ticket sales for travel originating in Oklahoma is externally consistent, as reaching only the activity taking place within the taxing State, that is, the sale of the service. Cf. *id.*, at 261–262; *Container Corp., supra,* at 169–170.[7]

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[7] JUSTICE BREYER would reject review of the tax under general sales tax principles in favor of an analogy between sales and gross receipts taxes which, in the dissent's view, are without "practical difference," *post,* at 204. Although his dissenting opinion rightly counsels against the adoption of purely formal distinctions, economic equivalence alone has similarly not been (and should not be) the touchstone of Commerce Clause jurispru-

C

We now turn to the remaining two portions of *Complete Auto*'s test, which require that the tax must "not discriminate against interstate commerce," and must be "fairly related to the services provided by the State." 430 U. S., at 279. Oklahoma's tax meets these demands.

A State may not "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S., at 458; see also *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 269 (1987). Thus, States are barred from discriminating against foreign enterprises competing with local businesses, see, *e. g.*, *id.*, at 286, and from discriminating against commercial activity occurring outside the taxing State, see, *e. g.*, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977). No argument has been made that Oklahoma dis-

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dence. Our decisions cannot be reconciled with the view that two taxes must inevitably be equated for purposes of constitutional analysis by virtue of the fact that both will ultimately be "pass[ed] . . . along to the customer" or calculated in a similar fashion, *ibid.* Indeed, were that to be the case, we could not, for example, dismiss successive taxation of the extraction, sale, and income from the sale of coal as consistent with the Commerce Clause's prohibition against multiple taxation.

JUSTICE BREYER's opinion illuminates the difference between his view and our own in its suggestion, *post*, at 206, that our disagreement turns on differing assessments of the force of competing analogies. His analogy to *Central Greyhound* derives strength from characterizing the tax as falling on "interstate travel," *post*, at 207, or "transportation," *post*, at 202. Our analogy to prior cases on taxing sales of goods and services derives force from identifying the taxpayer in categorizing the tax and from the value of a uniform rule governing taxation on the occasion of what is generally understood as a sales transaction. The significance of the taxpayer's identity is, indeed, central to the Court's longstanding recognition of structural differences that permit successive taxation as an incident of multiple taxing jurisdictions. The decision today is only the latest example of such a recognition and brings us as close to simplicity as the conceptual distinction between sales and income taxation is likely to allow.

criminates against out-of-state enterprises, and there is no merit in the argument that the tax discriminates against interstate activity.

The argument proffered by Jefferson and *amicus* Greyhound Lines is largely a rewriting of the apportionment challenge rejected above, and our response needs no reiteration here. See Brief for Respondent 40; Brief for Greyhound Lines, Inc., as *Amicus Curiae* 20–27. Jefferson takes the additional position, however, that Oklahoma discriminates against out-of-state travel by taxing a ticket "at the full 4% rate" regardless of whether the ticket relates to "a route entirely within Oklahoma" or to travel "only 10 percent within Oklahoma." Brief for Respondent 40. In making the same point, *amicus* Greyhound invokes our decision in *Scheiner*, which struck down Pennsylvania's flat tax on all trucks traveling in and through the State as "plainly discriminatory." 483 U. S., at 286. But that case is not on point.

In *Scheiner*, we held that a flat tax on trucks for the privilege of using Pennsylvania's roads discriminated against interstate travel, by imposing a cost per mile upon out-of-state trucks far exceeding the cost per mile borne by local trucks that generally traveled more miles on Pennsylvania roads. *Ibid.* The tax here differs from the one in *Scheiner*, however, by being imposed not upon the use of the State's roads, but upon "the freedom of purchase." *McLeod* v. *J. E. Dilworth Co.*, 322 U. S., at 330. However complementary the goals of sales and use taxes may be, the taxable event for one is the sale of the service, not the buyer's enjoyment or the privilege of using Oklahoma's roads. Since Oklahoma facilitates purchases of the services equally for intrastate and interstate travelers, all buyers pay tax at the same rate on the value of their purchases. See *D. H. Holmes*, 486 U. S., at 32; cf. *Scheiner, supra,* at 291 ("[T]he amount of Pennsylvania's . . . taxes owed by a trucker does not vary directly . . . with some . . . proxy for value obtained from the State"). Thus, even if dividing Oklahoma sales taxes by

in-state miles to be traveled produces on average a higher figure when interstate trips are sold than when the sale is of a wholly domestic journey, there is no discrimination against interstate travel; miles traveled within the State simply are not a relevant proxy for the benefit conferred upon the parties to a sales transaction. As with a tax on the sale of tangible goods, the potential for interstate movement after the sale has no bearing on the reason for the sales tax. See, *e. g.*, *Wardair Canada Inc.* v. *Florida Dept. of Revenue*, 477 U. S. 1 (1986) (upholding sales tax on airplane fuel); cf. *Commonwealth Edison Co.*, 453 U. S., at 617–619 (same for severance tax). Only Oklahoma can tax a sale of transportation to begin in that State, and it imposes the same duty on equally valued purchases regardless of whether the purchase prompts interstate or only intrastate movement. There is no discrimination against interstate commerce.

D

Finally, the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State. See *Goldberg*, 488 U. S., at 266–267; *D. H. Holmes*, *supra*, at 32–34; *Commonwealth Edison*, *supra*, at 621–629. The taxpayer argues that the tax fails this final prong because the buyer's only benefits from the taxing State occur during the portion of the journey that takes place in Oklahoma. The taxpayer misunderstands the import of this last requirement.

The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and "'contribute to the cost of providing *all* governmental services, including those serv-

ices from which it arguably receives no direct "benefit."'" *Goldberg*, *supra*, at 267, quoting *Commonwealth Edison*, *supra*, at 627, n. 16 (emphasis in original). The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax. See *Goldberg*, *supra*, at 267. *Complete Auto*'s fourth criterion asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State. See *Commonwealth Edison*, *supra*, at 626, 629. What we have already said shows that demand to be satisfied here. The tax falls on the sale that takes place wholly inside Oklahoma and is measured by the value of the service purchased.

IV

Oklahoma's tax on the sale of transportation services does not contravene the Commerce Clause. The judgment of the Court of Appeals is reversed, accordingly, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

I agree with the Court's conclusion that Oklahoma's sales tax does not facially discriminate against interstate commerce. See *ante*, at 198–199. That seems to me the most we can demand to certify compliance with the "negative Commerce Clause"—which is "negative" not only because it negates state regulation of commerce, but also because it does *not* appear in the Constitution. See *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66, 80 (1989) (SCALIA, J., concurring in judgment); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of*

Revenue, 483 U. S. 232, 254, 259–265 (1987) (SCALIA, J., concurring in part and dissenting in part).

I would not apply the remainder of the eminently unhelpful, so-called "four-part test" of *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). Under the *real* Commerce Clause ("The Congress shall have Power . . . To regulate Commerce . . . among the several States," U. S. Const., Art. I, § 8), it is for Congress to make the judgment that interstate commerce must be immunized from certain sorts of nondiscriminatory state action—a judgment that may embrace (as ours ought not) such imponderables as how much "value [is] *fairly attributable* to economic activity within the taxing State," and what constitutes "*fair relation* between a tax and the benefits conferred upon the taxpayer by the State." *Ante*, at 185, 199 (emphases added). See *Tyler Pipe*, *supra*, at 259. I look forward to the day when *Complete Auto* will take its rightful place in Part II of the Court's opinion, among the other useless and discarded tools of our negative Commerce Clause jurisprudence.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

Despite the Court's lucid and thorough discussion of the relevant law, I am unable to join its conclusion for one simple reason. Like the judges of the Court of Appeals, I believe the tax at issue here and the tax that this Court held unconstitutional in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), are, for all relevant purposes, identical. Both cases involve taxes imposed upon interstate bus transportation. In neither case did the State apportion the tax to avoid taxing that portion of the interstate activity performed in other States. And, I find no other distinguishing features. Hence, I would hold that the tax before us violates the Constitution for the reasons this Court set forth in *Central Greyhound*.

Central Greyhound considered a tax imposed by the State of New York on utilities doing business in New York—a tax called "'[e]mergency tax on the furnishing of utility services.'" *Id.*, at 664 (Murphy, J., dissenting) (quoting New York Tax Law § 186–a). That tax was equal to "two per centum" of "gross income," defined to include "receipts received . . . by reason of any sale . . . made" in New York. 334 U. S., at 664. The New York taxing authorities had applied the tax to gross receipts from sales (in New York) of bus transportation between New York City and cities in upstate New York over routes that cut across New Jersey and Pennsylvania. *Id.*, at 654. The out-of-state portion of the trips accounted for just over 40 percent of total mileage. *Id.*, at 660.

Justice Frankfurter wrote for the *Central Greyhound* Court that "it is interstate commerce which the State is seeking to reach," *id.*, at 661; that the "real question [is] whether what the State is exacting is a constitutionally fair demand . . . for that aspect of the interstate commerce to which the State bears a special relation," *ibid.;* and that by "its very nature an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys,'" *id.*, at 663 (quoting *Freeman* v. *Hewit*, 329 U. S. 249, 253 (1946)). The Court noted:

> "If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which they afford protection, we do not see how on principle and in precedent such a claim could be denied. This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give pro-

tection to those portions, as well as to a State which does not." 334 U. S., at 662.

The Court essentially held that the tax lacked what it would later describe as "external consistency." *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169 (1983). That is to say, the New York law violated the Commerce Clause because it tried to tax significantly more than "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg* v. *Sweet*, 488 U. S. 252, 262 (1989).

The tax before us bears an uncanny resemblance to the New York tax. The Oklahoma statute (as applied to "[t]ransportation . . . by common carriers") imposes an "excise tax" of 4% on "the *gross receipts* or gross proceeds *of each sale*" made in Oklahoma. Okla. Stat., Tit. 68, § 1354(1)(C) (Supp. 1988) (emphasis added). The New York statute imposed a 2% tax on the "*receipts* received . . . by reason *of any sale* . . . made" in New York. See *supra*, at 202 (emphasis added). Oklahoma imposes its tax on the total value of trips of which a large portion may take place in other States. New York imposed its tax on the total value of trips of which a large portion took place in other States. New York made no effort to apportion the tax to reflect the comparative cost or value of the in-state and out-of-state portions of the trips. Neither does Oklahoma. Where, then, can one find a critical difference?

Not in the language of the two statutes, which differs only slightly. Oklahoma calls its statute an "excise tax" and "levie[s]" the tax "upon all sales" of transportation. New York called its tax an "[e]mergency tax on . . . services" and levied the tax on "'gross income,'" defined to include "'receipts . . . of any sale.'" This linguistic difference, however, is not significant. As the majority properly recognizes, purely formal differences in terminology should not make a constitutional difference. *Ante*, at 183. In both instances, the State im-

poses the tax on gross receipts as measured by sales. Both taxes, then, would seem to have the same practical effect on the, inherently interstate, bus transportation activity. If the *Central Greyhound* Court was willing to look through New York's formal labels ("[e]mergency tax on . . . services"; "gross income" tax) to the substance (a tax on gross receipts from sales), why should this Court not do the same?

The majority sees a number of reasons why the result here should be different from that in *Central Greyhound*, but I do not think any is persuasive. First, the majority points out that the New York law required a seller, the bus company, to pay the tax, whereas the Oklahoma law says that the "tax . . . shall be paid by the consumer or user to the vendor." Okla. Stat., Tit. 68, § 1361(A) (Supp. 1988). This difference leads the majority to characterize the former as a "gross receipts" tax and the latter as a constitutionally distinguishable "sales tax." This difference, however, seems more a formal, than a practical difference. The Oklahoma law makes the bus company ("the vendor") and "each principal officer . . . personally liable" for the tax, whether or not they collect it from the customer. *Ibid.* Oklahoma (as far as I can tell) has never tried to collect the tax directly from a customer. And, in any event, the statute tells the customer to pay the tax, not to the State, but "to the vendor." *Ibid.* The upshot is that, as a practical matter, in respect to both taxes, the State will calculate the tax bill by multiplying the rate times gross receipts from sales; the bus company will pay the tax bill; and, the company will pass the tax along to the customer.

Second, the majority believes that this case presents a significantly smaller likelihood than did *Central Greyhound* that the out-of-state portions of a bus trip will be taxed both "by States which give protection to those portions, as well as [by] . . . a State which does not." *Central Greyhound*, 334 U. S., at 662. There is at least a hint in the Court's opinion that this is so because the "taxable event" to which the Okla-

homa tax attaches is not the interstate transportation of passengers but the sale of a bus ticket (combined, perhaps, with transportation to the state line). See *ante,* at 190 ("The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State . . ."). Thus, the majority suggests that a tax on transportation (as opposed to the sale of a bus ticket) by a different State might be "successive," *ante,* at 192, but is not "double taxation" in a constitutionally relevant way, *ante,* at 191; see *ante,* at 190 ("[N]o other State can claim to be the site of the same combination"). I concede that Oklahoma could have a tax of the kind envisioned, namely, one that would tax the bus company for the privilege of selling tickets. But, whether or not such a tax would pass constitutional muster should depend upon its practical effects. To suggest that the tax here is constitutional simply because it lends itself to recharacterizing the taxable event as a "sale" is to ignore economic reality. Because the sales tax is framed as a percentage of the ticket price, it seems clear that the activity Oklahoma intends to tax is the transportation of passengers—not some other kind of conduct (like selling tickets).

In any event, the majority itself does not seem to believe that Oklahoma is taxing something other than bus transportation; it seems to acknowledge the risk of multiple taxation. The Court creates an ingenious set of constitutionally based taxing rules in footnote 6—designed to show that any other State that imposes, say, a gross receipts tax on its share of bus ticket sales would likely have to grant a credit for the Oklahoma sales tax (unless it forced its own citizens to pay both a sales tax and a gross receipts tax). But, one might have said the same in *Central Greyhound.* Instead of enforcing its apportionment requirement, the Court could have simply said that once one State, like New York, imposes a gross receipts tax on "receipts received . . . by reason of any sale . . . made" in that State, any other State, trying to tax the gross receipts of its share of bus ticket sales, might have

to give some kind of credit. The difficulties with this approach lie in its complexity and our own inability to foresee all the ways in which other States might effectively tax their own portion of the journey now (also) taxed by Oklahoma. Under the Court's footnote rules, is not a traveler who buys a ticket in Oklahoma still threatened with a duplicative tax by a State that does *not* impose a sales tax on transportation (and thus, would not have to offer a credit for the sales tax paid in Oklahoma)? Even if that were not so, the constitutional problem would remain, namely, that Oklahoma is imposing an unapportioned tax on the portion of travel outside the State, just as did New York.

Finally, the majority finds support in *Goldberg* v. *Sweet*, 488 U. S. 252 (1989), a case in which this Court permitted Illinois to tax interstate telephone calls that originated, or terminated, in that State. However, the *Goldberg* Court was careful to distinguish "cases [dealing] with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State," *id.*, at 264, and listed *Central Greyhound* as one of those cases, 488 U. S., at 264. Telephone service, the *Goldberg* Court said, differed from movement of the kind at issue in *Central Greyhound*, in that, at least arguably, the service itself is consumed wholly within one State, or possibly two—those in which the call is charged to a service address or paid by an addressee. 488 U. S., at 263. Regardless of whether telephones and buses are more alike than different, the *Goldberg* Court did not purport to modify *Central Greyhound*, nor does the majority. In any event, the *Goldberg* Court said, the tax at issue credited taxpayers for similar taxes assessed by other States. 488 U. S., at 264.

Ultimately, I may differ with the majority simply because I assess differently the comparative force of two competing analogies. The majority finds determinative this Court's case law concerning sales taxes applied to the sale of goods,

which cases, for example, permit one State to impose a severance tax and another a sales tax on the same physical item (say, coal). In my view, however, the analogy to sales taxes is not as strong as the analogy to the tax at issue in *Central Greyhound.* After all, the tax before us is not a tax imposed upon a product that was made in a different State or was consumed in a different State or is made up of ingredients that come from a different State or has itself moved in interstate commerce. Rather, it is a tax imposed upon interstate travel itself—the very essence of interstate commerce. And, it is a fairly obvious effort to tax more than "that portion" of the "interstate activity['s]" revenue "which reasonably reflects the in-state component." *Goldberg* v. *Sweet, supra,* at 262. I would reaffirm the *Central Greyhound* principle, even if doing so requires different treatment for the inherently interstate service of interstate transportation, and denies the possibility of having a single, formal constitutional rule for all self-described "sales taxes." The Court of Appeals wrote that this "is a classic instance of an unapportioned tax" upon interstate commerce. *In re Jefferson Lines, Inc.*, 15 F. 3d 90, 93 (CA8 1994). In my view, that is right. I respectfully dissent.

Per Curiam

WHITAKER *v.* SUPERIOR COURT OF CALIFORNIA, SAN FRANCISCO COUNTY (MERRILL REESE, INC., REAL PARTY IN INTEREST)

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 94–7743. Decided April 17, 1995

Since 1987, *pro se* petitioner Whitaker has filed 24 claims for relief, including 18 petitions for certiorari, all of which have been denied without recorded dissent. Earlier this Term, this Court directed the Clerk of the Court not to accept further petitions for extraordinary writs from Whitaker in noncriminal matters unless he pays the required docketing fee and submits his petitions in compliance with Rule 33, *In re Whitaker*, 513 U. S. 1, 2, and warned Whitaker about his frequent filing patterns with respect to petitions for writ of certiorari, *ibid.*

Held: Pursuant to this Court's Rule 39.8, Whitaker is denied leave to proceed *in forma pauperis* in the instant case, and the Clerk is instructed not to accept any further petitions for certiorari from him in noncriminal matters unless he pays the required docketing fee and submits his petitions in compliance with Rule 33. Like other similar orders this Court has issued, see, *e. g.*, *In re Sassower*, 510 U. S. 4, this order will allow the Court to devote its limited resources to the claims of petitioners who have not abused the Court's process.

Motion denied.

PER CURIAM.

Pro se petitioner Fred Whitaker has filed a petition for writ of certiorari and requests leave to proceed *in forma pauperis* under Rule 39 of this Court. Pursuant to Rule 39.8, we deny petitioner's request to proceed *in forma pauperis.** Petitioner is allowed until May 8, 1995, to pay the docketing fees required by Rule 38 and to submit his petition in compliance with this Court's Rule 33. For the reasons explained below, we also direct the Clerk of the Court not to

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*Rule 39.8 provides: "If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis.*"

accept any further petitions for certiorari from petitioner in noncriminal matters unless he pays the docketing fees required by Rule 38 and submits his petition in compliance with Rule 33.

Petitioner is a prolific filer in this Court. Since 1987, he has filed 24 petitions for relief, including 6 petitions for extraordinary relief and 18 petitions for certiorari. Fifteen of the twenty-four petitions have been filed in the last four Terms, and we have denied all 24 petitions without recorded dissent. We also have denied petitioner leave to proceed *in forma pauperis* pursuant to Rule 39.8 of this Court for the last three petitions in which he has sought extraordinary relief. See *In re Whitaker*, 513 U. S. 1 (1994); *In re Whitaker*, 511 U. S. 1105 (1994); *In re Whitaker*, 506 U. S. 983 (1992). And earlier this Term, we directed the Clerk of the Court "not to accept any further petitions for extraordinary writs from petitioner in noncriminal matters unless he pays the docketing fee required by Rule 38(a) and submits his petition in compliance with Rule 33." 513 U. S., at 2. Though we warned petitioner at that time about his "frequent filing patterns with respect to petitions for writ of certiorari," *ibid.*, we limited our sanction to petitions for extraordinary writs.

We now find it necessary to extend that sanction to petitions for certiorari filed by petitioner. In what appears to be an attempt to circumvent this Court's prior order, petitioner has labeled his instant petition a "petition for writ of certiorari" even though it would seem to be more aptly termed a "petition for an extraordinary writ": He argues that the California Supreme Court erred in denying his petition for review of a California Court of Appeals order which denied his petition for writ of mandate/prohibition seeking to compel a California trial judge to make a particular ruling in a civil action filed by petitioner. And the legal arguments petitioner makes in his instant "petition for writ of certiorari" are, just as those made in his previous 18 pe-

titions for certiorari, frivolous. As we told petitioner earlier this Term, "[t]he goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests." *Ibid.* (internal quotation marks and citation omitted).

Petitioner's abuse of petitions for certiorari has occurred only in noncriminal cases, and we limit our sanction accordingly. This order therefore will not prevent petitioner from filing a petition for certiorari to challenge criminal sanctions that might be imposed upon him. But like other similar orders we have issued, see *In re Sassower*, 510 U. S. 4 (1993); *Day* v. *Day*, 510 U. S. 1 (1993); *Demos* v. *Storrie*, 507 U. S. 290 (1993); *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992), this order will allow the Court to devote its limited resources to the claims of petitioners who have not abused our process.

It is so ordered.

JUSTICE STEVENS, dissenting.

A simple denial would adequately serve the laudable goal of conserving the Court's "limited resources." *Ante* this page. See generally *In re Whitaker*, 513 U. S. 1, 3 (1994) (STEVENS, J., dissenting).

I respectfully dissent.

Syllabus

PLAUT ET AL. *v.* SPENDTHRIFT FARM, INC., ET AL.

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

No. 93–1121. Argued November 30, 1994—Decided April 18, 1995

In a 1987 civil action, petitioners alleged that in 1983 and 1984 respondents committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 of the Securities and Exchange Commission. The District Court dismissed the action with prejudice following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 364, which required that suits such as petitioners' be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation. After the judgment became final, Congress enacted § 27A(b) of the 1934 Act, which provides for reinstatement on motion of any action commenced pre-*Lampf* but dismissed thereafter as time barred, if the action would have been timely filed under applicable pre-*Lampf* state law. Although finding that the statute's terms required that petitioners' ensuing § 27A(b) motion be granted, the District Court denied the motion on the ground that § 27A(b) is unconstitutional. The Court of Appeals affirmed.

Held: Section 27A(b) contravenes the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments entered before its enactment. Pp. 215–240.

(a) Despite respondents' arguments to the contrary, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*. Pp. 215–217.

(b) Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury* v. *Madison*, 1 Cranch 137, 177. The Framers crafted this charter with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them conclusively, subject to review only by superior courts in the Article III hierarchy. Thus, the Constitution forbids the Legislature to interfere with courts' final judgments. Pp. 219–225.

(c) Section 27A(b) effects a clear violation of the foregoing principle by retroactively commanding the federal courts to reopen final judgments. This Court's decisions have uniformly provided fair warning that retroactive legislation such as § 27A(b) exceeds congressional pow-

Syllabus

ers. See, *e. g., Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113. Petitioners are correct that when a new law makes clear that it is retroactive, an appellate court must apply it in reviewing judgments still on appeal, and must alter the outcome accordingly. However, once a judgment has achieved finality in the highest court in the hierarchy, the decision becomes the last word of the judicial department with regard to the particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that case was in fact something other than it was. It is irrelevant that § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit, and that the final judgments so reopened rested on the bar of a statute of limitations rather than on some other ground. Pp. 225–230.

(d) Apart from § 27A(b), the Court knows of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. Fed. Rule Civ. Proc. 60(b), 20 U. S. C. § 1415(e)(4), 28 U. S. C. § 2255, 50 U. S. C. App. § 520(4), and, *e. g.*, the statutes at issue in *United States* v. *Sioux Nation*, 448 U. S. 371, 391–392, *Sampeyreac* v. *United States*, 7 Pet. 222, 238, *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370, and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, distinguished. Congress's prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed by the Constitution's separation of powers. The Court rejects the suggestion that § 27A(b) might be constitutional if it exhibited prospectivity or a greater degree of general applicability. Pp. 230–240.

1 F. 3d 1487, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in the judgment, *post*, p. 240. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 246.

William W. Allen argued the cause for petitioners. With him on the briefs was *J. Montjoy Trimble.*

Michael R. Dreeben argued the cause for the United States urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Barbara C. Biddle, Simon M. Lorne, Paul Gonson,* and *Jacob H. Stillman.*

Theodore B. Olson argued the cause for respondents. With him on the briefs were *Larry L. Simms*, *Theodore J. Boutrous, Jr.*, *John K. Bush*, *D. Jarrett Arp*, *Barbara B. Edelman*, *Barry Friedman*, *James E. Burns, Jr.*, *Kevin Muck*, *William E. Johnson*, *Robert M. Watt III*, *Robert S. Miller*, and *L. Clifford Craig.**

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether § 27A(b) of the Securities Exchange Act of 1934, to the extent that it requires federal courts to reopen final judgments in private civil actions under § 10(b) of the Act, contravenes the Constitution's separation of powers or the Due Process Clause of the Fifth Amendment.

I

In 1987, petitioners brought a civil action against respondents in the United States District Court for the Eastern District of Kentucky. The complaint alleged that in 1983 and 1984 respondents had committed fraud and deceit in the sale of stock in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 of the Securities and Exchange Commission. The case was mired in pretrial proceedings in the District Court until June 20, 1991, when we decided *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350. *Lampf* held that "[l]itigation instituted pursuant to § 10(b) and Rule 10b–5 . . . must be commenced within one year after the discovery of the facts constituting the violation and within three years after such violation." *Id.*, at

*Briefs of *amici curiae* urging reversal were filed for the National Association of Securities and Commercial Law Attorneys by *James M. Finberg* and *Paul J. Mishkin;* for the Pacific Mutual Life Insurance Co. by *Richard G. Taranto*, *H. Bartow Farr III*, and *Stewart M. Weltman;* and for *Michael B. Dashjian*, *pro se.*

Joseph E. Schmitz, *Zachary D. Fasman*, *Judith Richards Hope*, *Charles A. Shanor*, *Daniel J. Popeo*, and *Paul D. Kamenar* filed a brief for the Washington Legal Foundation as *amicus curiae* urging affirmance.

364. We applied that holding to the plaintiff-respondents in *Lampf* itself, found their suit untimely, and reinstated a summary judgment previously entered in favor of the defendant-petitioners. *Ibid.* On the same day we decided *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991), in which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review. See *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 92 (1993). The joint effect of *Lampf* and *Beam* was to mandate application of the 1-year/3-year limitations period to petitioners' suit. The District Court, finding that petitioners' claims were untimely under the *Lampf* rule, dismissed their action with prejudice on August 13, 1991. Petitioners filed no appeal; the judgment accordingly became final 30 days later. See 28 U. S. C. § 2107(a) (1988 ed., Supp. V); *Griffith* v. *Kentucky*, 479 U. S. 314, 321, n. 6 (1987).

On December 19, 1991, the President signed the Federal Deposit Insurance Corporation Improvement Act of 1991, 105 Stat. 2236. Section 476 of the Act—a section that had nothing to do with FDIC improvements—became § 27A of the Securities Exchange Act of 1934, and was later codified as 15 U. S. C. § 78aa–1 (1988 ed., Supp. V). It provides:

> "(a) Effect on pending causes of action
>
> "The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the Securities Exchange Act of 1934] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> "(b) Effect on dismissed causes of action
>
> "Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991—

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

"(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

"shall be reinstated on motion by the plaintiff not later than 60 days after December 19, 1991."

On February 11, 1992, petitioners returned to the District Court and filed a motion to reinstate the action previously dismissed with prejudice. The District Court found that the conditions set out in §§ 27A(b)(1) and (2) were met, so that petitioners' motion was required to be granted by the terms of the statute. It nonetheless denied the motion, agreeing with respondents that § 27A(b) is unconstitutional. Memorandum Opinion and Order, Civ. Action No. 87–438 (ED Ky., Apr. 13, 1992). The United States Court of Appeals for the Sixth Circuit affirmed. 1 F. 3d 1487 (1993). We granted certiorari. 511 U. S. 1141 (1994).[1]

II

Respondents bravely contend that § 27A(b) does not require federal courts to reopen final judgments, arguing first that the reference to "the laws applicable in the jurisdiction . . . as such laws existed on June 19, 1991" (the day before *Lampf* was decided) may reasonably be construed to refer precisely to the limitations period provided in *Lampf* itself, in which case petitioners' action was time barred even under

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[1] Last Term this Court affirmed, by an equally divided vote, a judgment of the United States Court of Appeals for the Fifth Circuit that held § 27A(b) constitutional. *Morgan Stanley & Co.* v. *Pacific Mut. Life Ins. Co.*, 511 U. S. 658 (1994) *(per curiam)*. That ruling of course lacks precedential weight. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 73, n. 8 (1977).

§ 27A.[2] It is true that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 312–313 (1994); see also *id.*, at 313, n. 12. But respondents' argument confuses the question of what the law *in fact* was on June 19, 1991, with the distinct question of what § 27A *means* by its *reference* to what the law was. We think it entirely clear that it does not mean the law enunciated in *Lampf*, for two independent reasons. First, *Lampf* provides a uniform, national statute of limitations (instead of using the applicable state limitations period, as lower federal courts had previously done. See *Lampf*, 501 U. S., at 354, and n. 1). If the statute referred to *that* law, its reference to the "laws applicable *in the jurisdiction*" (emphasis added) would be quite inexplicable. Second, if the statute refers to the law enunciated in *Lampf*, it is utterly without effect, a result to be avoided if possible. *American Nat. Red Cross* v. *S. G.*, 505 U. S. 247, 263–264 (1992); see 2A N. Singer, Sutherland on Statutory Construction § 46.06 (Sands rev. 4th ed. 1984). It would say, in subsection (a), that the limitations period is what the Supreme Court has held to be the limitations period; and in subsection (b), that suits dismissed as untimely under *Lampf* which were timely under *Lampf* (a null set) shall be reinstated. To avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute "disingenuous evasion." *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933).

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[2] Since respondents' reading of the statute would avoid a constitutional question of undoubted gravity, we think it prudent to entertain the argument even though respondents did not make it in the Sixth Circuit. Of course the Sixth Circuit did *decide* (against respondents) the point to which the argument was directed. See 1 F. 3d 1487, 1490 (1993) ("The statute's language is plain and unambiguous. . . . [It] commands the Federal courts to reinstate cases which those courts have dismissed").

As an alternative reason why § 27A(b) does not require the reopening of final judgments, respondents suggest that the subsection applies only to cases still pending in the federal courts when § 27A was enacted. This has only half the defect of the first argument, for it makes only half of § 27A purposeless—§ 27A(b). There is no need to "reinstate" actions that are still pending; § 27A(a) (the new statute of limitations) could and would be applied by the courts of appeals. On respondents' reading, the only consequence of § 27A(b) would be the negligible one of permitting the plaintiff in the pending appeal from a statute-of-limitations dismissal to return *immediately* to the district court, instead of waiting for the court of appeals' reversal. To enable § 27A(b) to achieve such an insignificant consequence, one must disregard the language of the provision, which refers generally to suits "dismissed as time barred." It is perhaps arguable that this does *not* include suits that are not yet *finally* dismissed, *i. e.*, suits still pending on appeal; but there is *no* basis for the contention that it includes *only* those. In short, there is no reasonable construction on which § 27A(b) does not require federal courts to reopen final judgments in suits dismissed with prejudice by virtue of *Lampf*.

III

Respondents submit that § 27A(b) violates both the separation of powers and the Due Process Clause of the Fifth Amendment.[3] Because the latter submission, if correct, might dictate a similar result in a challenge to state legislation under the Fourteenth Amendment, the former is the narrower ground for adjudication of the constitutional questions in the case, and we therefore consider it first. *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). We conclude that in § 27A(b) Congress has exceeded its authority by requiring the federal courts to exercise

[3] "No person shall be . . . deprived of life, liberty, or property, without due process of law." U. S. Const., Amdt. 5.

"[t]he judicial Power of the United States," U. S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.

Our decisions to date have identified two types of legislation that require federal courts to exercise the judicial power in a manner that Article III forbids. The first appears in *United States* v. *Klein*, 13 Wall. 128 (1872), where we refused to give effect to a statute that was said "[to] prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.*, at 146. Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress "amend[s] applicable law." *Robertson* v. *Seattle Audubon Soc.*, 503 U. S. 429, 441 (1992). Section 27A(b) indisputably does set out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively). The second type of unconstitutional restriction upon the exercise of judicial power identified by past cases is exemplified by *Hayburn's Case*, 2 Dall. 409 (1792), which stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch. See, *e. g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948). Yet under any application of § 27A(b) only courts are involved; no officials of other departments sit in direct review of their decisions. Section 27A(b) therefore offends neither of these previously established prohibitions.

We think, however, that § 27A(b) offends a postulate of Article III just as deeply rooted in our law as those we have mentioned. Article III establishes a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *de-*

cide them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that "a judgment conclusively resolves the case" because "a 'judicial Power' is one to render dispositive judgments." Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990). By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.

A

The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression. In the 17th and 18th centuries colonial assemblies and legislatures functioned as courts of equity of last resort, hearing original actions or providing appellate review of judicial judgments. G. Wood, The Creation of the American Republic 1776–1787, pp. 154–155 (1969). Often, however, they chose to correct the judicial process through special bills or other enacted legislation. It was common for such legislation not to prescribe a resolution of the dispute, but rather simply to set aside the judgment and order a new trial or appeal. M. Clarke, Parliamentary Privilege in the American Colonies 49–51 (1943). See, *e. g.*, Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208 (1902) (collecting documents from 1708–1709); 5 Laws of New Hampshire, Including Public and Private Acts, Resolves, Votes, Etc., 1784–1792 (Metcalf ed. 1916). Thus, as described in our discussion of *Hayburn's Case*, *supra*, at 218, such legislation bears not on the problem of interbranch review but on the problem of finality of judicial judgments.

The vigorous, indeed often radical, populism of the revolutionary legislatures and assemblies increased the frequency of legislative correction of judgments. Wood, *supra*, at 155–156, 407–408. See also *INS* v. *Chadha*, 462 U. S. 919, 961

(1983) (Powell, J., concurring). "The period 1780–1787 . . . was a period of 'constitutional reaction'" to these developments, "which . . . leaped suddenly to its climax in the Philadelphia Convention." E. Corwin, The Doctrine of Judicial Review 37 (1914). Voices from many quarters, official as well as private, decried the increasing legislative interference with the private-law judgments of the courts. In 1786, the Vermont Council of Censors issued an "Address of the Council of Censors to the Freemen of the State of Vermont" to fulfill the council's duty, under the State Constitution of 1784, to report to the people "'whether the legislative and executive branches of government have assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution.'" Vermont State Papers 1779–1786, pp. 531, 533 (Slade ed. 1823). A principal method of usurpation identified by the censors was "[t]he instances . . . of judgments being vacated by legislative acts." *Id.*, at 540. The council delivered an opinion

> "that the General Assembly, in all the instances where they have vacated judgments, recovered in due course of law, (except where the particular circumstances of the case evidently made it necessary to grant a new trial) have exercised a power not delegated, or intended to be delegated, to them, by the Constitution. . . . It supercedes the necessity of any other law than the pleasure of the Assembly, and of any other court than themselves: for it is an imposition on the suitor, to give him the trouble of obtaining, after several expensive trials, a final judgment agreeably to the known established laws of the land; if the Legislature, by a sovereign act, can interfere, reverse the judgment, and decree in such manner, as they, unfettered by rules, shall think proper." *Ibid.*

So too, the famous report of the Pennsylvania Council of Censors in 1784 detailed the abuses of legislative interference with the courts at the behest of private interests and

factions. As the General Assembly had (they wrote) made a custom of "extending their deliberations to the cases of individuals," the people had "been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief from hardships and losses, than the usual process of law." The censors noted that because "favour and partiality have, from the nature of public bodies of men, predominated in the distribution of this relief . . . [t]hese dangerous procedures have been too often recurred to, since the revolution." Report of the Committee of the Council of Censors 6 (Bailey ed. 1784).

This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. See Corwin, The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention, 30 Am. Hist. Rev. 511, 514–517 (1925). The Convention made the critical decision to establish a judicial department independent of the Legislative Branch by providing that "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's Federalist No. 48, the famous description of the process by which "[t]he legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." The Fed-

eralist No. 48, pp. 333, 337 (J. Cooke ed. 1961). Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature . . . in many instances decided rights which should have been left to judiciary controversy." *Id.*, at 336 (emphasis deleted).[4]

If the need for separation of legislative from judicial power was plain, the principal effect to be accomplished by that separation was even plainer. As Hamilton wrote in his exegesis of Article III, § 1, in The Federalist No. 81:

> "It is not true . . . that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorises the revisal of a judicial sentence, by a legislative act. . . . A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases." The Federalist No. 81, p. 545 (J. Cooke ed. 1961).

The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to "prescrib[e] the rules by which the duties and rights of every citizen are to be regulated," but the power of "[t]he interpretation of the laws" would be "the proper and peculiar province of the courts." *Id.*, No. 78, at 523, 525.

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[4] Read in the abstract these public pronouncements might be taken, as the Solicitor General does take them, see Brief for United States 28–30, to disapprove only the practice of having the legislature itself sit as a court of original or appellate jurisdiction. But against the backdrop of history, that reading is untenable. Many, perhaps a plurality, of the instances of legislative equity in the period before the framing simply involved duly enacted laws that nullified judgments so that new trials or judicial rulings on the merits could take place. See *supra*, at 219.

See also Corwin, The Doctrine of Judicial Review, at 42. The Judiciary would be, "from the nature of its functions, . . . the [department] least dangerous to the political rights of the constitution," not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. Thus, "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: . . . so long as the judiciary remains truly distinct from both the legislative and executive." The Federalist No. 78, at 522, 523.

Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts. In *Calder* v. *Bull*, 3 Dall. 386 (1798), the Legislature of Connecticut had enacted a statute that set aside the final judgment of a state court in a civil case. Although the issue before this Court was the construction of the *Ex Post Facto* Clause, Art. I, § 10, Justice Iredell (a leading Federalist who had guided the Constitution to ratification in North Carolina) noted that

> "the Legislature of [Connecticut] has been in the uniform, uninterrupted, habit of exercising a general superintending power over its courts of law, by granting new trials. It may, indeed, appear strange to some of us, that in any form, there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions . . . . The power . . . is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Id.*, at 398.

The state courts of the era showed a similar understanding of the separation of powers, in decisions that drew little distinction between the federal and state constitutions. To

choose one representative example from a multitude: In *Bates* v. *Kimball*, 2 Chipman 77 (Vt. 1824), a special Act of the Vermont Legislature authorized a party to appeal from the judgment of a court even though, under the general law, the time for appeal had expired. The court, noting that the unappealed judgment had become final, set itself the question "Have the Legislature power to vacate or annul an existing judgment between party and party?" *Id.*, at 83. The answer was emphatic: "The necessity of a distinct and separate existence of the three great departments of government . . . had been proclaimed and enforced by . . . Blackstone, Jefferson and Madison," and had been "sanctioned by the people of the United States, by being adopted in terms more or less explicit, into all their written constitutions." *Id.*, at 84. The power to annul a final judgment, the court held (citing *Hayburn's Case*, 2 Dall., at 410), was "an assumption of Judicial power," and therefore forbidden. *Bates* v. *Kimball*, *supra*, at 90. For other examples, see *Merrill* v. *Sherburne*, 1 N. H. 199 (1818) (legislature may not vacate a final judgment and grant a new trial); *Lewis* v. *Webb*, 3 Greenleaf 299 (Me. 1825) (same); T. Cooley, Constitutional Limitations 95–96 (1868) (collecting cases); J. Sutherland, Statutory Construction 18–19 (J. Lewis ed. 1904) (same).

By the middle of the 19th century, the constitutional equilibrium created by the separation of the legislative power to make general law from the judicial power to apply that law in particular cases was so well understood and accepted that it could survive even *Dred Scott* v. *Sandford*, 19 How. 393 (1857). In his First Inaugural Address, President Lincoln explained why the political branches could not, and need not, interfere with even that infamous judgment:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit . . . . And while it is obviously possible that

> such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice." 4 R. Basler, The Collected Works of Abraham Lincoln 268 (1953) (First Inaugural Address 1861).

And the great constitutional scholar Thomas Cooley addressed precisely the question before us in his 1868 treatise:

> "If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry." Cooley, *supra*, at 94–95.

B

Section 27A(b) effects a clear violation of the separation-of-powers principle we have just discussed. It is, of course, retroactive legislation, that is, legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred—in this case, the filing of the initial Rule 10b–5 action in the District Court. When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, at 545. Our decisions stemming from *Hayburn's Case*—although their precise holdings are not strictly applicable here, see *supra*, at 218—have uniformly provided fair warning that such an act exceeds the powers of Congress. See, *e. g.*, *Chicago & Southern Air Lines, Inc.*, 333 U. S., at 113 ("Judgments within the powers vested in courts by the Judiciary Article

of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States* v. *O'Grady*, 22 Wall. 641, 647–648 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and . . . Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); *Gordon* v. *United States*, 117 U. S. Appx. 697, 700–704 (1864) (opinion of Taney, C. J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Hayburn's Case*, 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D. J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *id.*, at 413 (opinion of Iredell, J., and Sitgreaves, D. J.) ("[N]o decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . . This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear statements must either be honored, or else proved false.

It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801); *Landgraf* v. *USI Film Products*, 511 U. S. 244, 273–280 (1994). Since that is

so, petitioners argue, federal courts must apply the "new" law created by § 27A(b) in finally adjudicated cases as well; for the line that separates lower court judgments that are pending on appeal (or may still be appealed), from lower court judgments that are final, is determined by statute, see, *e. g.*, 28 U. S. C. § 2107(a) (30-day time limit for appeal to federal court of appeals), and so cannot possibly be a *constitutional* line. But a distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy*, *supra*, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. Finality of a legal judgment is determined by statute, just as entitlement to a government benefit is a statutory creation; but that no more deprives the former of its constitutional significance for separation-of-powers analysis than it deprives the latter of its significance for due process purposes. See, *e. g.*, *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532 (1985); *Meachum* v. *Fano*, 427 U. S. 215 (1976).

To be sure, § 27A(b) reopens (or directs the reopening of) final judgments in a whole class of cases rather than in a particular suit. We do not see how that makes any differ-

ence. The separation-of-powers violation here, if there is any, consists of depriving judicial judgments of the conclusive effect that they had when they were announced, not of acting in a manner—viz., with particular rather than general effect—that is unusual (though, we must note, not impossible) for a legislature. To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons, such as the legislature's genuine conviction (supported by all the law professors in the land) that the judgment was wrong; and it is violated 40 times over when 40 final judgments are legislatively dissolved.

It is irrelevant as well that the final judgments reopened by § 27A(b) rested on the bar of a statute of limitations. The rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits. See, *e. g.*, Fed. Rule Civ. Proc. 41(b); *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88 (1916). Petitioners suggest, directly or by implication, two reasons why a merits judgment based on this particular ground may be uniquely subject to congressional nullification. First, there is the fact that the length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control. But virtually *all* of the reasons why a final judgment on the merits is rendered on a federal claim are subject to congressional control. Congress can eliminate, for example, a particular element of a cause of action that plaintiffs have found it difficult to establish; or an evidentiary rule that has often

excluded essential testimony; or a rule of offsetting wrong (such as contributory negligence) that has often prevented recovery. To distinguish statutes of limitations on the ground that they are mere creatures of Congress is to distinguish them not at all. The second supposedly distinguishing characteristic of a statute of limitations is that it can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired. See, *e. g.*, *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304 (1945). But that also does not set statutes of limitations apart. To mention only one other broad category of judgment-producing legal rule: Rules of pleading and proof can similarly be altered after the cause of action arises, *Landgraf* v. *USI Film Products*, *supra*, at 275, and n. 29, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered. Petitioners' principle would therefore lead to the conclusion that final judgments rendered on the basis of a stringent (or, alternatively, liberal) rule of pleading or proof may be set aside for retrial under a new liberal (or, alternatively, stringent) rule of pleading or proof. This alone provides massive scope for undoing final judgments and would substantially subvert the doctrine of separation of powers.

The central theme of the dissent is a variant on these arguments. The dissent maintains that *Lampf* "announced" a new statute of limitations, *post*, at 246, in an act of "judicial . . . lawmaking," *post*, at 247, that "changed the law," *post*, at 250. That statement, even if relevant, would be wrong. The point decided in *Lampf* had never before been addressed by this Court, and was therefore an open question, no matter what the lower courts had held at the time. But the more important point is that *Lampf* as such is irrelevant to this case. The dissent itself perceives that "[w]e would have the same issue to decide had Congress enacted the *Lampf* rule," and that the *Lampf* rule's genesis in judicial lawmaking rather than, shall we say, legislative lawmaking, "should not

affect the separation-of-powers analysis." *Post*, at 247. Just so. The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves. The separation-of-powers question before us has nothing to do with *Lampf*, and the dissent's attack on *Lampf* has nothing to do with the question before us.

C

Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed. The closest analogue that the Government has been able to put forward is the statute at issue in *United States* v. *Sioux Nation*, 448 U. S. 371 (1980). That law required the Court of Claims, "'[n]otwithstanding any other provision of law . . . [to] review on the merits, without regard to the defense of res judicata or collateral estoppel,'" a Sioux claim for just compensation from the United States—even though the Court of Claims had previously heard and rejected that very claim. We considered and rejected separation-of-powers objections to the statute based upon *Hayburn's Case* and *United States* v. *Klein*. See 448 U. S., at 391–392. The basis for our rejection was a line of precedent (starting with *Cherokee Nation* v. *United States*, 270 U. S. 476 (1926)) that stood, we said, for the proposition that "Congress has the power to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Sioux Nation*, 448 U. S., at 397. And our holding was as narrow as the precedent on which we had relied: "In sum, . . . Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does

not violate the doctrine of separation of powers." *Id.*, at 407.[5]

The Solicitor General suggests that even if *Sioux Nation* is read in accord with its holding, it nonetheless establishes that Congress may require Article III courts to reopen their final judgments, since "if res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant." Brief for United States 27 (citing *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 850–851 (1986)). But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with our cases. Certainly one such doctrine consists of the "judicial Power" to disregard an unconstitutional statute, see *Marbury*, 1 Cranch, at 177; yet none would suggest that a litigant may never waive the defense that a statute is unconstitutional. See, *e. g.*, *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404, 414 (1982). What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of res judicata are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of res judicata need not always be accepted—that trial courts may in appropriate cases raise the res judicata bar on their own motion. See, *e. g.*, *Coleman* v. *Ramada Hotel Operating Co.*, 933 F. 2d 470, 475 (CA7 1991); *In re Medomak Canning*, 922 F. 2d 895, 904 (CA1 1990); *Holloway Constr. Co.* v. *United States Dept. of Labor*, 891 F. 2d 1211, 1212 (CA6 1989). Waiver subject to the control of the

[5] The dissent quotes a passage from the opinion saying that Congress "'only was providing a forum so that a new judicial review of the Black Hills claim could take place.'" *Post*, at 256 (quoting 448 U. S., at 407). That is quite consistent with the res judicata holding. Any party who waives the defense of res judicata provides a forum for a new judicial review.

courts themselves would obviously raise no issue of separation of powers, and would be precisely in accord with the language of the decision that the Solicitor General relies upon. We held in *Schor* that, although a litigant had consented to bring a state-law counterclaim before an Article I tribunal, 478 U. S., at 849, we would nonetheless choose to consider his Article III challenge, because "when these Article III limitations are at issue, notions of consent and waiver cannot be *dispositive*," *id.*, at 851 (emphasis added). See also *Freytag* v. *Commissioner*, 501 U. S. 868, 878–879 (1991) (finding a "rare cas[e] in which we should exercise our discretion" to hear a waived claim based on the Appointments Clause, Art. II, § 2, cl. 2).[6]

Petitioners also rely on a miscellany of decisions upholding legislation that altered rights fixed by the final judgments of non-Article III courts, see, *e. g.*, *Sampeyreac* v. *United States*, 7 Pet. 222, 238 (1833); *Freeborn* v. *Smith*, 2 Wall. 160 (1865), or administrative agencies, *Paramino Lumber Co.* v. *Marshall*, 309 U. S. 370 (1940), or that altered the prospective effect of injunctions entered by Article III courts, *Wheeling & Belmont Bridge Co.*, 18 How., at 421. These cases distinguish themselves; nothing in our holding today calls them into question. Petitioners rely on general statements from some of these cases that legislative annulment of final judgments is not an exercise of judicial power. But even if it were our practice to decide cases by weight of prior dicta, we would find the many dicta that reject congressional

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[6] The statute at issue in *United States* v. *Sioux Nation*, 448 U. S. 371 (1980), seemingly prohibited courts from raising the res judicata defense *sua sponte*. See *id.*, at 432–433 (REHNQUIST, J., dissenting). The Court did not address that point; as far as appears it saw no reason to raise the defense on its own. Of course the unexplained silences of our decisions lack precedential weight. See, *e. g.*, *Brecht* v. *Abrahamson*, 507 U. S. 619, 630–631 (1993).

power to revise the judgments of Article III courts to be the more instructive authority. See *supra*, at 225–226.[7]

Finally, petitioners liken §27A(b) to Federal Rule of Civil Procedure 60(b), which authorizes courts to relieve parties from a final judgment for grounds such as excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief . . . ." We see little resemblance. Rule 60(b), which authorizes discretionary judicial revision of judgments in the listed situations and in other "'extraordinary circumstances,'" *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 864 (1988), does not impose any legislative mandate to reopen upon the courts, but merely reflects and

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[7] The dissent tries to turn the dicta of the territorial-court cases, *Sampeyreac* and *Freeborn*, into holdings. It says of *Sampeyreac* that "the relevant judicial power that the [challenged] statute arguably supplanted was this Court's Article III appellate jurisdiction." *Post*, at 253. Even if it were true that the judicial power under discussion was that of this Court (which is doubtful), the point could still not possibly constitute a holding, since there was no "supplanted power" at issue in the case. One of the principal grounds of decision was that the finality of the territorial court's decree had *not* been retroactively abrogated. The decree had been entered under a previous statute which provided that a decree "shall be final and conclusive *between the parties.*" *Sampeyreac* v. *United States*, 7 Pet., at 239 (emphasis in original). The asserted basis for reopening was fraud, in that Sampeyreac did not actually exist. We reasoned that "as Sampeyreac was a fictitious person, he was no party to the decree, and the act [under which the decree had allegedly become final] in strictness does not apply to the case." *Ibid.*

The dissent likewise says of *Freeborn* that "the 'judicial power' to which the opinion referred was this Court's Article III appellate jurisdiction." *Post*, at 255. Once again, even if it was, the point remains dictum. No final judgment was at issue in *Freeborn.* The challenged statute reached only "'cases of appeal or writ of error heretofore prosecuted *and now pending* in the supreme court of the United States,'" see *post*, at 254, n. 7 (quoting 13 Stat. 441) (emphasis added). As we have explained, see *supra*, at 226, Congress may require (insofar as separation-of-powers limitations are concerned) that new statutes be applied in cases not yet final but still pending on appeal.

confirms the courts' own inherent and discretionary power, "firmly established in English practice long before the foundation of our Republic," to set aside a judgment whose enforcement would work inequity. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, 244 (1944). Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process; but they are irrelevant to the claim that legislative instruction to reopen impinges upon the independent constitutional authority of the courts.

The dissent promises to provide "[a] few contemporary examples" of statutes retroactively requiring final judgments to be reopened, "to demonstrate that [such statutes] are ordinary products of the exercise of legislative power." *Post*, at 256. That promise is not kept. The relevant retroactivity, of course, consists not of the requirement that there be set aside a judgment that has been rendered *prior to its being setting aside*—for example, a statute passed today which says that all default judgments rendered in the future may be reopened within 90 days after their entry. In that sense, *all* requirements to reopen are "retroactive," and the designation is superfluous. Nothing we say today precludes a law such as that. The finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. The present case, however, involves a judgment that Congress subjected to a reopening requirement which did not exist when the judgment was pronounced. The dissent provides not a single clear prior instance of such congressional action.

The dissent cites, first, Rule 60(b), which it describes as a "familiar remedial measure." *Ibid.* As we have just discussed, Rule 60(b) does not provide a new remedy at all, but

is simply the recitation of pre-existing judicial power. The same is true of another of the dissent's examples, 28 U. S. C. § 2255, which provides federal prisoners a statutory motion to vacate a federal sentence. This procedure "'restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis.'" *United States* v. *Hayman*, 342 U. S. 205, 218 (1952) (quoting the 1948 Reviser's Note to § 2255). It is meaningless to speak of these statutes as applying "retroactively," since they simply codified judicial practice that pre-existed. Next, the dissent cites the provision of the Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U. S. C. App. § 520(4), which authorizes courts, upon application, to reopen judgments against members of the Armed Forces entered while they were on active duty. It could not be clearer, however, that this provision was not retroactive. It says: "If any judgment *shall be rendered* in any action or proceeding governed by this section against any person in military service during the period of such service . . . *such judgment* may . . . be opened . . . ." (Emphasis added.)

The dissent also cites, *post*, at 258, a provision of the Handicapped Children's Protection Act of 1986, 82 Stat. 901, 20 U. S. C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for the award of attorney's fees under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20 U. S. C. § 1411 *et seq.* (1988 ed. and Supp. V). This changed the law regarding attorney's fees under the Education for All Handicapped Children Act, after our decision in *Smith* v. *Robinson*, 468 U. S. 992 (1984), found such fees to be unavailable. The provision of the Statutes at Large adopting this amendment to the United States Code specified, in effect, that it would apply not only to proceedings brought after its enactment, but also to proceedings pending at the time of, or brought after, the decision in *Smith*. See 100 Stat. 798. The amendment says nothing about reopening final judgments, and the retroactivity provision may well mean noth-

ing more than that it applies not merely to new suits commenced after the date of its enactment, but also to *previously* filed (but not yet terminated) suits of the specified sort. This interpretation would be consistent with the only case the dissent cites, which involved a court-entered consent decree not yet fully executed. *Counsel* v. *Dow*, 849 F. 2d 731, 734, 738–739 (CA2 1988). Alternatively, the statute can perhaps be understood to create a new cause of action for attorney's fees attributable to already concluded litigation. That would create no separation-of-powers problem, and would be consistent with this Court's view that "[a]ttorney's fee determinations . . . are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Landgraf* v. *USI Film Products*, 511 U. S., at 277 (quoting *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451–452 (1982)).[8]

The dissent's perception that retroactive reopening provisions are to be found all about us is perhaps attributable to its inversion of the statutory presumption regarding retroactivity. Thus, it asserts that Rule 60(b) must be retroactive, since "[n]ot a single word in its text suggests that it does not apply to judgments entered prior to its effective date."

[8] Even the dissent's scouring the 50 States for support has proved unproductive. It cites statutes from five States, *post*, at 258–259, nn. 12–13. Four of those statutes involve a virtually identical provision, which permits the state-chartered entity that takes over an insolvent insurance company to apply to have any of the insurer's default judgments set aside. See Del. Code Ann., Tit. 18, § 4418 (1989); Fla. Stat. § 631.734 (1984); N. Y. Ins. Law § 7717 (McKinney Supp. 1995); 40 Pa. Cons. Stat. § 991.1716 (Supp. 1994). It is not at all clear, indeed it seems to us unlikely, that these statutes applied retroactively, to judgments that were final before enactment of the scheme that created the state-chartered entity. The last statute involves a discretionary procedure for allowing appeal by *pro se* litigants, Va. Code Ann. § 8.01–428(C) (Supp. 1994). It is obvious that the provision did not apply retroactively, to judgments rendered before the procedures were established.

Post, at 256–257. This reverses the traditional rule, confirmed only last Term, that statutes do *not* apply retroactively *unless* Congress expressly states that they do. See *Landgraf*, *supra*, at 277–280. The dissent adds that "the traditional construction of remedial measures . . . support[s] construing [Rule 60(b)] to apply to past as well as future judgments." *Post*, at 257. But reliance on the vaguely remedial purpose of a statute to defeat the presumption against retroactivity was rejected in the companion cases of *Landgraf*, see 511 U. S., at 284–286, and n. 37, and *Rivers* v. *Roadway Express*, 511 U. S., at 309–313. Cf. *Landgraf*, *supra*, at 297 (Blackmun, J., dissenting) ("This presumption [against retroactive legislation] need not be applied to remedial legislation . . .") (citing *Sampeyreac*, 7 Pet., at 238).

The dissent sets forth a number of hypothetical horribles flowing from our assertedly "rigid holding"—for example, the inability to set aside a civil judgment that has become final during a period when a natural disaster prevented the timely filing of a certiorari petition. *Post*, at 262. That is horrible not because of our holding, but because the underlying statute *itself* enacts a "rigid" jurisdictional bar to entertaining untimely civil petitions. Congress could undoubtedly enact *prospective* legislation permitting, or indeed requiring, this Court to make equitable exceptions to an otherwise applicable rule of finality, just as district courts do pursuant to Rule 60(b). It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law. That is a routine result of constitutional rules. See, *e. g.*, *Collins* v. *Youngblood*, 497 U. S. 37 (1990) (*Ex Post Facto* Clause precludes postoffense statutory extension of a criminal sentence); *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1 (1977) (Contract Clause prevents retroactive alteration of contract with state bondholders); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 589–

590, 601–602 (1935) (Takings Clause invalidates a bankruptcy law that abrogates a vested property interest). See also *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982).

Finally, we may respond to the suggestion of the concurrence that this case should be decided more narrowly. The concurrence is willing to acknowledge only that "*sometimes* Congress lacks the power under Article I to reopen an otherwise closed court judgment," *post*, at 240–241. In the present context, what it considers critical is that § 27A(b) is "exclusively retroactive" and "appli[es] to a limited number of individuals." *Post*, at 241. If Congress had only "provid[ed] some of the assurances against 'singling out' that ordinary legislative activity normally provides—say, prospectivity and general applicability—we might have a different case." *Post*, at 243.

This seems to us wrong in both fact and law. In point of fact, § 27A(b) does not "single out" any defendant for adverse treatment (or any plaintiff for favorable treatment). Rather, it identifies a class of actions (those filed pre-*Lampf*, timely under applicable state law, but dismissed as time barred post-*Lampf*) which embraces many plaintiffs and defendants, the precise number and identities of whom we even now do not know. The concurrence's contention that the number of covered defendants "is too small *(compared with the number of similar, uncovered firms)* to distinguish meaningfully the law before us from a similar law aimed at a single closed case," *post*, at 244 (emphasis added), renders the concept of "singling out" meaningless.

More importantly, however, the concurrence's point seems to us wrong in law. To be sure, the class of actions identified by § 27A(b) could have been more expansive (*e. g.*, all actions that were *or could have been* filed pre-*Lampf*) and the provision could have been written to have prospective as well as retroactive effect (*e. g.*, "all post-*Lampf* dismissed actions, plus all future actions under Rule 10b–5, shall be timely if brought within 30 years of the injury"). But it escapes us

how this could in any way cause the statute to be any less an infringement upon the judicial power. The nub of that infringement consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion;[9] but rather of the Legislature's nullifying prior, authoritative judicial action. It makes no difference whatever to that separation-of-powers violation that it is in gross rather than particularized (*e. g.*, "we hereby set aside *all* hitherto entered judicial orders"), or that it is not accompanied by an "almost" violation of the Bill of Attainder Clause, or an "almost" violation of any other constitutional provision.

Ultimately, the concurrence agrees with our judgment only "[b]ecause the law before us embodies risks of the very sort that our Constitution's 'separation of powers' prohibition seeks to avoid." *Post*, at 246. But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict. It is interesting that the concurrence quotes twice, and cites without quotation a third time, the opinion of Justice Powell in

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[9] The premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common, and were even more so in the days before establishment of the Claims Court. Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid—or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also *punishment*, see, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303, 315–318 (1946), and a case which says that Congress may legislate "a legitimate class of one," *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 472 (1977).

INS v. *Chadha*, 462 U. S., at 959. But Justice Powell wrote only for himself in that case. He alone expressed dismay that "[t]he Court's decision . . . apparently will invalidate every use of the legislative veto," and opined that "[t]he breadth of this holding gives one pause." *Ibid.* It did not give pause to the six-Justice majority, which put an end to the long-simmering interbranch dispute that would otherwise have been indefinitely prolonged. We think legislated invalidation of judicial judgments deserves the same categorical treatment accorded by *Chadha* to congressional invalidation of executive action. The delphic alternative suggested by the concurrence (the setting aside of judgments is all right so long as Congress does not "impermissibly tr[y] to *apply*, as well as *make*, the law," *post*, at 241) simply prolongs doubt and multiplies confrontation. Separation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors.

* * *

We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so. Section 27A(b) is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BREYER, concurring in the judgment.

I agree with the majority that § 27A(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa–1 (1988 ed., Supp. V) (hereinafter § 27A(b)) is unconstitutional. In my view, the separation of powers inherent in our Constitution means that at least *sometimes* Congress lacks the power under Ar-

ticle I to reopen an otherwise closed court judgment. And the statutory provision here at issue, § 27A(b), violates a basic "separation-of-powers" principle—one intended to protect individual liberty. Three features of this law—its exclusively retroactive effect, its application to a limited number of individuals, and its reopening of closed judgments—taken together, show that Congress here impermissibly tried to *apply,* as well as *make,* the law. Hence, § 27A(b) falls outside the scope of Article I. But, it is far less clear, and unnecessary for the purposes of this case to decide, that separation of powers "is violated" *whenever* an "individual final judgment is legislatively rescinded" or that it is "violated 40 times over when 40 final judgments are legislatively dissolved." See *ante,* at 228. I therefore write separately.

The majority provides strong historical evidence that Congress lacks the power simply to reopen, and to revise, final judgments in individual cases. See *ante,* at 219–222. The Framers would have hesitated to lodge in the Legislature both that kind of power and the power to enact general laws, as part of their effort to avoid the "despotic government" that accompanies the "accumulation of all powers, legislative, executive, and judiciary, in the same hands." The Federalist No. 47, p. 241 (J. Gideon ed. 1831) (J. Madison); *id.,* No. 48, at 249 (quoting T. Jefferson, Notes on the State of Virginia). For one thing, the authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms. See, *e. g.,* 1 Montesquieu, The Spirit of Laws 174 (T. Nugent transl. 1886) (describing one objective of the "separation of powers" as preventing "the same monarch or senate," having "enact[ed] tyrannical laws" from "execut[ing] them in a tyrannical manner"); W. Gwyn, The Meaning of the Separation of Powers 42–43, 104–106 (1965) (discussing historically relevant sources that explain one purpose of separation of powers as helping to assure an "impartial rule of

law"). For another thing, as Justice Powell has pointed out, the Constitution's "separation-of-powers" principles reflect, in part, the Framers' "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." *INS* v. *Chadha*, 462 U. S. 919, 962 (1983) (opinion concurring in judgment). The Framers "expressed" this principle, both in "specific provisions, such as the Bill of Attainder Clause," and in the Constitution's "general allocation of power." *Ibid.;* see *United States* v. *Brown*, 381 U. S. 437, 442 (1965) (Bill of Attainder Clause intended to implement the separation of powers, acting as "a general safeguard against legislative exercise of the judicial function"); *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810) (Marshall, C. J.) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments"); cf. *Hurtado* v. *California*, 110 U. S. 516, 535–536 (1884).

Despite these two important "separation-of-powers" concerns, *sometimes* Congress can enact legislation that focuses upon a small group, or even a single individual. See, *e. g.*, *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 468–484 (1977); *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U. S. 841, 846–856 (1984); *Brown*, *supra*, at 453–456. Congress also sometimes passes private legislation. See *Chadha*, *supra*, at 966, n. 9 (Powell, J., concurring in judgment) ("When Congress grants particular individuals relief or benefits under its spending power, the danger of oppressive action that the separation of powers was designed to avoid is not implicated"). And, *sometimes* Congress can enact legislation that, as a practical matter, radically changes the effect of an individual, previously entered court decree. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421 (1856). Statutes that apply prospectively and (in part because of that prospectivity) to an open-ended class of persons, however, are more than sim-

ply an effort to apply, person by person, a previously enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals. Thus, it seems to me, if Congress enacted legislation that reopened an otherwise closed judgment but in a way that mitigated some of the here relevant "separation-of-powers" concerns, by also providing some of the assurances against "singling out" that ordinary legislative activity normally provides—say, prospectivity and general applicability—we might have a different case. Cf. *Brown*, *supra*, at 461 ("Congress must accomplish [its desired] results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied"). Because such legislation, in light of those mitigating circumstances, might well present a different constitutional question, I do not subscribe to the Court's more absolute statement.

The statute before us, however, has no such mitigating features. It reopens previously closed judgments. It is entirely retroactive, applying only to those Rule 10b–5 actions actually filed, on or before (but on which final judgments were entered after) June 19, 1991. See 15 U. S. C. § 78j(b) and 17 CFR 240.10b–5 (1994). It lacks generality, for it applies only to a few individual instances. See Hearings on H. R. 3185 before the Subcommittee on Telecommunications and Finance of the House of Representatives Committee on Energy and Commerce, 102d Cong., 1st Sess., 3–4 (1991) (listing, by case name, only 15 cases that had been dismissed on the basis of *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991)). And, it is underinclusive, for it excludes from its coverage others who, relying upon pre-*Lampf* limitations law, may have failed to bring timely securities fraud actions against any other of the Nation's hundreds of thousands of businesses. I concede that its coverage extends beyond a single individual to many potential plaintiffs in these class actions. But because the legislation disfavors not plaintiffs but defendants, I should think

that the latter number is the more relevant. And, that number is too small (compared with the number of similar, uncovered firms) to distinguish meaningfully the law before us from a similar law aimed at a single closed case. Nor does the existence of § 27A(a), which applies to Rule 10b–5 actions pending at the time of the legislation, change this conclusion. That provision seems aimed at too few additional individuals to mitigate the low level of generality of § 27A(b). See Hearings on H. R. 3185, *supra*, at 5–6 (listing 17 cases in which dismissal motions based on *Lampf* were pending).

The upshot is that, viewed in light of the relevant, liberty-protecting objectives of the "separation of powers," this case falls directly within the scope of language in this Court's cases suggesting a restriction on Congress' power to reopen closed court judgments. See, *e. g.*, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised [or] overturned . . . by another Department of Government"); *Wheeling & Belmont Bridge Co.*, *supra*, at 431 ("[I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress"); *Hayburn's Case*, 2 Dall. 409, 413 (1792) (letter from Justice Iredell and District Judge Sitgreaves to President Washington) ("[N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the Legislature itself").

At the same time, because the law before us *both* reopens final judgments *and* lacks the liberty-protecting assurances that prospectivity and greater generality would have provided, we need not, and we should not, go further—to make of the reopening itself, an absolute, always determinative distinction, a "prophylactic device," or a foundation for the building of a new "high wal[l]" between the branches.

Ante, at 239. Indeed, the unnecessary building of such walls is, in itself, dangerous, because the Constitution blends, as well as separates, powers in its effort to create a government that will work for, as well as protect the liberties of, its citizens. See The Federalist No. 48 (J. Madison). That doctrine does not "divide the branches into watertight compartments," nor "establish and divide fields of black and white." *Springer* v. *Philippine Islands*, 277 U. S. 189, 209, 211 (1928) (Holmes, J., dissenting); see also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (referring to the need for "workable government"); *id.*, at 596–597 (Frankfurter, J., concurring); *Mistretta* v. *United States*, 488 U. S. 361, 381 (1989) (the doctrine does not create a "hermetic division among the Branches" but "a carefully crafted system of checked and balanced power within each Branch"). And, important separation-of-powers decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree. See, *e. g.*, *Crowell* v. *Benson*, 285 U. S. 22, 48–54 (1932); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 551–555 (1935) (Cardozo, J., concurring). As the majority invokes the advice of an American poet, one might consider as well that poet's caution, for he not only notes that "Something there is that doesn't love a wall," but also writes, "Before I built a wall I'd ask to know/ What I was walling in or walling out." R. Frost, Mending Wall, The New Oxford Book of American Verse 395–396 (R. Ellmann ed. 1976).

Finally, I note that the cases the dissent cites are distinguishable from the one before us. *Sampeyreac* v. *United States*, 7 Pet. 222 (1833), considered a law similar to § 27A(b) (it reopened a set of closed judgments in fraud cases), but the Court did not reach the here relevant issue. Rather, the Court rested its conclusion upon the fact that Sampeyreac was not "a real person," while conceding that, were he real, the case "might present a different question." *Id.*, at 238–239. *Freeborn* v. *Smith*, 2 Wall. 160 (1865), which involved

an Article I court, upheld a law that applied to all cases pending on appeal (in the Supreme Court) from the territory of Nevada, irrespective of the causes of action at issue or which party was seeking review. See *id.*, at 162. That law had generality, a characteristic that helps to avoid the problem of legislatively singling out a few individuals for adverse treatment. See *Chadha*, 462 U. S., at 966 (Powell, J., concurring in judgment). Neither did *United States* v. *Sioux Nation*, 448 U. S. 371 (1980), involve legislation that adversely treated a few individuals. Rather, it permitted the reopening of a case against the United States. See *id.*, at 391.

Because the law before us embodies risks of the very sort that our Constitution's "separation-of-powers" prohibition seeks to avoid, and because I can find no offsetting legislative safeguards that normally offer assurances that minimize those risks, I agree with the Court's conclusion and I join its judgment.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

On December 19, 1991, Congress enacted § 27A of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa–1 (1988 ed., Supp. V) (hereinafter 1991 amendment), to remedy a flaw in the limitations rule this Court announced on June 20, 1991, in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991). In *Lampf* the Court replaced the array of state statutes of limitations that had governed shareholder actions under the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and Rule 10b–5, 17 CFR 240.10b–5 (1994) (hereinafter 10b–5 actions), with a uniform federal limitations rule. Congress found only one flaw in the Court's new rule: its failure to exempt pending cases from its operation. Accordingly, without altering the prospective effect of the *Lampf* rule, the 1991 amendment remedied its flaw by providing that pre-*Lampf* law should determine the limitations period applicable to all cases that had

been pending on June 20, 1991—both those that remained pending on December 19, 1991, when § 27A was enacted, and those that courts dismissed between June 20 and December 19, 1991. Today the Court holds that the 1991 amendment violates the Constitution's separation of powers because, by encompassing the dismissed claims, it requires courts to reopen final judgments in private civil actions.

Section 27A is a statutory amendment to a rule of law announced by this Court. The fact that the new rule announced in *Lampf* was a product of judicial, rather than congressional, lawmaking should not affect the separation-of-powers analysis. We would have the same issue to decide had Congress enacted the *Lampf* rule but, as a result of inadvertence or perhaps a scrivener's error, failed to exempt pending cases, as is customary when limitations periods are shortened.[1] In my opinion, if Congress had retroactively restored rights its own legislation had inadvertently or unfairly impaired, the remedial amendment's failure to exclude dismissed cases from the benefited class would not make it invalid. The Court today faces a materially identical situation and, in my view, reaches the wrong result.

Throughout our history, Congress has passed laws that allow courts to reopen final judgments. Such laws characteristically apply to judgments entered before as well as after their enactment. When they apply retroactively, they may raise serious due process questions,[2] but the Court

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[1] Our decisions prior to *Lampf* consistently held that retroactive application of new, shortened limitations periods would violate "fundamental notions of justified reliance and due process." *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 371 (1991) (O'CONNOR, J., dissenting); see, *e. g., Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971); *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987).

[2] Because the Court finds a separation-of-powers violation, it does not reach respondents' alternative theory that § 27A(b) denied them due process under the Fifth Amendment, a theory the Court of Appeals did not identify as an alternative ground for its holding. In my judgment, the statute easily survives a due process challenge. Section 27A(b) is ration-

has never invalidated such a law on separation-of-powers grounds until today. Indeed, only last Term we recognized Congress' ample power to enact a law that "in effect 'restored' rights that [a party] reasonably and in good faith thought he possessed before the surprising announcement" of a Supreme Court decision. *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 310 (1994) (discussing *Frisbie* v. *Whitney*, 9 Wall. 187 (1870)). We conditioned our unambiguous restatement of the proposition that "Congress had the *power* to enact legislation that had the practical effect of restoring the status quo retroactively," 511 U. S., at 310, only on Congress' clear expression of its intent to do so.

A large class of investors reasonably and in good faith thought they possessed rights of action before the surprising announcement of the *Lampf* rule on June 20, 1991. When it enacted the 1991 amendment, Congress clearly expressed its intent to restore the rights *Lampf* had denied the aggrieved class. Section 27A comported fully with *Rivers* and with other precedents in which we consistently have recognized Congress' power to enact remedial statutes that set aside classes of final judgments. The only remarkable feature of

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ally related to a legitimate public purpose. Cf., *e. g.*, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 636–641 (1993). Given the existence of statutes and rules, such as Rule 60(b), that allow courts to reopen apparently "final" judgments in various circumstances, see *infra*, at 256–259, respondents cannot assert an inviolable "vested right" in the District Court's post-*Lampf* dismissal of petitioners' claims. In addition, § 27A(b) did not upset any "settled expectations" of respondents. Cf. *Landgraf* v. *USI Film Products*, 511 U. S. 244, 266 (1994). In *Landgraf*, we concluded that Congress did not intend § 102 of the Civil Rights Act of 1991, 42 U. S. C. § 1981a (1988 ed., Supp. V), to apply retroactively because retroactive application would have placed a new legal burden on past conduct. 511 U. S., at 280–286. Before 1991 no one could have relied either on the yet-to-be-announced rule in *Lampf* or on the Court's unpredictable decision to apply that rule retroactively. All of the reliance interests that ordinarily support a presumption against retroactivity militate in favor of allowing retroactive application of § 27A.

this enactment is the fact that it remedied a defect in a new judge-made rule rather than in a statute.

The familiar history the Court invokes, involving colonial legislatures' ad hoc decisions of individual cases, "'unfettered by rules,'" *ante*, at 220 (quoting Vermont State Papers 1779–1786, p. 540 (Slade ed. 1823)), provides no support for its holding. On the contrary, history and precedent demonstrate that Congress may enact laws that establish both substantive rules and procedures for reopening final judgments. When it enacted the 1991 amendment to the *Lampf* rule, Congress did not encroach on the judicial power. It decided neither the merits of any 10b–5 claim nor even whether any such claim should proceed to decision on the merits. It did provide that the rule governing the timeliness of 10b–5 actions pending on June 19, 1991, should be the pre-*Lampf* statute of limitations, and it also established a procedure for Article III courts to apply in determining whether any dismissed case should be reinstated. Congress' decision to extend that rule and procedure to 10b–5 actions dismissed during the brief period between this Court's law-changing decision in *Lampf* and Congress' remedial action is not a sufficient reason to hold the statute unconstitutional.

I

Respondents conducted a public offering of common stock in 1983. Petitioners, suing on behalf of themselves and other purchasers of the stock, filed a 10b–5 action in 1987 in the United States District Court for the Eastern District of Kentucky, alleging violations of substantive federal rules that had been in place since 1934. Respondents moved to dismiss the complaint as untimely because petitioners had filed it more than three years after the events in dispute. At that time, settled law in Kentucky and elsewhere in the United States directed federal courts to determine statutes of limitations applicable to 10b–5 actions by reference to

state law.[3] The relevant Kentucky statute provided a 3-year limitations period,[4] which petitioners contended ran from the time the alleged fraud was or should have been discovered. A Magistrate agreed with petitioners and recommended denial of respondents' motion to dismiss, but by 1991 the District Court had not yet ruled on that issue. The factual question whether petitioners should have discovered respondents' alleged 10b–5 violations more than three years before they filed suit remained open for decision by an Article III judge on June 20, 1991.

On that day, this Court's decision in *Lampf* changed the law. The Court concluded that every 10b–5 action is time barred unless brought within three years of the alleged violation and one year of its discovery. Moreover, it applied that novel rule to pending cases. As JUSTICE O'CONNOR pointed out in her dissent, the Court held the plaintiffs' suit "time barred under a limitations period that did not exist before," a holding that "depart[ed] drastically from our established practice and inflict[ed] an injustice on the [plaintiffs]." *Lampf*, 501 U. S., at 369.[5] The inequitable consequences of *Lampf* reached beyond the parties to that case,

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[3] "Federal judges have 'borrowed' state statutes of limitations because they were directed to do so by the Congress of the United States under the Rules of Decision Act, 28 U. S. C. § 1652." *Lampf*, 501 U. S., at 367, n. 2 (STEVENS, J., dissenting) (citations omitted); see, *e. g.*, *Stull* v. *Bayard*, 561 F. 2d 429, 431–432 (CA2 1977), cert. denied, 434 U. S. 1035 (1978); *Roberts* v. *Magnetic Metals Co.*, 611 F. 2d 450, 456 (CA3 1979); *Robuck* v. *Dean Witter & Co.*, 649 F. 2d 641, 644 (CA9 1980) (borrowing state statutes of limitations for 10b–5 actions).

[4] See Ky. Rev. Stat. Ann. § 292.480(3) (Michie 1988).

[5] The *Lampf* opinion drew two other dissents. JUSTICE KENNEDY, joined by JUSTICE O'CONNOR, would have adopted a different substantive limitations rule. See 501 U. S., at 374. JUSTICE SOUTER and I would have adhered to "four decades of . . . settled law" and maintained the existing regime until Congress enacted a new federal statute of limitations. *Id.*, at 366–367 (STEVENS, J., dissenting). No one dissented from the proposition that a uniform federal limitations period would be wise policy.

injuring a large class of litigants that includes petitioners. Without resolving the factual issue that would have determined the timeliness of petitioners' complaint before *Lampf*, the District Court dismissed the instant action as untimely under the new limitations period dictated by this Court. Because *Lampf* had deprived them of any nonfrivolous basis for an appeal, petitioners acquiesced in the dismissal, which therefore became final on September 12, 1991.

Congress responded to *Lampf* by passing § 27A, which became effective on December 19, 1991. The statute changed the substantive limitations law, restoring the pre-*Lampf* limitations rule for two categories of 10b–5 actions that had been pending on June 19, 1991. Subsection (a) of § 27A applies to cases that were still pending on December 19, 1991. The Courts of Appeals have uniformly upheld the constitutionality of that subsection,[6] and its validity is not challenged in this case. Subsection (b) applies to actions, like the instant case, that (1) were dismissed after June 19, 1991, and (2) would have been timely under the pre-*Lampf* regime. This subsection authorized the district courts to reinstate dismissed cases if the plaintiff so moved within 60 days after the effective date of § 27A. The amendment was not self-executing: Unless the plaintiff both filed a timely motion for reinstatement and then satisfied the court that the complaint had been timely filed under applicable pre-*Lampf* law, the dismissal would remain in effect.

In this case petitioners made the required showing, but the District Court refused to reinstate their case. Instead,

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[6] See *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F. 2d 269 (CA1), cert. pending, No. 93–564; *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F. 3d 78 (CA2 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F. 2d 1256 (CA4 1993); *Berning* v. *A. G. Edwards & Sons, Inc.*, 990 F. 2d 272 (CA7 1993); *Gray* v. *First Winthrop Corp.*, 989 F. 2d 1564 (CA9 1993); *Anixter* v. *Home-Stake Production Co.*, 977 F. 2d 1533 (CA10 1992), cert. denied *sub nom. Dennler* v. *Trippet*, 507 U. S. 1029 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F. 2d 1567 (CA11 1992), cert. denied, 510 U. S. 828 (1993).

it held § 27A(b) unconstitutional. 789 F. Supp. 231 (ED Ky. 1992). The Court of Appeals for the Sixth Circuit, contrary to an earlier decision of the Fifth Circuit, affirmed. 1 F. 3d 1487 (1993).

II

Aside from § 27A(b), the Court claims to "know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." *Ante*, at 230. In fact, Congress has done so on several occasions. Section 27A(b) is part of a remedial statute. As early as 1833, we recognized that a remedial statute authorizing the reopening of a final judgment after the time for appeal has expired is "entirely unexceptionable" even though it operates retroactively. "It has been repeatedly decided in this court, that the retrospective operation of such a law forms no objection to it. Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed." *Sampeyreac* v. *United States*, 7 Pet. 222, 239 (1833). We have upheld remedial statutes that carried no greater cause for separation-of-powers concerns than does § 27A(b); others have provoked no challenges. In contrast, the colonial directives on which the majority relies were nothing like remedial statutes.

The remedial 1830 law we construed in *Sampeyreac* strongly resembled § 27A(b): It authorized a class of litigants to reopen claims, brought under an 1824 statute, that courts had already finally adjudicated. The 1824 statute authorized proceedings to establish title to certain lands in the State of Missouri and the territory of Arkansas. It provided for an appeal to this Court within one year after the entry of the judgment or decree, "and should no appeal be taken, the judgment or decree of the district court shall in like manner be final and conclusive." 7 Pet., at 238. In 1827 the Arkansas Territorial Court entered a decree in favor of one Sampeyreac, over the objection of the United States that the nominal plaintiff was a fictitious person. Because no appeal

was taken from that decree, it became final in 1828. In 1830 Congress passed a special statute authorizing the Arkansas court to reopen any decree entered under the 1824 statute if, prior to July 1, 1831, the United States filed a bill of review alleging that the decree had been based on forged evidence of title. The United States filed such a bill and obtained a reversal of the 1827 decree from the Arkansas court.

The successors in interest of the fictitious Mr. Sampeyreac argued in this Court that the Arkansas court should not have entertained the Government's bill of review because the 1830 statute "was the exercise of a judicial power, and it is no answer to this objection, that the execution of its provisions is given to a court. The legislature of the union cannot use such a power." *Id.*, at 229. We categorically rejected that argument: "The law of 1830 is in no respect the exercise of judicial powers." *Id.*, at 239. Of course, as the majority notes, *ante*, at 232–233, the particular decree at stake in *Sampeyreac* had issued not from an Article III court but from a territorial court. However, our opinion contains no suggestion that Congress' power to authorize the reopening of judgments entered by the Arkansas court was any broader than its power to authorize the reopening of judgments entered under the same statute by the United States District Court in Missouri. Moreover, the relevant judicial power that the 1830 statute arguably supplanted was this Court's Article III appellate jurisdiction—which, prior to the 1830 enactment, provided the only avenue for review of the trial courts' judgments.

Similarly, in *Freeborn* v. *Smith*, 2 Wall. 160 (1865), the Court rejected a challenge to an Act of Congress that removed an accidental impediment to the exercise of our appellate jurisdiction. When Congress admitted Nevada into the Union as a State in March 1864, ch. 36, 13 Stat. 30, it neglected to provide for the disposition of pending appeals from final judgments previously entered by the Supreme Court of

the Nevada Territory. Accordingly, the *Freeborn* defendants in error moved to dismiss a writ of error to the territorial court on the ground that we had no power to decide the case. At the suggestion of plaintiffs in error, the Court deferred ruling on the motion until after February 27, 1865, when Congress passed a special statute that authorized the Court to decide this and similar cases.[7] Defendants in error renewed their motion, arguing that Congress could not reopen judgments that were already final and unreviewable because Congress was not competent to exercise judicial power.

Defendants in error argued that, "[i]f it be possible for a right to attach itself to a judgment, it has done so here, and there could not be a plainer case of an attempt to destroy it by legislative action." 2 Wall., at 165. The Court, however, noted that the omission in the 1864 statute had left the case "in a very anomalous situation," *id.*, at 174, and that passage of the later statute "was absolutely necessary to remove an impediment in the way of any legal proceeding in the case." *Id.*, at 175. It concluded that such "acts are of a remedial character, and are peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Ibid.* As in *Sampeyreac*, although *Freeborn* in-

[7] The Act provided, in part:

"That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States, upon any record from the supreme court of the Territory of Nevada, may be heard and determined by the supreme court of the United States, and the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the district court of the United States for the district of Nevada, or to the supreme court of the State of Nevada, as the nature of said appeal or writ of error may require, and each of these courts shall be the successor of the supreme court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon. . . . *Provided*, That said appeals shall be prosecuted and said writs of errors sued out at any time before the first day of July, eighteen hundred and sixty-six." Ch. 64, § 8, 13 Stat. 441.

volved the review of a judgment entered by a territorial court, the "judicial power" to which the opinion referred was this Court's Article III appellate jurisdiction. If Congress may enact a law authorizing this Court to reopen decisions that we previously lacked power to review, Congress must have the power to let district courts reopen their own judgments.

Also apposite is *United States* v. *Sioux Nation*, 448 U. S. 371 (1980), which involved the Sioux Nation's longstanding claim that the Government had in 1877 improperly abrogated the treaty by which the Sioux had held title to the Black Hills. The Sioux first brought their claim under a special 1920 jurisdictional statute. The Court of Claims dismissed the suit in 1942, holding that the 1920 Act did not give the court jurisdiction to consider the adequacy of the compensation the Government had paid in 1877. Congress passed a new jurisdictional statute in 1946, and in 1950 the Sioux brought a new action. In 1975 the Court of Claims, although acknowledging the merit of the Sioux's claim, held that the res judicata effect of the 1942 dismissal barred the suit. In response, Congress passed a statute in 1978 that authorized the Court of Claims to take new evidence and instructed it to consider the Sioux's claims on the merits, disregarding res judicata. The Sioux finally prevailed. We held that the 1978 Act did not violate the separation of powers. 448 U. S., at 407.

The Court correctly notes, see *ante*, at 230–231, and n. 5, that our opinion in *Sioux Nation* prominently discussed precedents establishing Congress' power to waive the res judicata effect of judgments against the United States. We never suggested, however, that those precedents sufficed to overcome the separation-of-powers objections raised against the 1978 Act. Instead, we made extensive comments about the propriety of Congress' action that were as necessary to our holding then as they are salient to the Court's analysis today. In passing the 1978 Act, we held, Congress

> "only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.
>
> "Moreover, Congress in no way attempted to prescribe the outcome of the Court of Claims' new review of the merits." 448 U. S., at 407.

Congress observed the same boundaries in enacting § 27A(b).

Our opinions in *Sampeyreac*, *Freeborn*, and *Sioux Nation* correctly characterize statutes that specify new grounds for the reopening of final judgments as remedial. Moreover, these precedents correctly identify the unremarkable nature of the legislative power to enact remedial statutes. "[A]cts . . . of a remedial character . . . are the peculiar subjects of legislation. They are not liable to the imputation of being assumptions of judicial power." *Freeborn*, 2 Wall., at 175. A few contemporary examples of such statutes will suffice to demonstrate that they are ordinary products of the exercise of legislative power.

The most familiar remedial measure that provides for reopening of final judgments is Rule 60(b) of the Federal Rules of Civil Procedure. That Rule both codified common-law grounds for relieving a party from a final judgment and added an encompassing reference to "any other reason justifying relief from the operation of the judgment."[8] Not a

[8] The full text of Rule 60(b) provides:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

single word in its text suggests that it does not apply to judgments entered prior to its effective date. On the contrary, the purpose of the Rule, its plain language, and the traditional construction of remedial measures all support construing it to apply to past as well as future judgments. Indeed, because the Rule explicitly abolished the common-law writs it replaced, an unintended gap in the law would have resulted if it did not apply retroactively.[9]

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misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

This Court adopted the Federal Rules of Civil Procedure and submitted them to Congress as the Rules Enabling Act required. They became effective after Congress adjourned without altering them. See generally 308 U. S. 647 (letter of transmittal to Congress, Jan. 3, 1938).

[9] In its criticism of this analysis of Rule 60(b), the majority overstates our holdings on retroactivity in *Landgraf*, 511 U. S., at 280, and *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298 (1994). Our opinion in *Landgraf* nowhere says "that statutes do *not* apply retroactively *unless* Congress expressly states that they do." *Ante*, at 237. To the contrary, it says that, "[w]hen . . . the statute contains no such express command, the court must determine whether the new statute would have retroactive effect," an inquiry that requires "clear congressional *intent* favoring such a result." *Landgraf*, 511 U. S., at 280 (emphasis added); see also *id.*, at 273–275; *Rivers*, 511 U. S., at 304–309. In the case of Rule 60(b), the factors I have identified, taken together, support a finding of clear congressional

Other examples of remedial statutes that resemble § 27A include the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. App. § 520(4), which authorizes members of the Armed Forces to reopen judgments entered while they were on active duty; the Handicapped Children's Protection Act of 1986, 20 U. S. C. § 1415(e)(4)(B) (1988 ed. and Supp. V), which provided for recovery of attorney's fees under the Education for All Handicapped Children Act of 1975, 20 U. S. C. § 1411 *et seq.* (1988 ed. and Supp. V);[10] and the federal habeas corpus statute, 28 U. S. C. § 2255, which authorizes federal courts to reopen judgments of conviction. The habeas statute, similarly to Rule 60(b), replaced a common-law writ, see App. to H. R. Rep. No. 308, 80th Cong., 2d Sess., A180 (1947), and thus necessarily applied retroactively.[11] State statutes that authorize the reopening of various types of default judgments[12] and judgments that became final before a party re-

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intent. Moreover, neither *Landgraf* nor *Rivers* "rejected" consideration of a statute's remedial purpose in analyzing Congress' intent to apply the statute retroactively. Compare *ante*, at 237, with *Landgraf*, 511 U. S., at 281–286, and n. 37, and *Rivers*, 511 U. S., at 304–311.

[10] When it enacted the Handicapped Children's Protection Act, Congress overruled our contrary decision in *Smith* v. *Robinson*, 468 U. S. 992 (1984), by applying the Act retroactively to any action either pending on or brought after July 4, 1984, the day before we announced *Smith*. See 100 Stat. 798. Accordingly, a court has applied the Act retroactively to a case in which the parties had entered into a consent decree prior to its enactment. See *Counsel* v. *Dow*, 849 F. 2d 731, 738–739 (CA2 1988). The Court's attempts to explain away the retroactivity provision, *ante*, at 235–236, simply do not comport with the plain language of the Act.

[11] The Government also calls our attention to 28 U. S. C. § 1655, a statute that requires courts to reopen final *in rem* judgments upon entries of appearance by defendants who were not personally served. See Brief for United States 24–25, and n. 17. While that statute had only prospective effect, the Court offers no reason why Congress could not pass a similar statute that would apply retroactively to judgments entered under preexisting procedures.

[12] See, *e. g.*, Del. Code Ann., Tit. 18, § 4418 (1989); Fla. Stat. § 631.734 (1984); N. Y. Ins. Law § 7717 (McKinney Supp. 1995); 40 Pa. Cons. Stat. § 991.1716 (Supp. 1994).

ceived notice of their entry,[13] as well as provisions for motions to reopen based on newly discovered evidence,[14] further demonstrate the widespread acceptance of remedial statutes that allow courts to set aside final judgments. As in the case of Rule 60(b), logic dictates that these statutes be construed to apply retroactively to judgments that were final at the time of their enactments. All of these remedial statutes announced generally applicable rules of law as well as establishing procedures for reopening final judgments.[15]

In contrast, in the examples of colonial legislatures' review of trial courts' judgments on which today's holding rests, the legislatures issued directives in individual cases without purporting either to set forth or to apply any legal standard. Cf. *ante,* at 219–225; see, *e. g., INS* v. *Chadha,* 462 U. S. 919, 961–962 (1983) (Powell, J., concurring in judgment). The principal compendium on which the Court relies, *ante,* at 219, accurately describes these legislative directives:

> "In these records, which are of the first quarter of the 18th century, the provincial legislature will often be found acting in a judicial capacity, sometimes trying causes in equity, sometimes granting equity powers to some court of the common law for a particular temporary purpose, and constantly granting appeals, new trials, and other relief from judgments, on equitable

[13] For example, a Virginia statute provides that, when a *pro se* litigant fails to receive notice of the trial court's entry of an order, even after the time to appeal has expired, the trial judge may within 60 days vacate the order and grant the party leave to appeal. Va. Code Ann. § 8.01–428(C) (Supp. 1994).

[14] See *Herrera* v. *Collins,* 506 U. S. 390, 410–411, and nn. 8–11 (1993) (citing state statutes).

[15] The Court offers no explanation of why the Constitution should be construed to interpose an absolute bar against these statutes' retroactive application. Under the Court's reasoning, for example, an amendment that broadened the coverage of Rule 60(b) could not apply to any inequitable judgments entered prior to the amendment. The Court's rationale for this formalistic restriction remains elusive.

> grounds." Judicial Action by the Provincial Legislature of Massachusetts, 15 Harv. L. Rev. 208, n. 1 (1902).

The Framers' disapproval of such a system of ad hoc legislative review of individual trial court judgments has no bearing on remedial measures such as Rule 60(b) or the 1991 amendment at issue today. The history on which the Court relies provides no support for its holding.

III

The lack of precedent for the Court's holding is not, of course, a sufficient reason to reject it. Correct application of separation-of-powers principles, however, confirms that the Court has reached the wrong result. As our most recent major pronouncement on the separation of powers noted, "we have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" *Morrison* v. *Olson*, 487 U. S. 654, 693–694 (1988) (quoting *United States* v. *Nixon*, 418 U. S. 683, 707 (1974)). Rather, our jurisprudence reflects "Madison's flexible approach to separation of powers." *Mistretta* v. *United States*, 488 U. S. 361, 380 (1989). In accepting Madison's conception rather than any "hermetic division among the Branches," *id.*, at 381, "we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment," *id.*, at 382. Today's holding does not comport with these ideals.

Section 27A shares several important characteristics with the remedial statutes discussed above. It does not decide the merits of any issue in any litigation but merely removes an impediment to judicial decision on the merits. The impediment it removes would have produced inequity because the statute's beneficiaries did not cause the impediment. It requires a party invoking its benefits to file a motion within a specified time and to convince a court that the statute entitles the party to relief. Most important, § 27A(b) specifies

both a substantive rule to govern the reopening of a class of judgments—the pre-*Lampf* limitations rule—and a procedure for the courts to apply in determining whether a particular motion to reopen should be granted. These characteristics are quintessentially legislative. They reflect Congress' fealty to the separation of powers and its intention to avoid the sort of ad hoc excesses the Court rightly criticizes in colonial legislative practice. In my judgment, all of these elements distinguish § 27A from "judicial" action and confirm its constitutionality. A sensible analysis would at least consider them in the balance.

Instead, the Court myopically disposes of § 27A(b) by holding that Congress has no power to "requir[e] an Article III court to set aside a final judgment." *Ante*, at 240. That holding must mean one of two things. It could mean that Congress may not impose a mandatory duty on a court to set aside a judgment even if the court makes a particular finding, such as a finding of fraud or mistake, that Congress has not made. Such a rule, however, could not be correct. Although Rule 60(b), for example, merely authorizes federal courts to set aside judgments after making appropriate findings, Acts of Congress characteristically set standards that judges are obligated to enforce. Accordingly, Congress surely could add to Rule 60(b) certain instances in which courts *must* grant relief from final judgments if they make particular findings—for example, a finding that a member of the jury accepted a bribe from the prevailing party. The Court, therefore, must mean to hold that Congress may not *unconditionally* require an Article III court to set aside a final judgment. That rule is both unwise and beside the point of this case.

A simple hypothetical example will illustrate the practical failings of the Court's new rule. Suppose Congress, instead of endorsing the new limitations rule fashioned by the Court in *Lampf*, had decided to return to the pre-*Lampf* regime (or perhaps to enact a longer uniform statute). Subsection

(a) of § 27A would simply have provided that the law in effect prior to June 19, 1991, would govern the timeliness of all 10b–5 actions. In that event, subsection (b) would still have been necessary to remedy the injustice caused by this Court's failure to exempt pending cases from its new rule. In my judgment, the statutory correction of the inequitable flaw in *Lampf* would be appropriate remedial legislation whether or not Congress had endorsed that decision's substantive limitations rule. The Court, unfortunately, appears equally consistent: Even though the class of dismissed 10b–5 plaintiffs in my hypothetical would have been subject to the same substantive rule as all other 10b–5 plaintiffs, the Court's reasoning would still reject subsection (b) as an impermissible exercise of "judicial" power.

The majority's rigid holding unnecessarily hinders the Government from addressing difficult issues that inevitably arise in a complex society. This Court, for example, lacks power to enlarge the time for filing petitions for certiorari in a civil case after 90 days from the entry of final judgment, no matter how strong the equities. See 28 U. S. C. § 2101(c). If an Act of God, such as a flood or an earthquake, sufficiently disrupted communications in a particular area to preclude filing for several days, the majority's reasoning would appear to bar Congress from addressing the resulting inequity. If Congress passed remedial legislation that retroactively granted movants from the disaster area extra time to file petitions or motions for extensions of time to file, today's holding presumably would compel us to strike down the legislation as an attack on the finality of judgments. Such a ruling, like today's holding, would gravely undermine federal courts' traditional power "to set aside a judgment whose enforcement would work inequity." *Ante,* at 234.[16]

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[16] The Court also appears to bar retroactive application of changes in the criminal law. Its reasoning suggests that, for example, should Congress one day choose to abolish the federal death penalty, the new statute

Even if the rule the Court announces today were sound, it would not control the case before us. In order to obtain the benefit of § 27A, petitioners had to file a timely motion and persuade the District Court they had timely filed their complaint under pre-*Lampf* law. In the judgment of the District Court, petitioners satisfied those conditions. Congress reasonably could have assumed, indeed must have expected, that some movants under § 27A(b) would fail to do so. The presence of an important condition that the District Court must find a movant to have satisfied before it may reopen a judgment distinguishes § 27A from the unconditional congressional directives the Court appears to forbid.

Moreover, unlike the colonial legislative commands on which the Court bases its holding, § 27A directed action not in "a civil case," *ante*, at 223 (discussing *Calder* v. *Bull*, 3 Dall. 386 (1798)), but in a large category of civil cases.[17] The Court declares that a legislative direction to reopen a class of 40 cases is 40 times as bad as a direction to reopen a single final judgment because "*power* is the object of the separation-of-powers prohibition." See *ante*, at 228. This self-evident observation might be salient if § 27A(b) unconditionally commanded courts to reopen judgments even absent findings that the complaints were timely under pre-*Lampf* law. But Congress did not decide—and could not know how any court would decide—the timeliness issue in any particu-

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could not constitutionally save a death row inmate from execution if his conviction had become final before the statute was passed.

[17] At the time Congress was considering the bill that became § 27A, a House Subcommittee reported that *Lampf* had resulted in the dismissal of 15 cases, involving thousands of plaintiffs in every State (of whom over 32,000 had been identified) and claims totaling over $692.25 million. In addition, motions to dismiss based on *Lampf* were then pending in 17 cases involving thousands of plaintiffs in every State and claims totaling over $4.578 billion. Hearing on H. R. 3185, before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, 102d Cong., 1st Sess., 1–4 (1991).

lar case in the affected category. Congress, therefore, had no way to identify which particular plaintiffs would benefit from § 27A. It merely enacted a law that applied a substantive rule to a class of litigants, specified a procedure for invoking the rule, and left particular outcomes to individualized judicial determinations—a classic exercise of legislative power.

"All we seek," affirmed a sponsor of § 27A, "is to give the victims [of securities fraud] a fair day in court."[18] A statute, such as § 27A, that removes an unanticipated and unjust impediment to adjudication of a large class of claims on their merits poses no danger of "aggrandizement or encroachment." *Mistretta*, 488 U. S., at 382.[19] This is particularly true for § 27A in light of Congress' historic primacy over statutes of limitations.[20] The statute contains several checks against the danger of congressional overreaching. The Court in *Lampf* undertook a legislative function. Essentially, it supplied a statute of limitations for 10b–5 ac-

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[18] 137 Cong. Rec. S18624 (Nov. 27, 1991) (statement of Sen. Bryan).

[19] Today's decision creates a new irony of judicial legislation. A challenge to the constitutionality of § 27A(a) could not turn on the sanctity of final judgments. Section 27A(a) benefits litigants who had filed appeals that *Lampf* rendered frivolous; petitioners and other law-abiding litigants whose claims *Lampf* rendered untimely had acquiesced in the dismissal of their actions. By striking down § 27A(b) on a ground that would leave § 27A(a) intact, the Court indulges litigants who protracted proceedings but shuts the courthouse door to litigants who proceeded with diligence and respect for the *Lampf* judgment.

[20] "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. . . . [T]he history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945) (Jackson, J.) (footnote and citation omitted).

tions. The Court, however, failed to adopt the transition rules that ordinarily attend alterations shortening the time to sue. Congress, in § 27A, has supplied those rules. The statute reflects the ability of two coequal branches to cooperate in providing for the impartial application of legal rules to particular disputes. The Court's mistrust of such cooperation ill serves the separation of powers.[21]

IV

The Court has drawn the wrong lesson from the Framers' disapproval of colonial legislatures' appellate review of judicial decisions. The Framers rejected that practice, not out of a mechanistic solicitude for "final judgments," but because they believed the impartial application of rules of law, rather

[21] Although I agree with JUSTICE BREYER's general approach to the separation-of-powers issue, I believe he gives insufficient weight to two important features of § 27A. First, he fails to recognize that the statute restored a pre-existing rule of law in order to remedy the manifest injustice produced by the Court's retroactive application of *Lampf*. The only "'substantial deprivation'" Congress imposed on defendants was that properly filed lawsuits proceed to decisions on the merits. Cf. *ante*, at 242 (BREYER, J., concurring in judgment) (quoting *INS* v. *Chadha*, 462 U. S. 919, 962 (1983) (Powell, J., concurring in judgment)). Second, he understates the class of defendants burdened by § 27A: He finds the statute underinclusive because it provided no remedy for potential plaintiffs who may have failed to file timely actions in reliance on pre-*Lampf* limitations law, but he denies the importance of § 27A(a), which provided a remedy for plaintiffs who appealed dismissals after *Lampf*. See *ante*, at 243–244 (BREYER, J., concurring in judgment). The coverage of § 27A is coextensive with the retroactive application of the general rule announced in *Lampf*. If Congress had enacted a statute providing that the *Lampf* rule should apply to all cases filed after the statute's effective date and that the pre-*Lampf* rule should apply to all cases filed before that date, JUSTICE BREYER could not reasonably condemn the statute as special legislation. The only difference between such a statute and § 27A is that § 27A covered all cases pending on the date of *Lampf*—June 20, 1991—rather than on the effective date of the statute—December 19, 1991. In my opinion, § 27A has sufficient generality to avoid the characteristics of a bill of attainder.

than the will of the majority, must govern the disposition of individual cases and controversies. Any legislative interference in the adjudication of the merits of a particular case carries the risk that political power will supplant even-handed justice, whether the interference occurs before or after the entry of final judgment. Cf. *United States* v. *Klein*, 13 Wall. 128 (1872); *Hayburn's Case*, 2 Dall. 409 (1792). Section 27A(b) neither commands the reinstatement of any particular case nor directs any result on the merits. Congress recently granted a special benefit to a single litigant in a pending civil rights case, but the Court saw no need even to grant certiorari to review that disturbing legislative favor.[22] In an ironic counterpoint, the Court today places a higher priority on protecting the Republic from the restoration to a large class of litigants of the opportunity to have Article III courts resolve the merits of their claims.

"We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Tex.* v. *Pinson*, 282 U. S. 499, 501 (1931) (Holmes, J.). The three branches must cooperate in order to govern. We should regard favorably, rather than with suspicious hostility, legislation that enables the judiciary to overcome impediments to the performance of its mission of administering justice impartially, even when, as here, this Court has created the impediment.[23] Rigid rules often make good law, but judgments in areas such as the review of potential conflicts among the three coequal branches of the

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[22] See *Atonio* v. *Wards Cove Packing Co.*, 513 U. S. 809 (1994); see also *Landgraf*, 511 U. S., at 258 ("The parties agree that § 402(b) [of the Civil Rights Act of 1991] was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company").

[23] Of course, neither the majority nor I would alter its analysis had Congress, rather than the Court, enacted the *Lampf* rule without any exemption for pending cases, then later tried to remedy such unfairness by enacting § 27A. Thus, the Court's attribution of § 27A to "the legislature's genuine conviction (supported by all the law professors in the land) that *[Lampf]* was wrong," *ante*, at 228, is quite beside the point.

Federal Government partake of art as well as science. That is why we have so often reiterated the insight of Justice Jackson:

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (concurring opinion).

We have the authority to hold that Congress has usurped a judicial prerogative, but even if this case were doubtful I would heed Justice Iredell's admonition in *Calder* v. *Bull*, 3 Dall., at 399, that "the Court will never resort to that authority, but in a clear and urgent case." An appropriate regard for the interdependence of Congress and the judiciary amply supports the conclusion that § 27A(b) reflects constructive legislative cooperation rather than a usurpation of judicial prerogatives.

Accordingly, I respectfully dissent.

Syllabus

SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WHITECOTTON ET AL.

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

No. 94–372. Argued February 28, 1995—Decided April 18, 1995

Respondents, Margaret Whitecotton and her parents, filed a claim for compensation under the National Childhood Vaccine Injury Act of 1986, alleging that Margaret had suffered encephalopathy as a result of her vaccination against diphtheria, pertussis, and tetanus (DPT). Under the Act, a claimant who, like Margaret, does not attempt to prove actual causation must make out a prima facie case by showing that "the first symptom or manifestation of the onset . . . of any . . . [listed] condition . . . occurred within the time period after vaccine administration set forth in the Vaccine Injury Table." 42 U. S. C. § 300aa–11(c)(1)(C)(i). That table specifies a 3-day period for encephalopathy following a DPT vaccination. § 300aa–14(a). The Special Master ruled that Margaret had failed to make out a prima facie case, finding, *inter alia*, that by the time she received her vaccination she was "clearly microcephalic," that this condition evidenced pre-existing encephalopathy, and that, accordingly, "the first symptom or manifestation" of her condition's onset had occurred before her vaccination and the 3-day table period. The Court of Federal Claims affirmed, but the Court of Appeals for the Federal Circuit reversed, holding, among other things, that a claimant satisfies the table requirements whenever she shows that any symptom or manifestation of a listed condition occurred within the table time period, even if there was evidence of the condition before the vaccination.

Held: A claimant who shows that she experienced symptoms of an injury after receiving a vaccination does not make out a prima facie case for compensation under the Act where the evidence fails to indicate that she had no symptoms of that injury before the vaccination. The Court of Appeals' assertion that the Act does not "expressly state" that a claimant relying on the table must show that the child sustained no injury prior to her vaccination—*i. e.*, that the first symptom of the injury occurred after vaccination—simply does not square with § 300aa–11(c)(1)(C)(i)'s plain language. If a symptom or manifestation of a table injury has occurred before the vaccination, a symptom or manifestation thereafter cannot be the first, or signal the injury's onset. There cannot be two first symptoms or onsets of the same injury. Thus, a demonstration that the claimant experienced symptoms of an injury during

the table period, while necessary, is insufficient to make out a prima facie case. The claimant must also show that no evidence of the injury appeared before the vaccination. The Court of Appeals misread language in §§ 300aa–14(a), 300aa–14(b)(2), and 300aa–13(a)(2)(B) in coming to the contrary conclusion. Pp. 273–276.

17 F. 3d 374, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which BREYER, J., joined, *post,* p. 276.

Irving L. Gornstein argued the cause for petitioner. With him on the briefs were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Barbara C. Biddle, Richard A. Olderman,* and *Karen P. Hewitt.*

Robert T. Moxley argued the cause for respondents. With him on the brief were *Richard Gage, Peter H. Meyers,* and *John S. Capper IV.**

JUSTICE SOUTER delivered the opinion of the Court.

The question in this case is whether a claimant who shows that she experienced symptoms of an injury after receiving a vaccination makes out a prima facie case for compensation under the National Childhood Vaccine Injury Act of 1986, 100 Stat. 3755, 42 U. S. C. § 300aa–1 *et seq.* (1988 ed. and Supp. V), where the evidence fails to indicate that she had no symptoms of that injury before the vaccination. We hold that the claimant does not make out a case for compensation.

I

For injuries and deaths traceable to vaccinations, the Act establishes a scheme of recovery designed to work faster and with greater ease than the civil tort system. H. R. Rep.

**Stephan E. Lawton* and *Anne M. Dellinger* filed a brief for the American Academy of Pediatrics as *amicus curiae* urging reversal.

Curtis R. Webb filed a brief for Dissatisfied Parents Together et al. as *amici curiae* urging affirmance.

No. 99–908, pp. 3–7 (1986). Special masters in the Court of Federal Claims hear vaccine-related complaints, 42 U. S. C. § 300aa–12(c) (1988 ed., Supp. V), which they adjudicate informally, § 300aa–12(d)(2), within strict time limits, § 300aa–12(d)(3)(A), subject to similarly expeditious review, § 300aa–12(e)(2). A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any *de novo* civil action in state or federal court. 42 U. S. C. § 300aa–11(a) (1988 ed. and Supp. V).

The streamlining does not stop with the mechanics of litigation, but goes even to substantive standards of proof. While a claimant may establish prima facie entitlement to compensation by introducing proof of actual causation, § 300aa–11(c)(1)(C)(ii), she can reach the same result by meeting the requirements of what the Act calls the Vaccine Injury Table. The table lists the vaccines covered under the Act, together with particular injuries or conditions associated with each one. 42 U. S. C. § 300aa–14 (1988 ed., Supp. V). A claimant who meets certain other conditions not relevant here makes out a prima facie case by showing that she (or someone for whom she brings a claim) "sustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table in association with [a] vaccine . . . or died from the administration of such vaccine, and the first symptom or manifestation of the onset or of the significant aggravation of any such illness, disability, injury, or condition or the death occurred within the time period after vaccine administration set forth in the Vaccine Injury Table." 42 U. S. C. § 300aa–11(c)(1)(C)(i). Thus, the rule of prima facie proof turns the old maxim on its head by providing that if the *post hoc* event happens fast, *ergo propter hoc.* The Secretary of Health and Human Services may rebut a prima facie case by proving that the injury or death was in fact caused by "factors unre-

lated to the administration of the vaccine . . . ." § 300aa–13(a)(1)(B). If the Secretary fails to rebut, the claimant is entitled to compensation. 42 U. S. C. § 300aa–13(a)(1) (1988 ed. and Supp. V).

Respondents, Margaret Whitecotton and her parents, filed a claim under the Act for injuries Margaret allegedly sustained as a result of vaccination against diphtheria, pertussis, and tetanus (or DPT) on August 18, 1975, when she was nearly four months old. They alleged that Margaret (whom we will refer to as claimant) had suffered encephalopathy after the DPT vaccination, and they relied on the table scheme to make out a prima facie case. The Act defines encephalopathy as "any significant acquired abnormality of, or injury to, or impairment of function of the brain," 42 U. S. C. § 300aa–14(b)(3)(A), and lists the condition on the Vaccine Injury Table in association with the DPT vaccine. Under the Act, a claimant who does not prove actual causation must show that "the first symptom or manifestation of the onset or of the significant aggravation" of encephalopathy occurred within three days of a DPT vaccination in order to make out a prima facie right to compensation. § 300aa–11(c)(1)(C)(i); 42 U. S. C. § 300aa–14(a) (1988 ed., Supp. V).

The Special Master found that claimant had suffered clonic seizures on the evening after her vaccination and again the following morning, App. to Pet. for Cert. 24a, 27a, and accepted those seizures as symptoms of encephalopathy. He also found, however, that by the time claimant received the vaccination she was "clearly microcephalic" (meaning that she had a head size more than two standard deviations below the mean for a girl her age) and that her microcephaly was a symptom or evidence of encephalopathy that existed before the vaccination. *Id.*, at 32a–33a. Accordingly, the Master concluded that the first symptom or manifestation of the onset of claimant's encephalopathy had occurred before the vaccination and the ensuing 3-day period provided for in the table. *Id.*, at 34a.

The Master then considered whether the series of seizures was "the first symptom or manifestation . . . of [a] significant aggravation" of the claimant's encephalopathy, 42 U. S. C. § 300aa–11(c)(1)(C)(i), and again decided that it was not. The Act defines "significant aggravation" as "any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." § 300aa–33(4). The Master found that "[t]here is nothing to distinguish this case from what would reasonably have been expected considering [claimant's] microcephaly. . . . [T]here was nothing that occurred in temporal relationship to the DPT vaccination which indicates that it is more likely than not that the vaccine permanently aggravated her condition. . . . [T]he seizures did not continue and there was no dramatic turn for the worse in her condition . . . . Thus, there is no basis for implicating the vaccine as the cause of any aspect of [claimant's] present condition." App. to Pet. for Cert. 41a–43a. Because he found that claimant had failed to satisfy the table requirements, and had not tried to prove actual causation, the Master denied her compensation for failure to make out a prima facie case.

The Court of Federal Claims found the Master's decision neither arbitrary nor otherwise unlawful, see 42 U. S. C. § 300aa–12(e)(2) (1988 ed., Supp. V), and affirmed. The Court of Appeals for the Federal Circuit then reversed, holding that a claimant satisfies the table requirements for the "first symptom or manifestation of the onset" of an injury whenever she shows that any symptom or manifestation of a listed condition occurred within the time period after vaccination specified in the table, even if there was evidence of the condition before the vaccination. Because claimant here showed symptoms of encephalopathy during the 3-day period after her DPT vaccination, the Court of Appeals concluded for that reason alone that she had made out a prima facie entitlement to recovery. 17 F. 3d 374, 376–377 (1994).

The Court of Appeals went on to say that the Secretary had failed to rebut this prima facie case because she had not shown that claimant's encephalopathy was caused by "factors unrelated to the administration of the vaccine," 42 U. S. C. § 300aa–13(a)(1)(B). The Court of Appeals relied on the provision that a "facto[r] unrelated" cannot include an "idiopathic" condition, § 300aa–13(a)(2)(A), which the court read to mean that even when the Secretary can point to a specific factor, unrelated to the vaccine, as the source of a claimant's injury, she does not defeat a prima facie case when the cause of the identified factor is itself unknown. Taking the Secretary to have relied on claimant's microcephaly as the unrelated factor (or as associated with it), the court ruled the Secretary's evidence insufficient on the ground that the cause of microcephaly is unknown. 17 F. 3d, at 377–378.*

We granted certiorari to address the Court of Appeals's construction of the Act's requirements for making and rebutting a prima facie case. 513 U. S. 959 (1994). Because we hold that the court erroneously construed the provisions defining a prima facie case under the Act, we reverse without reaching the adequacy of the Secretary's rebuttal.

II

The Court of Appeals declared that nowhere does the Act "expressly state" that a claimant relying on the table to establish a prima facie case for compensation must show "that the child sustained no injury prior to administration of the vaccine," that is, that the first symptom of the injury

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*The Court of Appeals's language can also be read as casting doubt on the Special Master's conclusion that claimant's microcephaly evidenced a pre-existing encephalopathy. We express no view as to the validity of that conclusion.

The Secretary has recently issued new regulations that may affect the Court of Appeals's definition of an idiopathic condition in future cases. These regulations apply only to petitions for compensation filed after March 10, 1995, and accordingly have no application to the present case. 60 Fed. Reg. 7678–7696 (1995).

occurred after vaccination. 17 F. 3d, at 376. This statement simply does not square with the plain language of the statute. In laying out the elements of a prima facie case, the Act provides that a claimant relying on the table (and not alleging significant aggravation) must show that "the first symptom or manifestation of the onset . . . of [her table illness] . . . occurred within the time period after vaccine administration set forth in the Vaccine Injury Table." § 300aa–11(c)(1)(C)(i). If a symptom or manifestation of a table injury has occurred before a claimant's vaccination, a symptom or manifestation after the vaccination cannot be the first, or signal the injury's onset. There cannot be two first symptoms or onsets of the same injury. Thus, a demonstration that the claimant experienced symptoms of an injury during the table period, while necessary, is insufficient to make out a prima facie case. The claimant must also show that no evidence of the injury appeared before the vaccination.

In coming to the contrary conclusion, the Court of Appeals relied on language in the table, which contains the heading, "Time period for first symptom or manifestation of onset . . . after vaccine administration." 42 U. S. C. § 300aa–14(a) (1988 ed., Supp. V). The Court of Appeals saw a "significant" distinction, 17 F. 3d, at 376, between this language and that of 42 U. S. C. § 300aa–11(c)(1)(C)(i), which is set forth above. We do not. The key to understanding the heading is the word "onset." Since the symptom or manifestation occurring after the vaccination must be evidence of the table injury's onset, an injury manifested before the vaccination could qualify only on the theory that it could have two onsets, one before the vaccination, one after it. But it cannot: one injury, one onset. Indeed, even if the language of the heading did conflict with the text of § 300aa–11(c)(1)(C)(i), the latter would prevail, since the table heading was obviously meant to be a short form of the text preceding it.

The Court of Appeals sought to shore up the contrary conclusion with two further arguments. As the court read the Act, Congress "expressly made the absence of preexisting injury an element of the prima facie case" for residual seizure disorder (another table injury), 17 F. 3d, at 376; thus, the court reasoned, Congress had implicitly rejected any need to negate the pre-existence of other injuries like encephalopathy. This argument rests on a misreading of the language in question. The statutory notes explaining the table provide that a claimant "may be considered to have suffered a residual seizure disorder if [she] did not suffer a seizure or convulsion unaccompanied by fever or accompanied by a fever of less than 102 degrees Fahrenheit before the first seizure or convulsion after the administration of the vaccine involved . . . ." § 300aa–14(b)(2). But this is not the language that requires a claimant alleging a seizure disorder to demonstrate the absence of pre-existing symptoms. This provision specifies instead that certain types of seizures (those accompanied by a high fever) may not be considered symptoms of residual seizure disorder, and, so, do not preclude a prima facie case even when a claimant suffered them before vaccination. The language carries no implication about a claimant's burden generally and does nothing to undermine Congress's global provision that a claimant who has actually suffered symptoms of a listed injury before vaccination cannot make out a prima facie case of the injury's onset after vaccination.

Finally, we cannot accept the Court of Appeals's argument that because the causal "factors unrelated" on which the Secretary may rely to defeat a prima facie case can include occurrences before vaccination, see § 300aa–13(a)(2)(B), such occurrences cannot bar the establishment of a prima facie case in the first instance. The "factors unrelated" provision is wholly independent of the first-symptom and onset provisions, serving the distinct purpose of allowing the Secretary to defeat a claim even when an injury has not manifested

itself before vaccination. It does not relieve a claimant of the clear statutory requirements for making out a prima facie case.

III

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

It is so ordered.

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

Margaret Whitecotton was born in 1975 with a condition known as microcephaly, defined commonly (but not universally) as a head size smaller than two standard deviations below the norm. At the age of four months, she received a diphtheria, pertussis, and tetanus (DPT) vaccination. Prior to receiving her vaccine, Margaret had never had a seizure. The day after receiving her vaccine, she suffered a series of seizures that required three days of hospitalization. Over the next five years, Margaret had intermittent seizures. She now has cerebral palsy and hip and joint problems and cannot communicate verbally. In 1990, Margaret's parents applied for compensation for her injuries under the National Childhood Vaccine Injury Act of 1986. The Special Master denied compensation, and the Court of Federal Claims agreed. The Court of Appeals for the Federal Circuit reversed, 17 F. 3d 374 (1994), finding that the Whitecottons had made out a prima facie case for compensation.

Although I join the Court's opinion rejecting the Court of Appeals' reading of the pertinent statutory provision, I write separately to make two points. First, I wish to indicate an additional factor supporting my conclusion that the Court of Appeals' reading of 42 U. S. C. § 300aa–11(c)(1)(C)(i) is inconsistent with congressional intent. Second, I wish to underscore the limited nature of the question the Court decides.

Examining the language of § 300aa–11(c)(1)(C)(i), the Court properly rejects the Court of Appeals' determination that a claimant may make out a prima facie "onset" case simply by proving that she experienced a symptom of a "table illness" within the specified period after receiving a vaccination. *Ante,* at 273–274. To establish a table case, the statute requires that a claimant prove by a preponderance of the evidence either (1) that she suffered the first symptom or manifestation of the onset of a table condition within the period specified in the table or (2) that she suffered the first symptom or manifestation of a significant aggravation of a pre-existing condition within the same period. As the Court rightly concludes, proof that the claimant suffered *a* symptom within the period is necessary but not sufficient to satisfy either burden; the word "first" is significant and requires that the claimant demonstrate that the postvaccine symptom, whether of onset or of significant aggravation, was in fact the very first such manifestation.

The Court relies on a commonsense consideration of the words "first" and "onset" in reaching this conclusion: "If a symptom or manifestation of a table injury has occurred before a claimant's vaccination, a symptom or manifestation after the vaccination cannot be the first, or signal the injury's onset." *Ante,* at 274. I find equally persuasive the observation that the Court of Appeals' reading deprives the "significant aggravation" language in the provision of all meaningful effect. The term "significant aggravation" is defined in the statute to mean "any change for the worse in a preexisting condition which results in markedly greater disability, pain, or illness accompanied by substantial deterioration of health." 42 U. S. C. § 300aa–33(4). If, as the Court of Appeals determined, a claimant makes out an "onset" case any time she can demonstrate that *any* symptom occurred within the relevant period, all cases in which children experience postvaccine symptoms within the table period become "onset" cases. The phrase "significant aggravation,"

and any limitations Congress sought to impose by including language like "*markedly* greater disability" and "*substantial deterioration* of health," are altogether lost.

To the extent possible, we adhere to "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 340 (1994) (internal quotation marks omitted); *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 562 (1990). The construction adopted by the Court of Appeals contravenes this principle. Our reading gives effect to the "onset" and the "significant aggravation" language while according "first" its commonsense meaning.

Today's decision is quite limited. The Court of Appeals had no occasion to address the Whitecottons' challenges to the Special Master's factual findings with respect to their daughter's condition. We assume, *arguendo*, the soundness of his conclusions that Margaret Whitecotton suffered a pre-existing encephalopathy that was manifested by her prevaccine microcephaly. But this may not be the case, and the Whitecottons of course may challenge these findings as clearly erroneous on remand. The Court of Appeals also did not address the Whitecottons' argument, rejected by the Special Master, that their daughter suffered a significant aggravation of whatever pre-existing condition she may have had as a result of the vaccine. This factual challenge appears to be open as well, as does a challenge to the legal standard used by the Special Master to define "significant aggravation."

We also do not pass on the Secretary's argument that the Court of Appeals misstated petitioner's burden under 42 U. S. C. § 300aa–13(a)(1)(B) (1988 ed. and Supp. V) in rebutting a claimant's prima facie case. Given our holding with respect to the claimant's burden, it is speculative at this time whether any effort on our part to evaluate the Court of Appeals' approach to the "facto[r] unrelated" standard will find

concrete application in this case. That said, the approach taken by the Court of Appeals, under which the Secretary may not point to an underlying condition that predated use of a vaccine and obviously caused a claimant's ill health, if the cause of that underlying condition is unknown, may well warrant our attention in the future.

Syllabus

FREIGHTLINER CORP. ET AL. *v.* MYRICK ET AL.

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

No. 94–286. Argued February 22, 1995—Decided April 18, 1995

In separate state common-law suits, respondents alleged that the absence of an antilock braking system (ABS) in tractor-trailers manufactured by petitioners constituted a negligent design defect that caused accidents injuring one respondent and killing another's spouse. The District Court granted summary judgments for petitioners, holding that respondents' claims were pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966 (Act) and by the National Highway Traffic Safety Administration's Standard 121, even though the applicable portion of that standard had previously been suspended by the Ninth Circuit. Among other things, the Act forbids any State to "establish, or continue in effect," a motor vehicle safety standard "[w]henever a Federal . . . standard . . . is in effect" with respect to "the same aspect of performance," 15 U. S. C. § 1392(d), while Standard 121 imposed vehicle stability requirements and truck stopping distances shorter than those that could be achieved with brakes lacking ABS. The Eleventh Circuit consolidated the cases and reversed, holding that respondents' claims were not expressly pre-empted under Circuit precedent and were not impliedly pre-empted due to a conflict between state law and the federal regulatory scheme.

Held:

1. Respondents' lawsuits are not expressly pre-empted. Because of Standard 121's suspension, there is simply no "minimum," § 1391(2), "objective," § 1392(a), federal standard addressing stopping distances or vehicle stability for trucks. States thus remain free to "establish, or continue in effect," their own safety standards concerning those "aspects of performance." § 1392(d). Moreover, the absence of regulation cannot itself constitute regulation in this instance. The lack of a federal standard did not result from an affirmative decision of officials to refrain from regulating brakes, but from the decision of a federal court that the Government had not compiled sufficient evidence to justify its regulations. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 178, distinguished. Pp. 286–287.

2. Because respondents' common-law actions do not conflict with federal law, they cannot be pre-empted by implication. This Court has found implied conflict pre-emption where it is "impossible for a private

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party to comply with both state and federal requirements," *English* v. *General Elec. Co.*, 496 U. S. 72, 79, or where state law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives," *Hines* v. *Davidowitz*, 312 U. S. 52, 67. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 518, distinguished. First, it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Act or its regulations currently regulates the use of ABS devices. Second, a finding of liability against petitioners would undermine no federal objectives or purposes with respect to such devices, since none exist absent a promulgated federal standard. Pp. 287–290.

13 F. 3d 1516, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., concurred in the judgment.

Charles Fried argued the cause for petitioners. With him on the briefs were *Richard G. Taranto*, *Edgar A. Neely III*, *Richard B. North, Jr.*, *James A. Jacobson*, and *Cindy F. Wile.*

Paul R. Q. Wolfson argued the cause for the United States as *amicus curiae* in support of respondents. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, *Deputy Solicitor General Kneedler*, *Douglas N. Letter*, *Paul D. Scott*, *Paul M. Geier*, and *Phillip R. Recht.*

Michael H. Gottesman argued the cause for respondents. With him on the brief were *Arthur H. Bryant*, *Leslie A. Brueckner*, *Robert M. Weinberg*, *Andrew D. Roth*, *James E. Carter*, *Raymond Brooks*, and *Charles A. Mathis, Jr.**

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*Briefs of *amici curiae* urging reversal were filed for the American Automobile Manufacturers Association et al. by *David M. Heilbron* and *Leslie G. Landau;* for the American Trucking Associations, Inc., et al. by *Kenneth S. Geller*, *Erika Z. Jones*, *John J. Sullivan*, *Daniel R. Barney*, *Lynda S. Mounts*, and *Jan S. Amundson;* for the Product Liability Advisory Council, Inc., by *Malcolm E. Wheeler* and *Richard P. Barkley;* and for the Truck Trailer Manufacturers Association by *Glen M. Darbyshire.*

Briefs of *amicus curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White* and *Larry S. Stew-*

JUSTICE THOMAS delivered the opinion of the Court.

By statute, the Secretary of Transportation has the authority to issue appropriate safety standards for motor vehicles and their equipment. Respondents filed lawsuits under state common law alleging negligent design defects in equipment manufactured by petitioners. Petitioners claim that these actions are pre-empted by a federal safety standard, even though the standard was suspended by a federal court. We hold that the absence of a federal standard cannot implicitly extinguish state common law.

I

This case arises from two separate but essentially identical accidents in Georgia involving tractor-trailers. In both cases, 18-wheel tractor-trailers attempted to brake suddenly and ended up jackknifing into oncoming traffic. Neither vehicle was equipped with an antilock braking system (ABS).[1] In the first case, respondent Ben Myrick was the driver of an oncoming vehicle that was hit by a tractor-trailer manufactured by petitioner Freightliner. The accident left him permanently paraplegic and brain damaged. In the second case, the driver of an oncoming car, Grace Lindsey, was killed when her vehicle collided with a tractor-trailer manufactured by petitioner Navistar.

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art; for the National Conference of State Legislatures et al. by *Richard Ruda* and *James I. Crowley;* and for Public Citizen, Inc., by *Alan B. Morrison, Cornish F. Hitchcock,* and *David C. Vladeck.*

[1] ABS "helps prevent loss of control situations by automatically controlling the amount of braking pressure applied to a wheel. With these systems, the Electronic Control Unit (ECU) monitors wheel-speeds, and changes in wheel-speeds, based on electric signals transmitted from sensors located at the wheels or within the axle housings. If the wheels start to lock, the ECU signals a modulator control valve to actuate, thereby reducing the amount of braking pressure applied to the wheel that is being monitored." 57 Fed. Reg. 24213 (1992).

Respondents independently sued the manufacturers of the tractor-trailers under state tort law. They alleged that the absence of ABS was a negligent design that rendered the vehicles defective. Petitioners removed the actions to the District Court for the Northern District of Georgia on the basis of diversity of citizenship. They then sought summary judgment on the ground that respondents' claims were pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act or Act), Pub. L. 89–563, 80 Stat. 718, as amended, 15 U. S. C. § 1381 *et seq.*, and its implementing regulations. In respondent Myrick's case, the District Court held that the claims were pre-empted by federal law and granted summary judgment for petitioner Freightliner. *Myrick* v. *Fruehauf Corp.*, 795 F. Supp. 1139 (ND Ga. 1992). Following the opinion in the Myrick case, the District Court granted summary judgment in the Lindsey action in favor of petitioner Navistar.

The Court of Appeals for the Eleventh Circuit consolidated the cases and reversed. *Myrick* v. *Freuhauf Corp.*, 13 F. 3d 1516 (1994). It held that under its previous decision in *Taylor* v. *General Motors Corp.*, 875 F. 2d 816 (CA11 1989), cert. denied, 494 U. S. 1065 (1990), the state-law tort claims were not expressly pre-empted. The Court of Appeals rejected petitioners' alternative argument that the claims were pre-empted due to a conflict between state law and the federal regulatory scheme. We granted certiorari, 513 U. S. 922 (1994). We now affirm.

II

In 1966, Congress enacted the Safety Act "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U. S. C. § 1381. The Act requires the Secretary of Transportation to establish "appropriate Federal motor vehicle safety standards." § 1392(a). The Act defines a safety standard as "a minimum standard for

motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." § 1391(2).

The Safety Act's express pre-emption clause provides:

> "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard." § 1392(d).

The Act also contains a saving clause, which states: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." § 1397(k).

The Secretary has delegated the authority to promulgate safety standards to the Administrator of the National Highway Traffic Safety Administration (NHTSA). 49 CFR § 1.50(a) (1994). In 1970, the predecessor to NHTSA issued regulations concerning vehicles equipped with air brakes, which are used in trucks and tractor-trailers. Known as Standard 121, this regulation imposed stopping distances and vehicle stability requirements for trucks. See 36 Fed. Reg. 3817 (1971).[2] Because these stopping distances were

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[2] Standard 121 required air-brake equipped vehicles to stop within certain distances at various speeds without deviating from a 12-foot-wide lane, and without any wheel lock-up. 49 CFR § 571.121 S5.3.1 (1972). The initial stopping distance requirement from 60 miles per hour was 217 feet on a dry surface. The regulation also established brake actuation and release times, as well as other aspects of brake performance. *Ibid.*

shorter than those that could be achieved with brakes without ABS, several manufacturers notified NHTSA that ABS devices would be required. Some manufacturers asked NHTSA to alter the standard itself because they believed that ABS devices were unreliable and rendered vehicles dangerously unsafe when combined with new, more effective brakes. In 1974, NHTSA responded that Standard 121 was practical and that ABS devices did not cause accidents. See generally *Paccar, Inc.* v. *NHTSA*, 573 F. 2d 632, 637–638 (CA9), cert. denied, 439 U. S. 862 (1978).

Several manufacturers and trade associations then sought review of Standard 121 in the Court of Appeals for the Ninth Circuit. That court remanded the case to NHTSA because "a careful review of the extensive record" indicated that "the Standard was neither reasonable nor practicable at the time it was put into effect." 573 F. 2d, at 640. The court found that NHTSA had failed to consider the high failure rate of ABS devices placed in actual use, *id.*, at 642, and that "there [was] a strong probability that [ABS] has created a potentially more hazardous highway situation than existed before the Standard became operative," *id.*, at 643. Until NHTSA compiled sufficient evidence to show that ABS would not create the possibility of greater danger, the court concluded, the Standard would remain suspended. *Ibid.*

After the Ninth Circuit's decision in *Paccar*, the agency amended Standard 121 so that the stopping distance and lock-up requirements no longer applied to trucks and trailers. NHTSA nevertheless left the unamended Standard 121 in the Code of Federal Regulations so that "the affected sections [could] most easily be reinstated" when the agency met *Paccar*'s requirements. 44 Fed. Reg. 46849 (1979). NHTSA also stated that the provisions would remain in place so that manufacturers would know "what the agency still considers to be reasonable standards for minimum acceptable performance." *Ibid.* Although NHTSA has developed new stopping distance standards, to this day it still

has not taken final action to reinstate a safety standard governing the stopping distance of trucks and trailers.

III

Despite the fact that Standard 121 remains suspended, petitioners maintain that respondents' lawsuits are expressly pre-empted. We disagree. The Act's pre-emption clause applies only "[w]henever a Federal motor vehicle safety standard . . . is in effect" with respect to "the same aspect of performance" regulated by a state standard. 15 U. S. C. § 1392(d). There is no express federal standard addressing stopping distances or vehicle stability for trucks or trailers. No NHTSA regulation currently establishes a "minimum standard for . . . motor vehicle equipment performance," § 1391(2), nor is any standard "stated in objective terms," § 1392(a). There is simply no minimum, objective standard stated at all. Therefore, States remain free to "establish, or to continue in effect," their own safety standards concerning those "aspect[s] of performance." § 1392(d).

Petitioners insist, however, that the absence of regulation itself constitutes regulation. Relying upon our opinion in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151 (1978), petitioners assert that the failure of federal officials " 'affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.' " *Id.*, at 178 (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 774 (1947). Unlike this case, however, we found in *Ray* that Congress intended to centralize all authority over the regulated area in one decisionmaker: the Federal Government. 435 U. S., at 177. Here, there is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the

minimum, objective safety standard required by 15 U. S. C. § 1392(a) should be the absence of all standards, both federal and state.[3] Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.

IV

Even if § 1392(d) does not expressly extinguish state tort law, petitioners argue that respondents' lawsuits are pre-empted by implication because the state-law principle they seek to vindicate would conflict with federal law. We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English* v. *General Elec. Co.*, 496 U. S. 72, 78–79 (1990), or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," *id.*, at 79, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

A

As an initial matter, we must address the argument that we need not reach the conflict pre-emption issue at all. According to respondents and the Court of Appeals, *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992), held that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute. This argument is without merit. In *Cipollone* we did hold that the

[3] Because no federal safety standard exists, we need not reach respondents' argument that the term "standard" in 15 U. S. C. § 1392(d) pre-empts only state statutes and regulations, but not common law. We also need not address respondents' claim that the saving clause, § 1397(k), does not permit a manufacturer to use a federal safety standard to immunize itself from state common-law liability.

pre-emptive scope of the two statutes at issue was governed by the language in each Act. That conclusion rested on a familiar canon of statutory construction and on the absence of any reason to infer any broader pre-emption. Instead of announcing a categorical rule precluding the coexistence of express and implied pre-emption, however, the relevant passage in the opinion stated:

> "In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' *Malone* v. *White Motor Corp.*, 435 U. S., at 505, 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. *California Federal Savings & Loan Assn.* v. *Guerra*, 479 U. S. 272, 282 (1987) (opinion of MARSHALL, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn." *Id.*, at 517.

The fact that an express definition of the pre-emptive reach of a statute "implies"—*i. e.*, supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption. Indeed, just two paragraphs after the quoted passage in *Cipollone*, we

engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act, 79 Stat. 282, as amended, 15 U. S. C. § 1331 *et seq.*, and found "no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions." 505 U. S., at 518. Our subsequent decisions have not read *Cipollone* to obviate the need for analysis of an individual statute's pre-emptive effects. See, *e. g.*, *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 673, n. 12 (1993) ("We reject petitioner's claim of implied 'conflict' pre-emption . . . on the basis of the preceding analysis"). At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

B

Petitioners' pre-emption argument is ultimately futile, however, because respondents' common-law actions do not conflict with federal law. First, it is not impossible for petitioners to comply with both federal and state law because there is simply no federal standard for a private party to comply with. Nothing in the Safety Act or its regulations currently regulates the use of ABS devices. As Standard 121 imposes no requirements either requiring or prohibiting ABS systems, tractor-trailer manufacturers are free to obey state standards concerning stopping distances and vehicle stability.

Second, we cannot say that the respondents' lawsuits frustrate "the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, *supra*, at 67. In the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all. Further, Standard 121 currently has nothing to say concerning ABS devices one way or the other, and NHTSA has not ordered truck manufacturers to refrain from using ABS devices. A finding of liability against petitioners would undermine no

federal objectives or purposes with respect to ABS devices, since none exist.

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

It is so ordered.

JUSTICE SCALIA concurs in the judgment.

Syllabus

HEINTZ ET AL. *v.* JENKINS

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

No. 94–367. Argued February 21, 1995—Decided April 18, 1995

Petitioner Heintz is a lawyer representing a bank that sued respondent Jenkins to recover the balance due on her defaulted car loan. After a letter from Heintz listed the amount Jenkins owed as including the cost of insurance bought by the bank when she reneged on her promise to insure the car, Jenkins brought this suit against Heintz and his law firm under the Fair Debt Collection Practices Act, which forbids "debt collector[s]" to make false or misleading representations and to engage in various abusive and unfair practices. The District Court dismissed the suit, holding that the Act does not apply to lawyers engaging in litigation. The Court of Appeals disagreed and reversed.

Held: The Act must be read to apply to lawyers engaged in consumer debt-collection litigation for two rather strong reasons. First, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings meets the Act's definition of "debt collector": one who "regularly collects or attempts to collect, directly or indirectly, [consumer] debts owed . . . another," 15 U. S. C. § 1692a(6). Second, although an earlier version of that definition expressly excluded "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client," Congress repealed this exemption in 1986 without creating a narrower, litigation-related, exemption to fill the void. Heintz's arguments for nonetheless inferring the latter type of exemption—(1) that many of the Act's requirements, if applied directly to litigation activities, will create harmfully anomalous results that Congress could not have intended; (2) that a postenactment statement by one of the 1986 repeal's sponsors demonstrates that, despite the removal of the earlier blanket exemption, the Act still does not apply to lawyers' litigating activities; and (3) that a nonbinding "Commentary" by the Federal Trade Commission's staff establishes that attorneys engaged in sending dunning letters and other traditional debt-collection activities are covered by the Act, while those whose practice is limited to legal activities are not—are unconvincing. Pp. 294–299.

25 F. 3d 536, affirmed.

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

George W. Spellmire argued the cause for petitioners. With him on the briefs were *D. Kendall Griffith*, *Bruce L. Carmen*, and *David M. Schultz.*

Daniel A. Edelman argued the cause for respondent. With him on the brief were *Joanne S. Faulkner* and *Richard J. Rubin.**

JUSTICE BREYER delivered the opinion of the Court.

The issue before us is whether the term "debt collector" in the Fair Debt Collection Practices Act, 91 Stat. 874, 15 U. S. C. §§ 1692–1692*o* (1988 ed. and Supp. V), applies to a lawyer who "regularly," *through litigation*, tries to collect consumer debts. The Court of Appeals for the Seventh Circuit held that it does. We agree with the Seventh Circuit and we affirm its judgment.

The Fair Debt Collection Practices Act prohibits "debt collector[s]" from making false or misleading representations and from engaging in various abusive and unfair practices. The Act says, for example, that a "debt collector" may not use violence, obscenity, or repeated annoying phone calls, 15 U. S. C. § 1692d; may not falsely represent "the character, amount, or legal status of any debt," § 1692e(2)(A); and may not use various "unfair or unconscionable means to collect or attempt to collect" a consumer debt, § 1692f. Among other things, the Act sets out rules that a debt collector must follow for "acquiring location information" about the debtor, § 1692b; communicating about the debtor (and the

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *George E. Bushnell;* for the Commercial Law League of America by *Manuel H. Newburger* and *Barbara M. Barron;* and for the National Association of Retail Collection Attorneys by *Ronald S. Canter* and *Rosalie B. Levinson.*

Robert J. Hobbs, *Joan S. Wise*, *Deborah M. Zuckerman*, and *Alan Alop* filed a brief for the National Consumer Law Center, Inc., et al. as *amici curiae* urging affirmance.

Andrew Rosen filed a brief for Sherry Ann Edwards as *amicus curiae.*

debt) with third parties, § 1692c(b); and bringing "[l]egal actions," § 1692i. The Act imposes upon "debt collector[s]" who violate its provisions (specifically described) "[c]ivil liability" to those whom they, *e. g.*, harass, mislead, or treat unfairly. § 1692k. The Act also authorizes the Federal Trade Commission (FTC) to enforce its provisions. § 1692*l*(a). The Act's definition of the term "debt collector" includes a person "who regularly collects or attempts to collect, directly or indirectly, debts owed [to] . . . another." § 1692a(6). And, it limits "debt" to consumer debt, *i. e.*, debts "arising out of . . . transaction[s]" that "are primarily for personal, family, or household purposes." § 1692a(5).

The plaintiff in this case, Darlene Jenkins, borrowed money from the Gainer Bank in order to buy a car. She defaulted on her loan. The bank's law firm then sued Jenkins in state court to recover the balance due. As part of an effort to settle the suit, a lawyer with that law firm, George Heintz, wrote to Jenkins' lawyer. His letter, in listing the amount she owed under the loan agreement, included $4,173 owed for insurance, bought by the bank because she had not kept the car insured as she had promised to do.

Jenkins then brought this Fair Debt Collection Practices Act suit against Heintz and his firm. She claimed that Heintz's letter violated the Act's prohibitions against trying to collect an amount not "authorized by the agreement creating the debt," § 1692f(1), and against making a "false representation of . . . the . . . amount . . . of any debt," § 1692e(2)(A). The loan agreement, she conceded, required her to keep the car insured "'against loss or damage'" and permitted the bank to buy such insurance to protect the car should she fail to do so. App. to Pet. for Cert. 17. But, she said, the $4,173 substitute policy was not the kind of policy the loan agreement had in mind, for it insured the bank not only against "loss or damage" but also against her failure to repay the bank's car loan. Hence, Heintz's "representation"

about the "amount" of her "debt" was "false"; amounted to an effort to collect an "amount" not "authorized" by the loan agreement; and thus violated the Act.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the District Court dismissed Jenkins' Fair Debt Collection lawsuit for failure to state a claim. The court held that the Act does not apply to lawyers engaging in litigation. However, the Court of Appeals for the Seventh Circuit reversed the District Court's judgment, interpreting the Act to apply to litigating lawyers. 25 F. 3d 536 (1994). The Seventh Circuit's view in this respect conflicts with that of the Sixth Circuit. See *Green* v. *Hocking*, 9 F. 3d 18 (1993) *(per curiam)*. We granted certiorari to resolve this conflict. 513 U. S. 959 (1994). And, as we have said, we conclude that the Seventh Circuit is correct. The Act does apply to lawyers engaged in litigation.

There are two rather strong reasons for believing that the Act applies to the litigating activities of lawyers. *First*, the Act defines the "debt collector[s]" to whom it applies as including those who "regularly collec[t] or attemp[t] to collect, directly or indirectly, [consumer] debts owed or due or asserted to be owed or due another." § 1692a(6). In ordinary English, a lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly "attempts" to "collect" those consumer debts. See, *e. g.*, Black's Law Dictionary 263 (6th ed. 1990) ("To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings").

Second, in 1977, Congress enacted an earlier version of this statute, which contained an express exemption for lawyers. That exemption said that the term "debt collector" did not include "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub. L. 95–109, § 803(6)(F), 91 Stat. 874, 875. In 1986, however, Congress repealed this exemption in its entirety, Pub. L. 99–361, 100 Stat. 768, without creating a narrower, litigation-

related, exemption to fill the void. Without more, then, one would think that Congress intended that lawyers be subject to the Act whenever they meet the general "debt collector" definition.

Heintz argues that we should nonetheless read the statute as containing an implied exemption for those debt-collecting activities of lawyers that consist of litigating (including, he assumes, settlement efforts). He relies primarily on three arguments.

First, Heintz argues that many of the Act's requirements, if applied directly to litigating activities, will create harmfully anomalous results that Congress simply could not have intended. We address this argument in light of the fact that, when Congress first wrote the Act's substantive provisions, it had for the most part exempted litigating attorneys from the Act's coverage; that, when Congress later repealed the attorney exemption, it did not revisit the wording of these substantive provisions; and that, for these reasons, some awkwardness is understandable. Particularly when read in this light, we find Heintz's argument unconvincing.

Many of Heintz's "anomalies" are not particularly anomalous. For example, the Sixth Circuit pointed to § 1692e(5), which forbids a "debt collector" to make any "threat to take action that cannot legally be taken." The court reasoned that, were the Act to apply to litigating activities, this provision automatically would make liable any litigating lawyer who brought, and then lost, a claim against a debtor. *Green*, *supra*, at 21. But, the Act says explicitly that a "debt collector" may not be held liable if he "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." § 1692k(c). Thus, even if we were to assume that the suggested reading of § 1692e(5) is correct, we would not find the result so absurd as to warrant implying an exemption for litigating lawyers. In any event, the assumption

would seem unnecessary, for we do not see how the fact that a lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an "action that cannot legally be taken."

The remaining significant "anomalies" similarly depend for their persuasive force upon readings that courts seem unlikely to endorse. For example, Heintz's strongest "anomaly" argument focuses upon the Act's provisions governing "[c]ommunication in connection with debt collection." § 1692c. One of those provisions requires a "debt collector" not to "communicate further" with a consumer who "notifies" the "debt collector" that he or she "refuses to pay" or wishes the debt collector to "cease further communication." § 1692c(c). In light of this provision, asks Heintz, how can an attorney file a lawsuit against (and thereby communicate with) a nonconsenting consumer or file a motion for summary judgment against that consumer?

We agree with Heintz that it would be odd if the Act empowered a debt-owing consumer to stop the "communications" inherent in an ordinary lawsuit and thereby cause an ordinary debt-collecting lawsuit to grind to a halt. But, it is not necessary to read § 1692c(c) in that way—if only because that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor"). §§ 1692c(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact, "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. We need not authoritatively interpret the Act's conduct-regulating provisions now, however. Rather, we rest our

conclusions upon the fact that it is easier to read § 1692c(c) as containing some such additional, implicit, exception than to believe that Congress intended, silently and implicitly, to create a far broader exception, for all litigating attorneys, from the Act itself.

Second, Heintz points to a statement of Congressman Frank Annunzio, one of the sponsors of the 1986 amendment that removed from the Act the language creating a blanket exemption for lawyers. Representative Annunzio stated that, despite the exemption's removal, the Act still would not apply to lawyers' litigating activities. Representative Annunzio said that the Act

> "regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act, not because of attorney[s'] conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act. . . . The act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them." 132 Cong. Rec. 30842 (1986).

This statement, however, does not persuade us.

For one thing, the plain language of the Act itself says nothing about retaining the exemption in respect to litigation. The line the statement seeks to draw between "legal" activities and "debt collection" activities was not necessarily apparent to those who debated the legislation, for litigating, at first blush, seems simply one way of collecting a debt. For another thing, when Congress considered the Act, other Congressmen expressed fear that repeal would limit lawyers' "ability to contact third parties in order to facilitate settlements" and "could very easily interfere with a client's right to pursue judicial remedies." H. R. Rep. No. 99–405, p. 11

(1985) (dissenting views of Rep. Hiler). They proposed alternative language designed to keep litigation activities outside the Act's scope, but that language was not enacted. *Ibid.* Further, Congressman Annunzio made his statement not during the legislative process, but *after* the statute became law. It therefore is not a statement upon which other legislators might have relied in voting for or against the Act, but it simply represents the views of one informed person on an issue about which others may (or may not) have thought differently.

Finally, Heintz points to a "Commentary" on the Act by the FTC's staff. It says:

> "Attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the [Act], but *those whose practice is limited to legal activities are not covered.*" Federal Trade Commission—Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50100 (1988) (emphasis added; footnote omitted).

We cannot give conclusive weight to this statement. The Commentary of which this statement is a part says that it "is not binding on the Commission or the public." *Id.*, at 50101. More importantly, we find nothing either in the Act or elsewhere indicating that Congress intended to authorize the FTC to create this exception from the Act's coverage—an exception that, for the reasons we have set forth above, falls outside the range of reasonable interpretations of the Act's express language. See, *e. g.*, *Brown* v. *Gardner*, 513 U. S. 115, 120–122 (1994); see also *Fox* v. *Citicorp Credit Servs., Inc.*, 15 F. 3d 1507, 1513 (CA9 1994) (FTC staff's statement conflicts with Act's plain language and is therefore not entitled to deference); *Scott* v. *Jones*, 964 F. 2d 314, 317 (CA4 1992) (same).

For these reasons, we agree with the Seventh Circuit that the Act applies to attorneys who "regularly" engage in consumer-debt-collection activity, even when that activity consists of litigation. Its judgment is therefore

Affirmed.

Syllabus

CELOTEX CORP. *v.* EDWARDS ET UX.

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

No. 93–1504. Argued December 6, 1994—Decided April 19, 1995

The United States District Court for the Northern District of Texas entered a judgment in favor of respondents and against petitioner Celotex Corp. To stay execution of the judgment pending appeal, petitioner posted a supersedeas bond, with an insurance company (Northbrook) serving as surety. After the Fifth Circuit affirmed the judgment, Celotex filed for Chapter 11 bankruptcy in the Bankruptcy Court for the Middle District of Florida. Exercising its equitable powers under 11 U. S. C. § 105(a), the Bankruptcy Court issued an injunction, which, in pertinent part, prohibited judgment creditors from proceeding against sureties without the Bankruptcy Court's permission. Respondents thereafter filed a motion pursuant to Federal Rule of Civil Procedure 65.1 in the Northern District of Texas seeking permission to execute against Northbrook on the bond. The District Court granted the motion. The Fifth Circuit affirmed and later denied Celotex's petition for rehearing, rejecting the argument that its decision allowed a collateral attack on the Bankruptcy Court order.

Held: Respondents must obey the Bankruptcy Court's injunction. The well-established rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, 386, applies to bankruptcy cases, *Oriel* v. *Russell*, 278 U. S. 358. A bankruptcy court has jurisdiction over proceedings "arising under," "arising in," or "related to" a Chapter 11 case. 28 U. S. C. §§ 1334(b) and 157(a). The "related to" language must be read to grant jurisdiction over more than simply proceedings involving the debtor's property or the estate. Respondents' immediate execution on the bond is at least a question "related to" Celotex's bankruptcy. While the proceeding against Northbrook does not directly involve Celotex, the Bankruptcy Court found that allowing respondents and other bonded judgment creditors to execute immediately on the bonds would have a direct and substantial adverse effect on Celotex's ability to undergo a successful Chapter 11 reorganization. The fact that Federal Rule of Civil Procedure 65.1 provides an expedited procedure for executing on supersedeas bonds does not mean that such a procedure cannot be stayed by a law-

fully entered injunction. *Board of Governors, FRS* v. *MCorp Financial, Inc.*, 502 U. S. 32, distinguished. The issue whether the Bankruptcy Court properly issued the injunction need not be addressed here. Since it is for the court of first instance to determine the question of the validity of the law, and since its orders are to be respected until its decision is reversed, respondents should have challenged the injunction in the Bankruptcy Court rather than collaterally attacking the injunction in the Texas federal courts. Pp. 306–313.

6 F. 3d 312, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 313.

Jeffrey W. Warren argued the cause for petitioner. With him on the briefs were *John R. Bush*, *Christine M. Polans*, *Baldo M. Carnecchia, Jr.*, *Stephen A. Madva*, and *Howard J. Bashman.*

Brent M. Rosenthal argued the cause for respondents. With him on the brief was *Frederick M. Baron.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The United States Court of Appeals for the Fifth Circuit held that respondents should be allowed to execute against petitioner's surety on a supersedeas bond posted by petitioner where the judgment which occasioned the bond had become final. It so held even though the United States Bankruptcy Court for the Middle District of Florida previously had issued an injunction prohibiting respondents

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**Robert B. Millner* and *Lorie A. Chaiten* filed a brief for Northbrook Property and Casualty Insurance Co. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White*, *J. Conard Metcalf*, and *Larry S. Stewart;* and for the New York Clearing House Association by *Richard H. Klapper* and *James S. Rubin.*

Larry L. Simms filed a brief for Aetna Casualty and Surety Co. as *amicus curiae.*

from executing on the bond without the Bankruptcy Court's permission. We hold that respondents were obligated to obey the injunction issued by the Bankruptcy Court.

I

In 1987 respondents Bennie and Joann Edwards filed suit in the United States District Court for the Northern District of Texas against petitioner Celotex Corporation (and others) alleging asbestos-related injuries. In April 1989 the District Court entered a $281,025.80 judgment in favor of respondents and against Celotex. To stay execution of the judgment pending appeal, Celotex posted a supersedeas bond in the amount of $294,987.88, with Northbrook Property and Casualty Insurance Company serving as surety on the bond. As collateral for the bond, Celotex allowed Northbrook to retain money owed to Celotex under a settlement agreement resolving insurance coverage disputes between Northbrook and Celotex.

The United States Court of Appeals for the Fifth Circuit affirmed, issuing its mandate on October 12, 1990, and thus rendering "final" respondents' judgment against Celotex. *Edwards* v. *Armstrong World Industries, Inc.*, 911 F. 2d 1151 (1990). That same day, Celotex filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.[1] The filing of the petition automatically stayed both the continuation of "proceeding[s] against" Celotex and the commencement of "any act to obtain possession of property" of Celotex.[2] 11 U. S. C. §§ 362(a)(1) and (3).

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[1] For purposes of this case, we assume respondents' judgment became final before Celotex filed its petition in bankruptcy.

[2] As of the filing date, more than 141,000 asbestos-related bodily injury lawsuits were pending against Celotex, and over 100 asbestos-related bodily injury cases were in some stage of appeal, with judgments totaling nearly $70 million being stayed by supersedeas bonds that Celotex had posted.

On October 17, 1990, the Bankruptcy Court exercised its equitable powers under 11 U. S. C. § 105(a) and issued an injunction (hereinafter Section 105 Injunction) to augment the protection afforded Celotex by the automatic stay. In pertinent part, the Section 105 Injunction stayed all proceedings involving Celotex "regardless of . . . whether the matter is on appeal and a supersedeas bond has been posted by [Celotex]." App. to Pet. for Cert. A–28.[3] Respondents, whose bonded judgment against Celotex had already been affirmed on appeal, filed a motion pursuant to Federal Rule of Civil Procedure 65.1 in the District Court seeking permission to execute against Northbrook on the supersedeas bond. Both Celotex and Northbrook opposed this motion, asserting that all proceedings to enforce the bonds had been enjoined by the Bankruptcy Court's Section 105 Injunction. Celotex brought to the District Court's attention the fact that, since respondents had filed their Rule 65.1 motion, the Bankruptcy Court had reaffirmed the Section 105 Injunction and made clear that the injunction prohibited judgment creditors like respondents from proceeding against sureties without the Bankruptcy Court's permission:

> "Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105

[3] The Bankruptcy Court noted that, upon request of a party in interest and following 30 days' written notice and a hearing, it would "consider granting relief from the restraints imposed" by the Section 105 Injunction. App. to Pet. for Cert. A–28. Several of Celotex's bonded judgment creditors whose cases were still on appeal filed motions requesting that the Bankruptcy Court lift the Section 105 Injunction (1) to enable their pending appellate actions to proceed and (2) to permit them to execute upon the bonds once the appellate process concluded in their favor. The Bankruptcy Court granted the first request but denied the second. *In re Celotex*, 128 B. R. 478, 484 (1991) *(Celotex I)*.

> stay entered by this Court." *In re Celotex*, 128 B. R. 478, 485 (1991) *(Celotex I)*.

Despite the Bankruptcy Court's reaffirmation and clarification of the Section 105 Injunction, the District Court allowed respondents to execute on the bond against Northbrook.[4]

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[4] Two days after the District Court entered its order, the Bankruptcy Court ruled on motions to lift the Section 105 Injunction that had been filed by several bonded judgment creditors who, like respondents, had prevailed against Celotex on appeal. The Bankruptcy Court again reaffirmed the Section 105 Injunction and it again explained that the injunction prohibited judgment creditors like respondents from executing on the supersedeas bonds against third parties without its permission. *In re Celotex*, 140 B. R. 912, 914 (1992) *(Celotex II)*. It refused to lift the Section 105 Injunction at that time, finding that Celotex would suffer irreparable harm. It reasoned that if the judgment creditors were allowed to execute against the sureties on the supersedeas bonds, the sureties would in turn seek to lift the Section 105 Injunction to reach Celotex's collateral under the settlement agreements, possibly destroying any chance of a successful reorganization plan. See *id.*, at 914–915.

To protect the bonded judgment creditors, the Bankruptcy Court ordered that: (1) the sureties involved, including Northbrook, establish escrow accounts sufficient to insure full payment of the bonds; (2) Celotex create an interest-bearing reserve account or increase the face amount of any supersedeas bond to cover the full amount of judgment through confirmation; and (3) Celotex provide in any plan that the bonded claimants' claims be paid in full unless otherwise determined by the court or agreed by the claimant. *Id.*, at 917. The Bankruptcy Court also directed Celotex to file "any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety on any supersedeas bond within 60 days of the entry" of its order. *Ibid.* Accordingly, Celotex filed an adversary proceeding against respondents, 227 other similarly situated bonded judgment creditors in over 100 cases, and the sureties on the supersedeas bonds, including Northbrook. See Second Amended Complaint in *Celotex Corp.* v. *Allstate Ins. Co.*, Adversary No. 92–584 (Bkrtcy. Ct. MD Fla.). In that proceeding, Celotex asserts that the bonded judgment creditors should not be able to execute on their bonds because, by virtue of the collateralization of the bonds, the bonded judgment creditors are beneficiaries of Celotex asset transfers that are voidable as preferences and fraudulent transfers. See *ibid.* Celotex also

Celotex appealed, and the Fifth Circuit affirmed. *Edwards* v. *Armstrong World Industries, Inc.*, 6 F. 3d 312 (1993) *(Edwards II)*. It first held that, because the appellate process for which the supersedeas bond was posted had been completed, Celotex no longer had a property interest in the bond and the automatic stay provisions of 11 U. S. C. § 362 therefore did not prevent respondents from executing against Northbrook. 6 F. 3d, at 315–317. The court then acknowledged that "[t]he jurisdiction of bankruptcy courts has been extended to include stays on proceedings involving third parties under the auspices of 28 U. S. C. § 1334(b)," *id.*, at 318, and that the Bankruptcy Court itself had ruled that the Section 105 Injunction enjoined respondents' proceeding against Northbrook to execute on the supersedeas bond. *Ibid.* The Fifth Circuit nevertheless disagreed with the merits of the Bankruptcy Court's Section 105 Injunction, holding that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." *Id.*, at 320. The court reasoned that the Section 105 Injunction was "manifestly unfair" and an "unjust result" because the supersedeas bond was posted "to cover precisely the type of eventuality which occurred in this case, insolvency of the judgment debtor." *Id.*, at 319. In concluding that the Section 105 Injunction was improper, the Fifth Circuit expressly disagreed with the reasoning and result of *Willis* v. *Celotex Corp.*, 978 F. 2d 146 (1992), cert. denied, 507 U. S. 1030 (1993), where the Court of Appeals for the Fourth Circuit, examining the same Section 105 Injunction, held that the Bankruptcy Court had the power under 11 U. S. C. § 105(a) to stay proceedings against sureties on the supersedeas bonds. 6 F. 3d, at 320.

Celotex filed a petition for rehearing, arguing that the Fifth Circuit's decision allowed a collateral attack on an

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contends that the punitive damages portions of the judgments can be voided or subordinated on other bankruptcy law grounds. See *ibid.* This adversary proceeding is currently pending in the Bankruptcy Court.

order of the Bankruptcy Court sitting under the jurisdiction of the Court of Appeals for the Eleventh Circuit. The Fifth Circuit denied the petition, stating in part that "we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have appellate jurisdiction, was right." *Id.*, at 321. Because of the conflict between the Fifth Circuit's decision in this case and the Fourth Circuit's decision in *Willis*, we granted certiorari. 511 U. S. 1105 (1994). We now reverse.

II

Respondents acknowledge that the Bankruptcy Court's Section 105 Injunction prohibited them from attempting to execute against Northbrook on the supersedeas bond posted by Celotex. Brief in Opposition 6, n. 2 (recognizing that the Section 105 Injunction "was intended to, and did, enjoin collection attempts like those made by [respondents] against Northbrook in this case"). In *GTE Sylvania, Inc.* v. *Consumers Union of United States, Inc.*, 445 U. S. 375, 386 (1980), we reaffirmed the well-established rule that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." In *GTE Sylvania*, we went on to say:

> "There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining orders and preliminary and permanent injunctions. Nor were those equitable decrees challenged as only a frivolous pretense to validity, although of course there is disagreement over whether the District Court erred in issuing the permanent injunction. Under these circumstances, the CPSC was required to obey the injunctions out of respect for judicial process." *Id.*, at 386–387 (internal quotation marks, citations, and footnote omitted).

This rule was applied in the bankruptcy context more than 60 years ago in *Oriel* v. *Russell*, 278 U. S. 358 (1929), where the Court held that turnover orders issued under the old bankruptcy regime could not be collaterally attacked in a later contempt proceeding. Respondents acknowledge the validity of the rule but contend that it has no application here. They argue that the Bankruptcy Court lacked *jurisdiction* to issue the Section 105 Injunction, though much of their argument goes to the correctness of the Bankruptcy Court's decision to issue the injunction rather than to its jurisdiction to do so.

The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute. Title 28 U. S. C. § 1334(b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." The district courts may, in turn, refer "any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . to the bankruptcy judges for the district." 28 U. S. C. § 157(a). Here, the Bankruptcy Court's jurisdiction to enjoin respondents' proceeding against Northbrook must be based on the "arising under," "arising in," or "related to" language of §§ 1334(b) and 157(a).

Respondents argue that the Bankruptcy Court had jurisdiction to issue the Section 105 Injunction only if their proceeding to execute on the bond was "related to" the Celotex bankruptcy. Petitioner argues the Bankruptcy Court indeed had such "related to" jurisdiction. Congress did not delineate the scope of "related to"[5] jurisdiction, but its choice

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[5] Proceedings "related to" the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U. S. C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate. See 1 Collier on Bankruptcy ¶ 3.01[1][c][iv], p. 3–28 (15th ed. 1994). The first type of "related to" proceeding involves a claim like the state-law breach of contract action at issue in *Northern*

of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. See S. Rep. No. 95–989, pp. 153–154 (1978). We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc.* v. *Higgins*, 743 F. 2d 984 (1984), that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," *id.*, at 994; see also H. R. Rep. No. 95–595, pp. 43–48 (1977), and that the "related to" language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate. We also agree with that court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless. See *Pacor*, *supra*, at 994; cf. *Board of Governors, FRS* v. *MCorp Financial, Inc.*, 502 U. S. 32, 40 (1991) (stating that Congress has vested "limited authority" in bankruptcy courts).[6]

Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982). The instant case involves the second type of "related to" proceeding.

[6] In attempting to strike an appropriate balance, the Third Circuit in *Pacor, Inc.* v. *Higgins*, 743 F. 2d 984 (1984), devised the following test for determining the existence of "related to" jurisdiction:

"The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. . . . Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*, at 994 (emphasis in original; citations omitted).

The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation. See *In re G. S. F. Corp.*, 938 F. 2d 1467, 1475 (CA1 1991); *A. H. Robins Co.* v. *Pic-*

We believe that the issue whether respondents are entitled to immediate execution on the bond against Northbrook is at least a question "related to" Celotex's bankruptcy.[7] Admittedly, a proceeding by respondents against Northbrook on the supersedeas bond does not directly involve Celotex, except to satisfy the judgment against it secured by the bond. But to induce Northbrook to serve as surety on the bond,

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cinin, 788 F. 2d 994, 1002, n. 11 (CA4), cert. denied, 479 U. S. 876 (1986); *In re Wood*, 825 F. 2d 90, 93 (CA5 1987); *Robinson* v. *Michigan Consol. Gas Co.*, 918 F. 2d 579, 583–584 (CA6 1990); *In re Dogpatch U. S. A., Inc.*, 810 F. 2d 782, 786 (CA8 1987); *In re Fietz*, 852 F. 2d 455, 457 (CA9 1988); *In re Gardner*, 913 F. 2d 1515, 1518 (CA10 1990); *In re Lemco Gypsum, Inc.*, 910 F. 2d 784, 788, and n. 19 (CA11 1990). The Second and Seventh Circuits, on the other hand, seem to have adopted a slightly different test. See *In re Turner*, 724 F. 2d 338, 341 (CA2 1983); *In re Xonics, Inc.*, 813 F. 2d 127, 131 (CA7 1987); *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F. 2d 746, 749 (CA7 1989). But whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor.

[7] The dissent agrees that respondents' proceeding to execute on the supersedeas bond is "related to" Celotex's bankruptcy, *post*, at 318, n. 5, but noting that "only the district court has the power [under 28 U. S. C. § 157(c)(1)] to enter 'any final order or judgment'" in related "[n]on-core proceedings," *post*, at 321–322, the dissent concludes that the Bankruptcy Court here did not possess sufficient "related to" jurisdiction to issue the Section 105 Injunction, *post*, at 322. The Section 105 Injunction, however, is only an *interlocutory stay* which respondents have yet to challenge. See *infra*, at 313. Thus, the Bankruptcy Court did not lack jurisdiction under § 157(c)(1) to issue the Section 105 Injunction because that injunction was not a "final order or judgment."

In any event, respondents have waived any claim that the granting of the Section 105 Injunction was a noncore proceeding under § 157(c)(1). Respondents base their arguments solely on 28 U. S. C. § 1334, and concede in their brief that the "bankruptcy court had subject matter jurisdiction to issue orders affecting the bond, then, only if the proceedings on the bond were 'related' to the Celotex bankruptcy itself within the meaning of § 1334(b)." Brief for Respondents 22. We conclude, and the dissent agrees, that those proceedings are so related. See *post*, at 317–318, and n. 5. We thus need not (and do not) reach the question whether the granting of the Section 105 Injunction was a "core" proceeding.

Celotex agreed to allow Northbrook to retain the proceeds of a settlement resolving insurance coverage disputes between Northbrook and Celotex. The Bankruptcy Court found that allowing respondents—and 227 other bonded judgment creditors—to execute immediately on the bonds would have a direct and substantial adverse effect on Celotex's ability to undergo a successful reorganization. It stated:

> "[I]f the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse." *In re Celotex,* 140 B. R. 912, 915 (1992) *(Celotex II)*.

In light of these findings by the Bankruptcy Court, it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bankruptcy courts may extend more broadly in the former case than in the latter. Cf. *Continental Ill. Nat. Bank & Trust Co.* v. *Chicago, R. I. & P. R. Co.,* 294 U. S. 648, 676 (1935). And we think our holding—that respondents' *immediate* execution on the supersedeas bond is at least "related to" the Celotex bankruptcy—is in accord with representative recent decisions of the Courts of Appeals. See, *e. g., American Hardwoods, Inc.* v. *Deutsche Credit Corp.,* 885 F. 2d 621, 623 (CA9 1989) (finding "related to" jurisdiction where enforcement of state-court judgment

by creditor against debtor's guarantors would affect administration of debtor's reorganization plan); cf. *MacArthur Co.* v. *Johns-Manville Corp.*, 837 F. 2d 89, 93 (CA2) (noting that a bankruptcy court's injunctive powers under § 105(a) allow it to enjoin suits that "might impede the reorganization process"), cert. denied, 488 U. S. 868 (1988); *In re A. H. Robins Co.*, 828 F. 2d 1023, 1024–1026 (CA4 1987) (affirming Bankruptcy Court's § 105(a) injunction barring products liability plaintiffs from bringing actions against debtor's insurers because such actions would interfere with debtor's reorganization), cert. denied *sub nom.*, 485 U. S. 969 (1988).[8]

Respondents, relying on our decision in *Board of Governors, FRS* v. *MCorp Financial, Inc.*, 502 U. S. 32 (1991), contend that § 1334(b)'s statutory grant of jurisdiction must be reconciled and harmonized with Federal Rule of Civil Procedure 65.1, which provides an expedited procedure for executing on supersedeas bonds. In *MCorp*, we held that the grant of jurisdiction in § 1334(b) to district courts sitting in bankruptcy did not authorize an injunction against a regulatory proceeding, but there we relied on "the specific preclusive language" of 12 U. S. C. § 1818(i)(1), which stated that "'no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order.'" 502 U. S., at 39, 42. There is no analogous statutory prohibition against enjoining the maintenance of a proceeding under Rule 65.1. That Rule provides:

> "Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form

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[8] We recognize the theoretical possibility of distinguishing between the proceeding to execute on the bond in the Fifth Circuit and the § 105 stay proceeding in the Bankruptcy Court in the Eleventh Circuit. One might argue, technically, that though the proceeding to execute on the bond is "related to" the Title 11 case, the stay proceeding "arises under" Title 11, or "arises in" the Title 11 case. See *In re Monroe Well Serv., Inc.*, 67 B. R. 746, 753 (Bkrtcy. Ct. ED Pa. 1986). We need not and do not decide this question here.

> of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. . . ."

This Rule outlines a streamlined *procedure* for executing on bonds. It assures judgment creditors like respondents that they do not have to bring a separate action against sureties, and instead allows them to collect on the supersedeas bond by merely filing a motion. Just because the Rule provides a simplified procedure for collecting on a bond, however, does not mean that such a procedure, like the more complicated procedure of a full-fledged lawsuit, cannot be stayed by a lawfully entered injunction.

Much of our discussion dealing with the *jurisdiction* of the Bankruptcy Court under the "related to" language of §§ 1334(b) and 157(a) is likewise applicable in determining whether or not the Bankruptcy Court's Section 105 Injunction has "only a frivolous pretense to validity." *GTE Sylvania*, 445 U. S., at 386 (internal quotation marks and citation omitted). The Fourth Circuit has upheld the merits of the Bankruptcy Court's Section 105 Injunction, see *Willis*, 978 F. 2d, at 149–150, and even the Fifth Circuit in this case did not find "that the bankruptcy court in Florida was necessarily wrong." See *Edwards II*, 6 F. 3d, at 321. But we need not, and do not, address whether the Bankruptcy Court acted properly in issuing the Section 105 Injunction.[9]

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[9] The dissent contends that Celotex's attempts to set aside the supersedeas bond are "patently meritless" because none of Celotex's claims can impair Northbrook's obligation to respondents. See *post*, at 325. That premise, however, is not so clear as to give the Section 105 Injunction "only a frivolous pretense to validity." There is authority suggesting that, in certain circumstances, transfers from the debtor to another for

We have made clear that "'[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'" *Walker* v. *Birmingham*, 388 U. S. 307, 314 (1967) (quoting *Howat* v. *Kansas*, 258 U. S. 181, 189–190 (1922)). If respondents believed the Section 105 Injunction was improper, they should have challenged it in the Bankruptcy Court, like other similarly situated bonded judgment creditors have done. See *Celotex II*, 140 B. R., at 912. If dissatisfied with the Bankruptcy Court's ultimate decision, respondents can appeal "to the district court for the judicial district in which the bankruptcy judge is serving," see 28 U. S. C. § 158(a), and then to the Court of Appeals for the Eleventh Circuit, see § 158(d). Respondents chose not to pursue this course of action, but instead to collaterally attack the Bankruptcy Court's Section 105 Injunction in the federal courts in Texas. This they cannot be permitted to do without seriously undercutting the orderly process of the law.

The judgment of the Court of Appeals, accordingly, is reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

Today the majority holds that an Article III court erred when it allowed plaintiffs who prevailed on appeal to collect on a supersedeas bond in the face of an injunction issued by a non-Article III judge. Because, in my view, the majority

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the benefit of a third party may be recovered from that third party. See *In re Air Conditioning, Inc. of Stuart*, 845 F. 2d 293, 296–299 (CA11), cert. denied, 488 U. S. 993 (1988); *In re Compton Corp.*, 831 F. 2d 586, 595 (1987), modified on other grounds, 835 F. 2d 584 (CA5 1988). Although we offer no opinion on the merits of that authority or on whether it fits the facts here, it supports our conclusion that the stay was not frivolous.

attaches insufficient weight to the fact that the challenged injunction was issued by a non-Article III judge, I respectfully dissent.

I

The outlines of the problems I perceive are best drawn by starting with an examination of the injunctions and opinions issued by the Bankruptcy Judge in this case. As the majority notes, Bennie and Joann Edwards (the Edwards) won a tort judgment against Celotex Corporation for damages Bennie Edwards suffered as a result of exposure to asbestos. To stay the judgment pending appeal, Celotex arranged for Northbrook Property and Casualty Insurance Company (Northbrook) to post a supersedeas bond to cover the full amount of the judgment. On October 12, 1990, before Celotex filed its voluntary petition under Chapter 11 of the Bankruptcy Code, the Court of Appeals for the Fifth Circuit affirmed the Edwards' judgment against Celotex. It is undisputed that, when the Edwards' judgment was affirmed, any property interest that Celotex retained in the supersedeas bond was extinguished.

The filing of Celotex's bankruptcy petition on October 12, 1990, triggered the automatic stay provisions of the Bankruptcy Code. See 11 U. S. C. § 362(a). On October 17, 1990, the Bankruptcy Judge, acting pursuant to 11 U. S. C. § 105(a),[1] supplemented the automatic stay provisions with an emergency order staying, *inter alia*, all proceedings "involving any of the Debtors [*i. e.*, Celotex]." App. to Pet. for Cert. A–28. The supersedeas bond filed in the Edwards' case, however, evidences an independent obligation on the part of

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[1] Title 11 U. S. C. § 105(a) provides:

"The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

Northbrook. For that reason, neither the automatic stay of proceedings against the debtor pursuant to § 362(a) of the Bankruptcy Code nor the Bankruptcy Judge's October 17, § 105(a) stay restrained the Edwards from proceeding against Northbrook to enforce Northbrook's obligations under the bond. As the Court of Appeals correctly held, the October 17 order enjoined the prosecution of proceedings involving "the Debtors," but did not expressly enjoin the Edwards from proceeding against Northbrook. See *Edwards* v. *Armstrong World Industries, Inc.*, 6 F. 3d 312, 315 (CA5 1993).

On May 3, 1991, the Edwards commenced their proceeding against Northbrook by filing a motion pursuant to Rule 65.1 of the Federal Rules of Civil Procedure[2] to enforce the supersedeas bond. Several weeks later—on June 13, 1991—the Bankruptcy Court entered a new three-paragraph order enjoining all of Celotex's judgment creditors from collecting on their supersedeas bonds. Paragraph 1 of the order addressed creditors whose appellate process had not yet concluded. Paragraph 2 addressed creditors whose appellate process concluded only after Celotex had filed for bankruptcy. Paragraph 3 applied to judgment creditors, such as the Edwards, whose appeals had concluded before the filing of the bankruptcy petition. Paragraph 3 expressly precluded those creditors from proceeding against any bond "without first seeking to vacate the Section 105 stay entered by this Court." *In re Celotex Corp.*, 128 B. R. 478, 485 (Bkrtcy. Ct. MD Fla. 1991).

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[2] Rule 65.1 states:

"Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action."

The opinion supporting that order explained that Paragraphs 1 and 2 rested in part on the theory that the debtor retains a property interest in the supersedeas bonds until the appellate process was complete, and any attempt to collect on those bonds was therefore covered in the first instance by § 362(a)'s automatic stay provisions. The opinion recognized that that rationale did not cover supersedeas bonds posted in litigation with judgment creditors, such as the Edwards, whose appellate process was complete. The Bankruptcy Judge concluded, however, that § 105(a) gave him the power to stay the collection efforts of such bonded judgment creditors. The Bankruptcy Judge contended that other courts had utilized the § 105(a) stay "to preclude actions which may 'impede the reorganization process,'" *id.*, at 483, quoting *In re Johns-Manville Corp.*, 837 F. 2d 89, 93 (CA2), cert. denied, 488 U. S. 868 (1988), or "'which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan,'" 128 B. R., at 483, quoting *A. H. Robins Co.* v. *Piccinin*, 788 F. 2d 994 (CA4), cert. denied, 479 U. S. 876 (1986). But cf. n. 12, *infra*. Apparently viewing his own authority as virtually limitless, the Bankruptcy Judge described a general bankruptcy power "to stop ongoing litigation and to prevent peripheral court decisions from dealing with issues . . . without first allowing the bankruptcy court to have an opportunity to review the potential effect on the debtor." 128 B. R., at 484. He concluded that in "mega" cases in which "potential conflicts with other judicial determinations" might arise, "the powers of the bankruptcy court under Section 105 must in the initial stage be absolute." *Ibid.*

I do not agree that the powers of a bankruptcy judge, a non-Article III judge, "must . . . be absolute" at the initial stage or indeed at any stage. Instead, the jurisdiction and the power of bankruptcy judges are cabined by specific and important statutory and constitutional constraints that operate at every phase of a bankruptcy. In my view, those con-

straints require that the judgment of the Court of Appeals be affirmed.

The majority concludes that the Court of Appeals must be reversed because the Bankruptcy Judge had jurisdiction to issue the injunction and because the injunction had more than a "'frivolous pretense to validity.'" *Ante*, at 312. Even applying the majority's framework, I would affirm the Court of Appeals. As I will demonstrate, the constraints on the jurisdiction and authority of the Bankruptcy Judge compel the conclusion that the Bankruptcy Judge lacked jurisdiction to issue the challenged injunction, and that the injunction has only a "'frivolous pretense to validity.'" I will also explain, however, why the majority's deferential approach seems particularly inappropriate as applied to this particular injunction, now in its fifth year of preventing enforcement of supersedeas bonds lodged in an Article III court.

II

In my view, the Bankruptcy Judge lacked jurisdiction to issue an injunction that prevents an Article III court from allowing a judgment creditor to collect on a supersedeas bond posted in that court by a nondebtor. In reaching the contrary conclusion, the majority relies primarily on the Bankruptcy Judge's "related to" jurisdiction, and thus I will address that basis of jurisdiction first. The majority properly observes that, under 28 U. S. C. § 1334(b), the district court has broad bankruptcy jurisdiction, extending to "all civil proceedings arising under title 11, or arising in or related to cases under title 11."[3] The majority also notes cor-

[3] The full text of § 1334 reads as follows:

"(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

"(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the dis-

rectly that the Edwards' action to enforce the supersedeas bond is within the district court's "related to" jurisdiction,[4] because allowing creditors such as the Edwards "to execute immediately on the bonds would have a direct and substantial adverse effect on Celotex's ability to undergo a successful reorganization." *Ante*, at 310.[5] The majority then ob-

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trict courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

"(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

"(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

"(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U. S. C. § 1334 (1988 ed. and Supp. V).

[4] As § 1334(b) indicates, the district court's "related to" jurisdiction is "original but not exclusive."

[5] I do not take issue with the conclusion that the Edwards' attempt to collect on the supersedeas bond falls within the "related to" jurisdiction of the district court. Cf. 1 Collier on Bankruptcy ¶ 3.01[1][c][iv], p. 3–29 (15th ed. 1994) (hereinafter Collier) (" 'Related' proceedings which involve litigation between third parties, which could have some effect on the administration of the bankruptcy case, are illustrated by suits by creditors against guarantors"). Despite the Edwards' argument to the contrary, it seems to me quite clear that allowing the Edwards to recover from North-

serves that, under 28 U. S. C. § 157(a), the district court may "refe[r]" to the bankruptcy judge "any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11."[6] Thus, the majority concludes that, because the Edwards' action to enforce the

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brook on the supersedeas bond would have an adverse impact on Celotex because Northbrook would then be able to retain the insurance proceeds that Celotex pledged as collateral when the bond was issued. Indeed, I am willing to assume that if all of the bonds were enforced, the reorganization efforts would fail and Celotex would have to be liquidated. In my judgment, however, the specter of liquidation is not an acceptable basis for concluding that a bankruptcy judge, and not just the district court, has jurisdiction to interfere with the performance of a third party's fixed obligation to a judgment creditor.

I also agree with the majority, *ante,* at 308–309, n. 6, that the facts of this case do not require us to resolve whether *Pacor* v. *Higgins,* 743 F. 2d 984 (CA3 1984), articulates the proper test for determining the scope of the district court's "related to" jurisdiction.

[6] The text of § 157 reads in relevant part as follows:

"(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the Bankruptcy Judges for the district.

"(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

. . . . .

"(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the Bankruptcy Judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the Bankruptcy Judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

"(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title."

supersedeas bond was within the District Court's "related to" jurisdiction and because the District Court referred all matters to the Bankruptcy Judge, the Bankruptcy Judge had jurisdiction over the Edwards' action.

In my view, the majority's approach pays insufficient attention to the remaining provisions of § 157, and, more importantly, to the decision of this Court that gave rise to their creation. The current jurisdictional structure of the Bankruptcy Code reflects this Court's decision in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982), which in turn addressed the Bankruptcy Reform Act of 1978, 92 Stat. 2549. The 1978 Act significantly restructured the Bankruptcy Code. The Act created "bankruptcy courts" and vested in them "jurisdiction over all 'civil proceedings arising under title 11 [the Bankruptcy title] or arising in or related to cases under title 11.'" *Northern Pipeline*, 458 U. S., at 54, quoting 28 U. S. C. § 1471(b) (1976 ed., Supp. IV). As the plurality opinion in *Northern Pipeline* observed, "[t]his jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases," involving "claims based on state law as well as those based on federal law." 458 U. S., at 54. The Act also bestowed upon the judges of the bankruptcy courts broad powers to accompany this expanded jurisdiction. See n. 6, *supra; Northern Pipeline*, 458 U. S., at 55. The Act did not, however, make the newly empowered bankruptcy judges Article III judges. In particular, it denied bankruptcy judges the life tenure and salary protection that the Constitution requires for Article III judges. See U. S. Const., Art. III, § 1.

In *Northern Pipeline*, this Court held that the Act was unconstitutional, at least insofar as it allowed a non-Article III court to "entertain and decide" a purely state-law claim. 458 U. S., at 91 (REHNQUIST, J., concurring in judgment); see also *id.*, at 86 (plurality opinion). The plurality opinion distinguished the revamped bankruptcy courts from prior

district court "adjuncts" which the Court had found did not violate Article III. The plurality noted that, in contrast to the narrow, specialized jurisdiction exercised by these prior adjuncts, "the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also 'all civil proceedings arising under title 11 or arising in or related to cases under title 11.'" *Id.*, at 85. In addition, prior adjuncts "engaged in statutorily channeled factfinding functions," while the bankruptcy courts "exercise 'all of the jurisdiction' conferred by the Act on the district courts."[7] *Ibid.*

In response to *Northern Pipeline*, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984 (1984 amendments), 98 Stat. 333. Section 157 was passed as part of the 1984 amendments. Section 157 establishes two broad categories of proceedings: "core proceedings" and "[n]on-core proceedings." For "all core proceedings arising under title 11, or arising in a case under title 11, referred under [§ 157(a)]," § 157(b)(1) permits bankruptcy judges to "hear and determine" the proceedings and to "enter appropriate orders and judgments." For noncore proceedings "otherwise related to a case under title 11," § 157(c)(1) permits the bankruptcy court only to "hear" the proceedings and to "submit proposed findings of fact and conclusions of law to the district court." See 1 Collier ¶ 3.01[1][c][iv], at 3–28 ("[C]ivil proceedings 'related to cases under title 11'" are "excluded from being treated as 'core proceedings' by 28 U. S. C. § 157(b)(1), and are the subject of special procedures contained in section[s] 157(c)(1) and (c)(2)"). For these "related proceedings," 1 Collier ¶ 3.01[1][c][iv], at 3–28, only the

[7] The plurality also noted that, in contrast to the limited powers possessed by prior adjuncts, "the bankruptcy courts exercise all ordinary powers of district courts." 458 U. S., at 85. See n. 6, *supra*.

district court has the power to enter "any final order or judgment."[8]

In my view, the distinction between the jurisdiction to "hear and determine" core proceedings on the one hand and the jurisdiction only to "hear" related proceedings on the other hand is critical, if not dispositive. I believe that the jurisdiction to hear (and yet not to determine) a case under § 157(c)(1) provides insufficient jurisdiction to a bankruptcy judge to permit him to issue a binding injunction that prevents an Article III court from exercising its conceded jurisdiction over the case.[9] The unambiguous text of § 157(c)(1)

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[8] The district court may enter judgment only after *de novo* review of the bankruptcy judge's recommendation with respect to any matters to which one of the parties has raised a timely objection. See 28 U. S. C. § 157(c)(1).

[9] It should be noted that the Bankruptcy Judge's order cannot be upheld on the ground that it purported to enjoin only the Edwards and thus did not enjoin directly the Article III court. First, the Bankruptcy Judge's orders cannot be interpreted so narrowly. The October 17 order enjoined, *inter alia*, "all Entities" from "commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors." App. to Pet. for Cert. A–28. In my view, the word "entities" includes courts. Indeed, the Bankruptcy Judge's order tracks § 362(a)'s automatic stay provisions, which provide, in part, that the automatic stay is applicable "to all entities" and which enjoin "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor." 11 U. S. C. § 362(a)(1). The Courts of Appeals have uniformly held that "entities," as used in § 362, include courts. See, *e. g.*, *Maritime Electric Co.*, 959 F. 2d 1194, 1206 (CA3 1991) ("§ 362's stay is mandatory and 'applicable to all entities', including state and federal courts"); *Pope* v. *Manville Forest Products Corp.*, 778 F. 2d 238, 239 (CA5 1985) ("just the entry of an order of dismissal, even if entered sua sponte, constitutes a judicial act toward the disposition of the case and hence may be construed as a 'continuation' of a judicial proceeding"); *Ellis* v. *Consolidated Diesel Electric Corp.*, 894 F. 2d 371, 372–373 (CA10 1990) (District Court's entry of summary judgment violated § 362(a)'s automatic stay); see also *Maritime Electric Co.*, 959 F. 2d, at 1206 (collecting cases). Cf. 2 Collier ¶ 101.15, at 101–62 to 101–63 ("'Entity' is the broadest of all definitions which relate to bodies or units").

More importantly, though the Bankruptcy Judge's June 13 order enjoins "'the judgment creditor,'" *In re Celotex Corp.*, 128 B. R. 478, 485

requires that the bankruptcy judge's participation in related proceedings be merely advisory rather than adjudicative. In my view, having jurisdiction to grant injunctions over cases that one may not decide is inconsistent with such an advisory role. An injunction is an extraordinary remedy whose impact on private rights may be just as onerous as a final determination. The constitutional concerns that animate the current jurisdictional provisions of the Bankruptcy Code and that deny non-Article III tribunals the power to determine private controversies apply with equal force to the entry of an injunction interfering with the exercise of the admitted jurisdiction of an Article III tribunal.[10]

In sum, my view on the sufficiency of "related to" jurisdiction to sustain the injunction in this case can be stated quite simply: If a bankruptcy judge lacks jurisdiction to "determine" a question, the judge also lacks jurisdiction to issue an injunction that prevents an Article III court, which concededly does have jurisdiction, from determining that ques-

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(Bkrtcy. Ct. MD Fla. 1991), the order clearly has the same practical effect as if it enjoined the court directly. My objection to the majority's approach does not at all depend on whether the order that prevents the Article III court from exercising its jurisdiction does so directly or indirectly. Instead, my view is simply that a Bankruptcy Judge who lacks jurisdiction to decide an issue may not prevent an Article III court that is ready and willing to exercise its conceded jurisdiction from doing so.

[10] In addition, 28 U. S. C. § 1334(c)(2) provides for mandatory abstention in cases involving state-law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. That provision thus makes clear that no order could have been entered over the Edwards' objection if their tort action had been tried in a state rather than a federal court. The Bankruptcy Judge's order, which does not distinguish proceedings to enforce supersedeas bonds that were posted in state-court proceedings, fails to address the implications of this mandatory abstention provision.

I also believe that Congress would have expected bankruptcy judges to show the same deference to federal courts adjudicating state-law claims under diversity jurisdiction, at least when the bankruptcy judge purports to act on the basis of his "related to" jurisdiction and when the federal action can be "timely adjudicated." *Ibid.*

tion.[11] Any conclusion to the contrary would trivialize the constitutional imperatives that shaped the Bankruptcy Code's jurisdictional provisions.[12]

III

Petitioner and the majority rely primarily on "related to" jurisdiction. Indeed, the Court's holding appears to rest almost entirely on the view that a bankruptcy judge has jurisdiction to enjoin proceedings in Article III courts whenever those proceedings are "related to" a pending Title 11 case. See *ante*, at 307–311. Two footnotes in the Court's opinion, however, might be read as suggesting alternative bases of

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[11] I agree with the majority that the Bankruptcy Judge's order is a temporary injunction, and thus it is not a "final order or judgment." *Ante*, at 309, n. 7. The temporary nature of the injunction, however, is irrelevant. As I have stated repeatedly in the text, I believe that a statutory scheme that deprives a bankruptcy judge of jurisdiction to "determine" a case also deprives that judge of jurisdiction to issue binding injunctions—even temporary ones—that would prevent an Article III court with jurisdiction over the case from determining it.

[12] The cases on which the Bankruptcy Judge relied are entirely consistent with my approach, and they provide at most indirect support for his order. In *A. H. Robins Co.* v. *Piccinin*, 788 F. 2d 994, 997 (CA4), cert. denied, 479 U. S. 876 (1986), the challenged injunction was issued by an Article III court ("[T]he district court granted Robins' request for a preliminary injunction"); and in *In re Johns-Manville Corp.*, 837 F. 2d 89, 91–92 (CA2), cert. denied, 488 U. S. 868 (1988), the Court of Appeals found that the Bankruptcy Judge had jurisdiction to enter the injunction in a core proceeding because the insurance policies that were the subject of the injunction were property of the bankruptcy estate. Thus, those cases do not support the present injunction, which was issued by a non-Article III judge and which affects supersedeas bonds that are concededly not property of the debtor's estate.

I also note that in *Willis* v. *Celotex Corp.*, 978 F. 2d 146 (1992), cert. denied, 507 U. S. 1030 (1993), though upholding the very injunction at issue in this case, the Fourth Circuit engaged in no detailed jurisdictional analysis and entirely omitted any discussion of the significance of the Bankruptcy Judge's non-Article III status.

jurisdiction. See *ante,* at 304–305, n. 4, 311, n. 8. Those two footnotes require a brief response.

In footnote 4 of its opinion, the Court refers to two different claims advanced by Celotex in the bankruptcy proceedings: a claim that "the bonded judgment creditors should not be able to execute on their bonds because, by virtue of the collateralization of the bonds, the bonded judgment creditors are beneficiaries of Celotex asset transfers that are voidable as preferences and fraudulent transfers"; and a claim that "the punitive damages portions of the judgments can be voided or subordinated." There is little doubt that those claims are properly characterized as ones "arising under" Title 11 within the meaning of 28 U. S. C. § 1334(b);[13] however, it does not necessarily follow from that characterization that the Bankruptcy Judge had jurisdiction to issue the injunction in support of the prosecution of those claims. Celotex's complaint was not filed until months after the Bankruptcy Judge's injunction issued. The claims raised in that complaint cannot retroactively provide a jurisdictional basis for the Bankruptcy Judge's injunction.

Moreover, Celotex's attempts to set aside the Edwards' supersedeas bond are patently meritless. It strains credu-

[13] "[W]hen a cause of action is one which is created by title 11, then that civil proceeding is one 'arising under title 11.'" 1 Collier ¶ 3.01[1] [c][iii], at 3–26. A perusal of the complaint reveals that Celotex seeks relief under causes of action created by the Bankruptcy Code. See, *e. g.,* Count I (11 U. S. C. § 547(b) (seeking to avoid preferential transfers)); Count III (11 U. S. C. § 548(a)(2)(A) (seeking to avoid constructively fraudulent transfers)); Count IV (11 U. S. C. § 544 (seeking to avoid transactions that would constitute constructively fraudulent transfers under state law)); Count VII (11 U. S. C. § 502 (seeking to disallow punitive damages awards); Count VII (11 U. S. C. § 510(c)(1) (seeking equitable subordination of pending punitive damages awards to the claims of unsecured creditors)). Cf., *e. g.,* 1 Collier ¶ 3.01[1][c][iii], at 3–27 ("[C]ourts interpreting this language have held that 'arising under title 11' includes causes of action to recover fraudulent conveyances"). My acknowledgment of these claims, of course, is not intended as a suggestion that they have merit.

lity, to suggest that a supersedeas bond, posted almost a year and a half before the bankruptcy petition was filed, could be set aside as a preference or as a fraudulent transfer for the benefit of Celotex's adversaries in bitterly contested litigation. Conceivably, Celotex's provision of security to Northbrook might be voidable, but that possibility could not impair the rights of the judgment creditors to enforce the bond against Northbrook even though they might be unwitting beneficiaries of the fraud. That possibility, at most, would be relevant to the respective claims of Northbrook and Celotex to the pledged collateral. Similarly, the fact that the Edwards' judgment included punitive as well as compensatory damages does not provide even an arguable basis for reducing Northbrook's obligations under the supersedeas bond. Even if there is a basis for subordinating a portion of Northbrook's eventual claim against Celotex on "bankruptcy law grounds," that has nothing to do with the Edwards' claim against Northbrook. It thus seems obvious that, at least with respect to the Edwards, Celotex has raised frivolous claims in an attempt to manufacture bankruptcy jurisdiction and thereby to justify a bankruptcy judge's injunction that had been issued over one year earlier. Cf. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191–192 (1909) ("Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction").

In its footnote 8, the Court appears to suggest that the injunction prohibiting the Edwards from proceeding against Northbrook (described in the footnote as the "stay proceeding") may "aris[e] under" Title 11 or may "arise in" the Title 11 case. Perhaps this is accurate in a literal sense: The injunction did, of course, "arise under" Title 11 because 11 U. S. C. § 105(a) created whatever power the Bankruptcy Judge had to issue the injunction. Similarly, the injunction "arises in" the Title 11 case because that is where it originated. It cannot be the law, however, that a bankruptcy

judge has jurisdiction to enter any conceivable order that a party might request simply because § 105(a) authorizes some injunctions or because the request was first made in a pending Title 11 case. Cf. 2 Collier ¶ 105.01[1], at 105–3 (Section 105 "is not an independent source of jurisdiction, but rather it grants the courts flexibility to issue orders which preserve and protect their jurisdiction"). The mere filing of a motion for a § 105 injunction to enjoin a proceeding in another forum cannot be a jurisdictional bootstrap enabling a bankruptcy judge to exercise jurisdiction that would not otherwise exist.

IV

Even if I believed that the Bankruptcy Judge had jurisdiction to issue his injunction, I would still affirm the Court of Appeals because in my view the Bankruptcy Judge's injunction has only a "frivolous pretense to validity."

In 1898, Congress codified the bankruptcy laws. Under the 1898 Bankruptcy Act, most bankruptcy proceedings were conducted by "referees" who resolved controversies involving property in the actual or constructive possession of the court, as well as certain disputes involving property in the possession of third parties. In § 2(a)(15) of the 1898 Act, Congress vested in bankruptcy courts the power to:

> "[M]ake such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act." Act of July 1, 1898, 30 Stat. 546.

In 1938, Congress clarified both the powers and the limitations on the injunctive authority of referees in bankruptcy by adding to the end of § 2(a)(15), "*Provided, however*, That an injunction to restrain a court may be issued by the judge only." 52 Stat. 843 (emphasis in original).

In 1978, through the Bankruptcy Reform Act, Congress significantly revised the Bankruptcy Code and the role of

bankruptcy referees.[14] Though stopping short of making bankruptcy referees Article III judges, Congress significantly increased the status, the duties, and the powers of those referees. For example, as we noted in *Northern Pipeline*, the expanded powers under the new Act included "the power to hold jury trials, . . . to issue declaratory judgments, [and] to issue writs of habeas corpus under certain circumstances." 458 U. S., at 55. In addition, Congress again provided for broad injunctive powers. Thus, for example, in the place of § 2(a)(15), Congress added 11 U. S. C. § 105, which provided in relevant part: "The [bankruptcy court] may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." See also 458 U. S., at 55 ("Congress has allowed bankruptcy judges the power . . . to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction"). Once again, however, along with both this marked expansion of the power of bankruptcy judges and the broad delegation of injunctive authority, Congress indicated its intent to limit the power of those judges to enjoin other courts: Although Congress provided that "[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty," it also provided that bankruptcy courts "may not enjoin another court." 28 U. S. C. § 1481 (1982 ed.).[15] Thus, for well over 50 years prior to the adoption of the 1984 amendments to the Bankruptcy Code, it was clear that Congress intended to deny bankruptcy judges the power to enjoin other courts.

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[14] In 1973, bankruptcy "referees" were redesignated as "judges." See *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 53, n. 2 (1982). As did the plurality opinion in *Northern Pipeline*, see *ibid.*, I will continue to refer to all judges under the pre-1978 Act as "referees."

[15] Congress also limited the power of bankruptcy courts to "punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U. S. C. § 1481 (1982 ed.).

The 1984 amendments, *inter alia*, repealed § 1481 (and its express limitation on injunctive authority), leaving § 105 as the only source of the bankruptcy judge's injunctive authority.[16] Given that *Northern Pipeline* required a contraction in the authority of bankruptcy judges,[17] and given that the 1984 amendments regarding the powers of the bankruptcy courts were passed to comply with *Northern Pipeline*,[18] it would be perverse—and in my view "frivolous"—to contend that Congress intended the repeal of § 1481 to operate as an authorization for those judges to enjoin proceedings in other courts, thus significantly expanding the powers of bankruptcy judges.

My view of the consequence of the 1984 amendments is reinforced by the structure of § 1481. When Congress placed restrictions on the injunctive power of the bankruptcy courts, it did so in § 1481, right after the clause granting those courts "the powers of a court of equity, law, and admiralty." In my view, this suggests that Congress saw § 1481—and not § 105(a)—as the source of any power to enjoin other courts. Thus, the removal of § 1481 by the 1984 amendments is properly viewed as eliminating the sole source of congressionally granted authority to enjoin other courts. Cf. *In re Hipp*, 895 F. 2d 1503, 1515–1516 (CA5 1990) (concluding on similar reasoning that § 1481, not § 105(a), was the source of the bankruptcy court's power to punish criminal contempt under the 1978 Act).

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[16] The 1984 amendments also repealed the authorization of bankruptcy judges to act pursuant to the All Writs Act. See 2 Collier ¶ 105.01[1], at 105–3.

[17] The plurality opinion expressly noted its concerns about the bankruptcy judge's exercise of broad injunctive powers. See n. 7, *supra*.

[18] See, *e. g.*, 130 Cong. Rec. 20089 (1984) ("*[Northern Pipeline]* held that the broad powers granted to bankruptcy judges under the Bankruptcy Act of 1978 were judicial powers and violated Article III of the Constitution. The present Bill attempts to cure the problem").

Nor does anything in the 1986 amendments to the Bankruptcy Code alter my analysis.[19] The primary effect of those amendments was to give the bankruptcy judges the power to issue orders *sua sponte*.[20] The 1986 amendments, therefore, do not reflect any expansion of the power of Bankruptcy Judges to enjoin other courts.

The Bankruptcy Judge's error with respect to this injunction thus seems clear, and the injunction falls, therefore, within the exception recognized by the majority for injunctions with only a "frivolous pretense to validity." I recognize, of course, that one may legitimately question the "frivolousness" of the injunction in light of the Fourth Circuit's upholding the very injunction at issue in this case, see *Willis* v. *Celotex Corp.*, 978 F. 2d 146 (1992), cert. denied, 507 U. S. 1030 (1993), and the disagreement of a substantial number of my colleagues. In my view, however, the Bankruptcy Judge's error is sufficiently plain that the Court of Appeals was justified in allowing the Edwards to collect on their bond.[21]

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[19] See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99–554, 100 Stat. 3088. With respect to 11 U. S. C. § 105, the 1986 amendments added the second sentence of the current version of § 105(a). See 100 Stat. 3097.

[20] The only relevant legislative history regarding the changes to § 105(a) is contained in Senator Hatch's view that the amendment "allows a bankruptcy court to take any action on its own, or to make any necessary determination to prevent an abuse of process and to help expedite a case in a proper and justified manner." 132 Cong. Rec. 28610 (1986).

[21] Neither of the cases cited by the majority, *ante*, at 312–313, n. 9, provides any reason to conclude otherwise. As the majority notes, those cases hold that the bankruptcy trustee may recover from a third party (*e. g.*, the Edwards) funds transferred from the debtor (*e. g.*, Celotex) to another (*e. g.*, Northbrook) for the benefit of that third party. Both cases, however, make clear that the obligation of the Northbrook-like guarantor (a bank in each case) to pay the third party was not at issue. See *In re Compton Corp.*, 831 F. 2d 586, 590 (1987) ("[T]he trustee is not attempting to set aside the post petition payments by [the bank] to [the third party] under the letter of credit as a preference"), modified on other grounds, 835

V

The Court's holding today rests largely on its view that the Edwards' proper remedy is to appeal the Bankruptcy Judge's injunction, first to the District Court and then to the Court of Appeals for the Eleventh Circuit. The Court concedes, however, that the Edwards need not do so if the Bankruptcy Judge exceeded his jurisdiction, or if the injunction is supported by nothing more than "a frivolous pretense to validity." *Ante*, at 312. For the reasons already stated, I think both of those conditions are satisfied in this case. The non-Article III Bankruptcy Judge simply lacked both jurisdiction and authority to prevent an Article III court from exercising its unquestioned jurisdiction to decide a matter that is related only indirectly to the bankruptcy proceeding. I think it important, however, to add a few brief words explaining why I find this injunction especially troubling and why the injunction should be viewed with a particularly critical eye.

First, the justification offered by the Bankruptcy Judge should give the Court pause. As originally articulated, the justification for this injunction was that emergency relief was required lest the reorganization of Celotex become impossible and liquidation follow. Apart from the fact that the "emergency" rationale is plainly insufficient to support an otherwise improper injunction that has now lasted for more than four years, the judge's reasoning reveals reliance on the misguided notion that a good end is a sufficient justification for the existence and exercise of power. His reference to the need to exercise "absolute" power to override "potential conflicts with other judicial determinations" that might have a "potential impact on the debtor" should invite far

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F. 2d 584 (CA5 1988); *In re Air Conditioning, Inc. of Stuart*, 845 F. 2d 293, 295–296 (CA11), cert. denied *sub nom. First Interstate Credit Alliance* v. *American Bank of Martin County*, 488 U. S. 993 (1988). Thus, in my view, those cases cannot form the basis for any nonfrivolous argument that Northbrook may avoid its obligation to pay the Edwards.

more exacting scrutiny of his order than the Court deems appropriate.

Second, that the subject of the injunction was a supersedeas bond makes the injunction suspect. A supersedeas bond may be viewed as putting the integrity of the court in which it is lodged on the line. As the Court of Appeals noted, the Edwards were "promised by the court" that the supersedeas bond would be available if they prevailed on appeal. 6 F. 3d, at 320. For that reason, in my opinion, questions relating to the enforceability of a supersedeas bond should generally be answered in the forum in which the bond is posted.

Moreover, whenever possible, such questions should be resolved before the court accepts the bond as security for collection of the judgment being appealed. After a debtor has benefited from the postponement of collection of an adverse judgment, both that debtor and its successors in interest should normally be estopped from asserting that the judgment creditors who relied to their detriment on the validity of the bond had no right to do so. The very purpose of a supersedeas bond is to protect judgment creditors from the risk that insolvency of the debtor may impair their ability to enforce the judgment promptly. When the bond has served the purpose of forestalling immediate levies on the judgment debtor's assets—levies that might have precipitated an earlier bankruptcy—it is inequitable to postpone payment merely because the risk against which the bond was intended to provide protection has actually occurred. See *id.*, at 319 ("It is manifestly unfair to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy"); *In re Southmark*, 138 B. R. 820, 827–828 (Bkrtcy. Ct. ND Tex. 1992) (internal quotation marks omitted) ("The principal risk against which such bonds are intended as a protection is insolvency. To hold

that the very contingency against which they guard shall, if it happens, discharge them, seems to us bad law and worse logic"). The inequity that the Court today condones does not, of course, demonstrate that its legal analysis is incorrect. It does, however, persuade me that the Court should not review this case as though it presented an ordinary collateral attack on an injunction entered by an Article III court.[22] Instead, the Court should, I believe, more carefully consider which of the two competing tribunals is guilty of trespassing in the other's domain.

Accordingly, I respectfully dissent.

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[22] Indeed, one wonders if the same analysis would apply to a bankruptcy judge's injunction that purported to prevent this Court from allowing a successful litigant to enforce a supersedeas bond posted by a nondebtor in this Court pursuant to our Rule 23.4.

Syllabus

McINTYRE, EXECUTOR OF ESTATE OF McINTYRE, DECEASED *v.* OHIO ELECTIONS COMMISSION

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 93–986. Argued October 12, 1994—Decided April 19, 1995

After petitioner's decedent distributed leaflets purporting to express the views of "CONCERNED PARENTS AND TAX PAYERS" opposing a proposed school tax levy, she was fined by respondent for violating § 3599.09(A) of the Ohio Code, which prohibits the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature. The Court of Common Pleas reversed, but the Ohio Court of Appeals reinstated the fine. In affirming, the State Supreme Court held that the burdens § 3599.09(A) imposed on voters' First Amendment rights were "reasonable" and "nondiscriminatory" and therefore valid. Declaring that § 3599.09(A) is intended to identify persons who distribute campaign materials containing fraud, libel, or false advertising and to provide voters with a mechanism for evaluating such materials, the court distinguished *Talley* v. *California*, 362 U. S. 60, in which this Court invalidated an ordinance prohibiting all anonymous leafletting.

Held: Section 3599.09(A)'s prohibition of the distribution of anonymous campaign literature abridges the freedom of speech in violation of the First Amendment. Pp. 341–357.

(a) The freedom to publish anonymously is protected by the First Amendment, and, as *Talley* indicates, extends beyond the literary realm to the advocacy of political causes. Pp. 341–343.

(b) This Court's precedents make abundantly clear that the Ohio Supreme Court's reasonableness standard is significantly more lenient than is appropriate in a case of this kind. Although *Talley* concerned a different limitation than § 3599.09(A) and thus does not necessarily control here, the First Amendment's protection of anonymity nevertheless applies. Section 3599.09(A) is not simply an election code provision subject to the "ordinary litigation" test set forth in *Anderson* v. *Celebrezze*, 460 U. S. 780, and similar cases. Rather, it is a regulation of core political speech. Moreover, the category of documents it covers is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required information. See, *e. g.*, *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776–777. When a law burdens such speech, the Court applies "exacting scrutiny,"

Syllabus

upholding the restriction only if it is narrowly tailored to serve an overriding state interest. See, *e. g.*, *id.*, at 786. Pp. 343–347.

(c) Section 3599.09(A)'s anonymous speech ban is not justified by Ohio's asserted interests in preventing fraudulent and libelous statements and in providing the electorate with relevant information. The claimed informational interest is plainly insufficient to support the statute's disclosure requirement, since the speaker's identity is no different from other components of a document's contents that the author is free to include or exclude, and the author's name and address add little to the reader's ability to evaluate the document in the case of a handbill written by a private citizen unknown to the reader. Moreover, the state interest in preventing fraud and libel (which Ohio vindicates by means of other, more direct prohibitions) does not justify § 3599.09(A)'s extremely broad prohibition of anonymous leaflets. The statute encompasses all documents, regardless of whether they are arguably false or misleading. Although a State might somehow demonstrate that its enforcement interests justify a more limited identification requirement, Ohio has not met that burden here. Pp. 348–353.

(d) This Court's opinions in *Bellotti*, 435 U. S., at 792, n. 32—which commented in dicta on the prophylactic effect of requiring identification of the source of corporate campaign advertising—and *Buckley* v. *Valeo*, 424 U. S. 1, 75–76—which approved mandatory disclosure of campaign-related expenditures—do not establish the constitutionality of § 3599.09(A), since neither case involved a prohibition of anonymous campaign literature. Pp. 353–356.

67 Ohio St. 3d 391, 618 N. E. 2d 152, reversed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion, *post*, p. 358. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 358. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 371.

David Goldberger argued the cause for petitioner. With him on the briefs were *George Q. Vaile*, *Steven R. Shapiro*, *Joel M. Gora*, *Barbara P. O'Toole*, and *Louis A. Jacobs*.

Andrew I. Sutter, Assistant Attorney General of Ohio, argued the cause for respondent. With him on the briefs were *Lee Fisher*, Attorney General, *Andrew S. Bergman*, *Robert A. Zimmerman*, and *James M. Harrison*, Assistant At-

torneys General, *Richard A. Cordray,* State Solicitor, and *Simon B. Karas.**

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a "law . . . abridging the freedom of speech" within the meaning of the First Amendment.[1]

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*Briefs of *amici curiae* urging affirmance were filed for the State of Tennessee et al. by *Charles W. Burson*, Attorney General of Tennessee, *Michael E. Moore*, Solicitor General, and *Michael W. Catalano*, and by the Attorneys General for their respective States as follows: *Jimmy Evans* of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Gale A. Norton* of Colorado, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Pamela Fanning Carter* of Indiana, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Deborah T. Poritz* of New Jersey, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Susan B. Loving* of Oklahoma, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, and *Jeffrey L. Amestoy* of Vermont; and for the Council of State Governments et al. by *Richard Ruda* and *Lee Fennell*.

Charles H. Bell, Jr., and *Robert E. Leidigh* filed a brief for the California Political Attorneys Association as *amicus curiae*.

[1] The term "liberty" in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States. The Fourteenth Amendment reads, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1. Referring to that Clause in his separate opinion in *Whitney* v. *California*, 274 U. S. 357 (1927), Justice Brandeis stated that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights." *Id.*, at 373 (concurring opinion). Although the text of the First Amendment provides only that "*Congress* shall make no law . . . abridging the freedom of speech . . . ," Justice Brandeis' view has been embedded in our law ever since. See *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 779–780 (1978); see also Stevens, The Bill of Rights: A Century of Progress, 59 U. Chi. L. Rev. 13, 20, 25–26 (1992).

I

On April 27, 1988, Margaret McIntyre distributed leaflets to persons attending a public meeting at the Blendon Middle School in Westerville, Ohio. At this meeting, the superintendent of schools planned to discuss an imminent referendum on a proposed school tax levy. The leaflets expressed Mrs. McIntyre's opposition to the levy.[2] There is no suggestion that the text of her message was false, misleading, or libelous. She had composed and printed it on her home computer and had paid a professional printer to make additional copies. Some of the handbills identified her as the author; others merely purported to express the views of "CONCERNED PARENTS AND TAX PAYERS." Except for the help provided by her son and a friend, who placed some of the leaflets on car windshields in the school parking lot, Mrs. McIntyre acted independently.

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[2] The following is one of Mrs. McIntyre's leaflets, in its original typeface:

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU.

CONCERNED PARENTS
AND
TAX PAYERS

While Mrs. McIntyre distributed her handbills, an official of the school district, who supported the tax proposal, advised her that the unsigned leaflets did not conform to the Ohio election laws. Undeterred, Mrs. McIntyre appeared at another meeting on the next evening and handed out more of the handbills.

The proposed school levy was defeated at the next two elections, but it finally passed on its third try in November 1988. Five months later, the same school official filed a complaint with the Ohio Elections Commission charging that Mrs. McIntyre's distribution of unsigned leaflets violated § 3599.09(A) of the Ohio Code.[3] The commission agreed and imposed a fine of $100.

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[3] Ohio Rev. Code Ann. § 3599.09(A) (1988) provides:

"No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. The disclaimer 'paid political advertisement' is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

"The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size

The Franklin County Court of Common Pleas reversed. Finding that Mrs. McIntyre did not "mislead the public nor act in a surreptitious manner," the court concluded that the statute was unconstitutional as applied to her conduct. App. to Pet. for Cert. A–34 to A–35. The Ohio Court of Appeals, by a divided vote, reinstated the fine. Notwithstanding doubts about the continuing validity of a 1922 decision of the Ohio Supreme Court upholding the statutory predecessor of § 3599.09(A), the majority considered itself bound by that precedent. *Id.*, at A–20 to A–21, citing *State* v. *Babst*, 104 Ohio St. 167, 135 N. E. 525 (1922). The dissenting judge thought that our intervening decision in *Talley* v. *California*, 362 U. S. 60 (1960), in which we invalidated a city ordinance prohibiting all anonymous leafletting, compelled the Ohio court to adopt a narrowing construction of the statute to save its constitutionality. App. to Pet. for Cert. A–30 to A–31.

The Ohio Supreme Court affirmed by a divided vote. The majority distinguished Mrs. McIntyre's case from *Talley* on the ground that § 3599.09(A) "has as its purpose the identification of persons who distribute materials containing false statements." 67 Ohio St. 3d 391, 394, 618 N. E. 2d 152, 154

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or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words 'paid for by' followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title."

Section 3599.09(B) contains a comparable prohibition against unidentified communications uttered over the broadcasting facilities of any radio or television station. No question concerning that provision is raised in this case. Our opinion, therefore, discusses only written communications and, particularly, leaflets of the kind Mrs. McIntyre distributed. Cf. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 637–638 (1994) (discussing application of First Amendment principles to regulation of television and radio).

The complaint against Mrs. McIntyre also alleged violations of two other provisions of the Ohio Code, but those charges were dismissed and are not before this Court.

(1993). The Ohio court believed that such a law should be upheld if the burdens imposed on the First Amendment rights of voters are "'*reasonable*'" and "'*nondiscriminatory.*'" *Id.*, at 396, 618 N. E. 2d, at 155, quoting *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983). Under that standard, the majority concluded that the statute was plainly valid:

> "The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated. This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in [*First Nat. Bank of Boston* v.] *Bellotti*[, 435 U. S. 765 (1978),] to be regulations of the sort which would survive constitutional scrutiny." 67 Ohio St. 3d, at 396, 618 N. E. 2d, at 155–156.

In dissent, Justice Wright argued that the statute should be tested under a more severe standard because of its significant effect "on the ability of individual citizens to freely express their views in writing on political issues." *Id.*, at 398, 618 N. E. 2d, at 156–157. He concluded that § 3599.09(A) "is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre." *Id.*, at 401, 618 N. E. 2d, at 159.

Mrs. McIntyre passed away during the pendency of this litigation. Even though the amount in controversy is only $100, petitioner, as the executor of her estate, has pursued her claim in this Court. Our grant of certiorari, 510 U. S.

1108 (1994), reflects our agreement with his appraisal of the importance of the question presented.

II

Ohio maintains that the statute under review is a reasonable regulation of the electoral process. The State does not suggest that all anonymous publications are pernicious or that a statute totally excluding them from the marketplace of ideas would be valid. This is a wise (albeit implicit) concession, for the anonymity of an author is not ordinarily a sufficient reason to exclude her work product from the protections of the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." *Talley* v. *California,* 362 U. S., at 64. Great works of literature have frequently been produced by authors writing under assumed names.[4] Despite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official re-

[4] American names such as Mark Twain (Samuel Langhorne Clemens) and O. Henry (William Sydney Porter) come readily to mind. Benjamin Franklin employed numerous different pseudonyms. See 2 W. Bruce, Benjamin Franklin Self-Revealed: A Biographical and Critical Study Based Mainly on His Own Writings, ch. 5 (2d ed. 1923). Distinguished French authors such as Voltaire (Francois Marie Arouet) and George Sand (Amandine Aurore Lucie Dupin), and British authors such as George Eliot (Mary Ann Evans), Charles Lamb (sometimes wrote as "Elia"), and Charles Dickens (sometimes wrote as "Boz"), also published under assumed names. Indeed, some believe the works of Shakespeare were actually written by the Earl of Oxford rather than by William Shaksper of Stratford-on-Avon. See C. Ogburn, The Mysterious William Shakespeare: The Myth & the Reality (2d ed. 1992); but see S. Schoenbaum, Shakespeare's Lives (2d ed. 1991) (adhering to the traditional view that Shaksper was in fact the author). See also Stevens, The Shakespeare Canon of Statutory Construction, 140 U. Pa. L. Rev. 1373 (1992) (commenting on the competing theories).

taliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.[5] Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

The freedom to publish anonymously extends beyond the literary realm. In *Talley*, the Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U. S. 60. Writing for the Court, Justice Black noted that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.*, at 64. Justice Black recalled England's abusive press licensing laws and seditious libel prosecutions, and he reminded us that even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names. *Id.*, at 64–65. On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of

[5] Though such a requirement might provide assistance to critics in evaluating the quality and significance of the writing, it is not indispensable. To draw an analogy from a nonliterary context, the now-pervasive practice of grading law school examination papers "blindly" (*i. e.*, under a system in which the professor does not know whose paper she is grading) indicates that such evaluations are possible—indeed, perhaps more reliable—when any bias associated with the author's identity is prescinded.

political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue* v. *Gilleo*, 512 U. S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity. The specific holding in *Talley* related to advocacy of an economic boycott, but the Court's reasoning embraced a respected tradition of anonymity in the advocacy of political causes.[6] This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

III

California had defended the Los Angeles ordinance at issue in *Talley* as a law "aimed at providing a way to identify those responsible for fraud, false advertising and libel." 362 U. S., at 64. We rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those evils.[7] *Ibid.* We then made clear that

[6] That tradition is most famously embodied in the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed "Publius." Publius' opponents, the Anti-Federalists, also tended to publish under pseudonyms: prominent among them were "Cato," believed to be New York Governor George Clinton; "Centinel," probably Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; "The Federal Farmer," who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and "Brutus," who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981). A forerunner of all of these writers was the pre-Revolutionary War English pamphleteer "Junius," whose true identity remains a mystery. See Encyclopedia of Colonial and Revolutionary America 220 (J. Faragher ed. 1990) (positing that "Junius" may have been Sir Phillip Francis). The "Letters of Junius" were "widely reprinted in colonial newspapers and lent considerable support to the revolutionary cause." *Powell* v. *McCormack*, 395 U. S. 486, 531, n. 60 (1969).

[7] In his concurring opinion, Justice Harlan added these words:

"Here the State says that this ordinance is aimed at the prevention of 'fraud, deceit, false advertising, negligent use of words, obscenity, and libel,' in that it will aid in the detection of those responsible for spreading

we did "not pass on the validity of an ordinance limited to prevent these or any other supposed evils." *Ibid.* The Ohio statute likewise contains no language limiting its application to fraudulent, false, or libelous statements; to the extent, therefore, that Ohio seeks to justify § 3599.09(A) as a means to prevent the dissemination of untruths, its defense must fail for the same reason given in *Talley.* As the facts of this case demonstrate, the ordinance plainly applies even when there is no hint of falsity or libel.

Ohio's statute does, however, contain a different limitation: It applies only to unsigned documents designed to influence voters in an election. In contrast, the Los Angeles ordinance prohibited all anonymous handbilling "in any place under any circumstances." *Id.*, at 60–61. For that reason, Ohio correctly argues that *Talley* does not necessarily control the disposition of this case. We must, therefore, decide whether and to what extent the First Amendment's protection of anonymity encompasses documents intended to influence the electoral process.

Ohio places its principal reliance on cases such as *Anderson* v. *Celebrezze*, 460 U. S. 780 (1983); *Storer* v. *Brown*, 415 U. S. 724 (1974); and *Burdick* v. *Takushi*, 504 U. S. 428 (1992), in which we reviewed election code provisions governing the voting process itself. See *Anderson*, *supra* (filing deadlines); *Storer*, *supra* (ballot access); *Burdick*, *supra* (write-in voting); see also *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208 (1986) (eligibility of independent voters to vote in party primaries). In those cases we refused to adopt "any

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material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have." 362 U. S., at 66–67 (footnote omitted).

'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U. S., at 789, quoting *Storer*, 415 U. S., at 730. Instead, we pursued an analytical process comparable to that used by courts "in ordinary litigation": We considered the relative interests of the State and the injured voters, and we evaluated the extent to which the State's interests necessitated the contested restrictions. *Anderson*, 460 U. S., at 789. Applying similar reasoning in this case, the Ohio Supreme Court upheld § 3599.09(A) as a "*reasonable*" and "*nondiscriminatory*" burden on the rights of voters. 67 Ohio St. 3d, at 396, 618 N. E. 2d, at 155, quoting *Anderson*, 460 U. S., at 788.

The "ordinary litigation" test does not apply here. Unlike the statutory provisions challenged in *Storer* and *Anderson*, § 3599.09(A) of the Ohio Code does not control the mechanics of the electoral process. It is a regulation of pure speech. Moreover, even though this provision applies evenhandedly to advocates of differing viewpoints,[8] it is a direct regulation of the content of speech. Every written document covered by the statute must contain "the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor." Ohio Rev. Code Ann. § 3599.09(A) (1988). Furthermore, the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings.[9] *Ibid.* Consequently, we are not faced with an ordinary election restric-

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[8] Arguably, the disclosure requirement places a more significant burden on advocates of unpopular causes than on defenders of the status quo. For purposes of our analysis, however, we assume the statute evenhandedly burdens all speakers who have a legitimate interest in remaining anonymous.

[9] Covered documents are those "designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election . . . ." § 3599.09(A).

tion; this case "involves a limitation on political expression subject to exacting scrutiny." *Meyer* v. *Grant*, 486 U. S. 414, 420 (1988).[10]

Indeed, as we have explained on many prior occasions, the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' *Winters* v. *New York*, 333 U. S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . .' *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citi-

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[10] In *Meyer*, we unanimously applied strict scrutiny to invalidate an election-related law making it illegal to pay petition circulators for obtaining signatures to place an initiative on the state ballot. Similarly, in *Burson* v. *Freeman*, 504 U. S. 191 (1992), although the law at issue—forbidding campaign-related speech within 100 feet of the entrance to a polling place—was an election-related restriction, both the plurality and dissent applied strict scrutiny because the law was "a facially content-based restriction on political speech in a public forum." *Id.*, at 198; see also *id.*, at 212–213 (KENNEDY, J., concurring); *id.*, at 217 (STEVENS, J., dissenting).

> zenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley* v. *Valeo*, 424 U. S. 1, 14–15 (1976) *(per curiam)*.

Of course, core political speech need not center on a candidate for office. The principles enunciated in *Buckley* extend equally to issue-based elections such as the school tax referendum that Mrs. McIntyre sought to influence through her handbills. See *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776–777 (1978) (speech on income tax referendum "is at the heart of the First Amendment's protection"). Indeed, the speech in which Mrs. McIntyre engaged—handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression. See *International Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U. S. 672 (1992); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938). That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to Mrs. McIntyre's expression: Urgent, important, and effective speech can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed. See *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). No form of speech is entitled to greater constitutional protection than Mrs. McIntyre's.

When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest. See, *e. g.*, *Bellotti*, 435 U. S., at 786. Our precedents thus make abundantly clear that the Ohio Supreme Court applied a significantly more lenient standard than is appropriate in a case of this kind.

IV

Nevertheless, the State argues that, even under the strictest standard of review, the disclosure requirement in § 3599.09(A) is justified by two important and legitimate state interests. Ohio judges its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information to be sufficiently compelling to justify the anonymous speech ban. These two interests necessarily overlap to some extent, but it is useful to discuss them separately.

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.[11] We have already held that the State may not compel a newspaper that prints editorials critical of a particular candidate to provide space for a reply by the candidate. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974). The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit. Moreover, in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the

[11] "Of course, the identity of the source is helpful in evaluating ideas. But 'the best test of truth is the power of the thought to get itself accepted in the competition of the market' (*Abrams* v. *United States*, [250 U. S. 616, 630 (1919) (Holmes, J., dissenting)]). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible', what is valuable, and what is truth." *New York* v. *Duryea*, 76 Misc. 2d 948, 966–967, 351 N. Y. S. 2d 978, 996 (1974) (striking down similar New York statute as overbroad).

document's message. Thus, Ohio's informational interest is plainly insufficient to support the constitutionality of its disclosure requirement.

The state interest in preventing fraud and libel stands on a different footing. We agree with Ohio's submission that this interest carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large. Ohio does not, however, rely solely on § 3599.09(A) to protect that interest. Its Election Code includes detailed and specific prohibitions against making or disseminating false statements during political campaigns. Ohio Rev. Code Ann. §§ 3599.09.1(B), 3599.09.2(B) (1988). These regulations apply both to candidate elections and to issue-driven ballot measures.[12] Thus,

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[12] Section 3599.09.1(B) provides:

"No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

"(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term 're-elect' when the candidate has never been elected at a primary, general, or special election to the office for which he is a candidate;

"(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate attended any school, college, community technical school, or institution;

"(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate held for which he received a salary or wages;

"(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

"(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

Ohio's prohibition of anonymous leaflets plainly is not its principal weapon against fraud.[13] Rather, it serves as an aid to enforcement of the specific prohibitions and as a deterrent

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"(6) Make a false statement that a candidate or official has a record of treatment or confinement for mental disorder;

"(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

"(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;

"(9) Make a false statement concerning the voting record of a candidate or public official;

"(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate. As used in this section, 'voting record' means the recorded 'yes' or 'no' vote on a bill, ordinance, resolution, motion, amendment, or confirmation."

Section 3599.09.2(B) provides:

"No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

"(1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication;

"(2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue." § 3599.09.2(B).

We need not, of course, evaluate the constitutionality of these provisions. We quote them merely to emphasize that Ohio has addressed directly the problem of election fraud. To the extent the anonymity ban indirectly seeks to vindicate the same goals, it is merely a supplement to the above provisions.

[13] The same can be said with regard to "libel," as many of the above-quoted Election Code provisions prohibit false statements about candidates. To the extent those provisions may be underinclusive, Ohio courts also

to the making of false statements by unscrupulous prevaricators. Although these ancillary benefits are assuredly legitimate, we are not persuaded that they justify § 3599.09(A)'s extremely broad prohibition.

As this case demonstrates, the prohibition encompasses documents that are not even arguably false or misleading. It applies not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources.[14] It applies not only to elections of public officers, but also to

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enforce the common-law tort of defamation. See, *e. g.*, *Varanese* v. *Gall*, 35 Ohio St. 3d 78, 518 N. E. 2d 1177 (1988) (applying the standard of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), to an Ohio public official's state-law libel claim arising from an election-related advertisement). Like other forms of election fraud, then, Ohio directly attacks the problem of election-related libel; to the extent that the anonymity ban serves the same interest, it is merely a supplement.

[14] We stressed the importance of this distinction in *Buckley* v. *Valeo*, 424 U. S. 1, 37 (1976):

"Treating these expenses [the expenses incurred by campaign volunteers] as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." (Footnote omitted.)

Again, in striking down the independent expenditure limitations of the Federal Election Campaign Act of 1971, 18 U. S. C. § 608(e)(1) (1970 ed., Supp. IV) (repealed 1976), we distinguished another section of the statute (§ 608(b), which we upheld) that placed a ceiling on contributions to a political campaign.

"By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U. S., at 47.

ballot issues that present neither a substantial risk of libel nor any potential appearance of corrupt advantage.[15] It applies not only to leaflets distributed on the eve of an election, when the opportunity for reply is limited, but also to those distributed months in advance.[16] It applies no matter what the character or strength of the author's interest in anonymity. Moreover, as this case also demonstrates, the absence of the author's name on a document does not necessarily protect either that person or a distributor of a forbidden document from being held responsible for compliance with the Election Code. Nor has the State explained why it can

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[15] "The risk of corruption perceived in cases involving candidate elections, *e. g., United States* v. *Automobile Workers,* [352 U. S. 567 (1957)]; *United States* v. *CIO,* [335 U. S. 106 (1948)], simply is not present in a popular vote on a public issue." *First Nat. Bank of Boston* v. *Bellotti,* 435 U. S. 765, 790 (1978) (footnote omitted).

[16] As the Illinois Supreme Court explained in *People* v. *White,* 116 Ill. 2d 171, 180, 506 N. E. 2d 1284, 1288 (Ill. 1987), which struck down a similar statute:

"Implicit in the State's . . . justification is the concern that the public could be misinformed and an election swayed on the strength of an eleventh-hour anonymous smear campaign to which the candidate could not meaningfully respond. The statute cannot be upheld on this ground, however, because it sweeps within its net a great deal of anonymous speech completely unrelated to this concern. In the first place, the statute has no time limit and applies to literature circulated two months prior to an election as well as that distributed two days before. The statute also prohibits anonymous literature supporting or opposing not only candidates, but also referenda. A public question clearly cannot be the victim of character assassination."

The temporal breadth of the Ohio statute also distinguishes it from the Tennessee law that we upheld in *Burson* v. *Freeman,* 504 U. S. 191 (1992). The Tennessee statute forbade electioneering within 100 feet of the entrance to a polling place. It applied only on election day. The State's interest in preventing voter intimidation and election fraud was therefore enhanced by the need to prevent last-minute misinformation to which there is no time to respond. Moreover, Tennessee geographically confined the reach of its law to a 100-foot no-solicitation zone. By contrast, the Ohio law forbids anonymous campaign speech wherever it occurs.

more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection. We recognize that a State's enforcement interest might justify a more limited identification requirement, but Ohio has shown scant cause for inhibiting the leafletting at issue here.

V

Finally, Ohio vigorously argues that our opinions in *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), and *Buckley* v. *Valeo*, 424 U. S. 1 (1976) *(per curiam)*, amply support the constitutionality of its disclosure requirement. Neither case is controlling: The former concerned the scope of First Amendment protection afforded to corporations; the relevant portion of the latter concerned mandatory disclosure of campaign-related expenditures. Neither case involved a prohibition of anonymous campaign literature.

In *Bellotti*, we reversed a judgment of the Supreme Judicial Court of Massachusetts sustaining a state law that prohibited corporate expenditures designed to influence the vote on referendum proposals. 435 U. S. 765. The Massachusetts court had held that the First Amendment protects corporate speech only if its message pertains directly to the business interests of the corporation. *Id.*, at 771–772. Consistently with our holding today, we noted that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.*, at 777. We also made it perfectly clear that we were not deciding whether the First Amendment's protection of corporate speech is coextensive with the protection it affords to individuals.[17] Accordingly, although we commented in dicta

[17] "In deciding whether this novel and restrictive gloss on the First Amendment comports with the Constitution and the precedents of this Court, we need not survey the outer boundaries of the Amendment's pro-

on the prophylactic effect of requiring identification of the source of corporate advertising,[18] that footnote did not necessarily apply to independent communications by an individual like Mrs. McIntyre.

Our reference in the *Bellotti* footnote to the "prophylactic effect" of disclosure requirements cited a portion of our earlier opinion in *Buckley*, in which we stressed the importance of providing "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate.'" 424 U. S., at 66. We observed that the "sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id.*, at 67. Those comments concerned contributions to the candidate or expenditures authorized by the candidate or his responsible agent. They had no reference to the kind of independent activity pursued by Mrs. McIntyre. Required disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption that has no application to this case.

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tection of corporate speech, or address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment." *Bellotti*, 435 U. S., at 777–778.

In a footnote to that passage, we continued:

"Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions, or like entities." *Id.*, at 777–778, n. 13.

[18] "Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See *Buckley*, 424 U. S., at 66–67; *United States* v. *Harriss*, 347 U. S. 612, 625–626 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U. S., at 67." *Id.*, at 792, n. 32.

True, in another portion of the *Buckley* opinion we expressed approval of a requirement that even "independent expenditures" in excess of a threshold level be reported to the Federal Election Commission. *Id.*, at 75–76. But that requirement entailed nothing more than an identification to the Commission of the amount and use of money expended in support of a candidate. See *id.*, at 157–159, 160 (reproducing relevant portions of the statute[19]). Though such mandatory reporting undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may "talk," its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.

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[19] One of those provisions, addressing contributions by campaign committees, required:

"the identification of each person to whom expenditures have been made by such committee or on behalf of such committee or candidate within the calendar year in an aggregate amount or value in excess of $100, the amount, date, and purpose of each such expenditure and the name and address of, and office sought by, each candidate on whose behalf such expenditure was made." 2 U. S. C. § 434(b)(9) (1970 ed., Supp. IV) (reprinted in *Buckley*, 424 U. S., at 158).

A separate provision, 2 U. S. C. § 434(e) (1970 ed., Supp. IV) (reprinted in *Buckley*, 424 U. S., at 160), required individuals making contributions or expenditures to file statements containing the same information.

Not only is the Ohio statute's infringement on speech more intrusive than the *Buckley* disclosure requirement, but it rests on different and less powerful state interests. The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures; and we construed "independent expenditures" to mean only those expenditures that "expressly advocate the election or defeat of a clearly identified candidate." *Id.*, at 80. In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office. Curriers of favor will be deterred by the knowledge that all expenditures will be scrutinized by the Federal Election Commission and by the public for just this sort of abuse.[20] Moreover, the federal Act contains numerous legitimate disclosure requirements for campaign organizations; the similar requirements for independent expenditures serve to ensure that a campaign organization will not seek to evade disclosure by routing its expenditures through individual supporters. See *Buckley*, 424 U. S., at 76. In short, although *Buckley* may permit a more narrowly drawn statute, it surely is not authority for upholding Ohio's open-ended provision.[21]

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[20] This interest also serves to distinguish *United States* v. *Harriss*, 347 U. S. 612 (1954), in which we upheld limited disclosure requirements for lobbyists. The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption.

[21] We note here also that the federal Act, while constitutional on its face, may not be constitutional in all its applications. Cf. *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87, 88 (1982) (holding Ohio disclosure requirements unconstitutional as applied to "a minor political

VI

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. Mill, On Liberty and Considerations on Representative Government 1, 3–4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See *Abrams* v. *United States*, 250 U. S. 616, 630–631 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented. One would be hard pressed to think of a better example of the pitfalls of Ohio's blunderbuss approach than the facts of the case before us.

The judgment of the Ohio Supreme Court is reversed.

It is so ordered.

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party which historically has been the object of harassment by government officials and private parties"); *Buckley*, 424 U. S., at 74 (exempting minor parties from disclosure requirements if they can show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties").

JUSTICE GINSBURG, concurring.

The dissent is stirring in its appreciation of democratic values. But I do not see the Court's opinion as unguided by "bedrock principle," tradition, or our case law. See *post*, at 375–378, 378–380. Margaret McIntyre's case, it seems to me, bears a marked resemblance to Margaret Gilleo's case[1] and Mary Grace's.[2] All three decisions, I believe, are sound, and hardly sensational, applications of our First Amendment jurisprudence.

In for a calf is not always in for a cow. The Court's decision finds unnecessary, overintrusive, and inconsistent with American ideals the State's imposition of a fine on an individual leafleteer who, within her local community, spoke her mind, but sometimes not her name. We do not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity. Appropriately leaving open matters not presented by McIntyre's handbills, the Court recognizes that a State's interest in protecting an election process "might justify a more limited identification requirement." *Ante*, at 353. But the Court has convincingly explained why Ohio lacks "cause for inhibiting the leafletting at issue here." *Ibid.*

JUSTICE THOMAS, concurring in the judgment.

I agree with the majority's conclusion that Ohio's election law, Ohio Rev. Code Ann. § 3599.09(A) (1988), is inconsistent with the First Amendment. I would apply, however, a dif-

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[1] See *City of Ladue* v. *Gilleo*, 512 U. S. 43 (1994), in which we held that the city of Ladue could not prohibit homeowner Gilleo's display of a small sign, on her lawn or in a window, opposing war in the Persian Gulf.

[2] Grace was the "lone picketer" who stood on the sidewalk in front of this Court with a sign containing the text of the First Amendment, prompting us to exclude public sidewalks from the statutory ban on display of a "flag, banner, or device" on Court grounds. *United States* v. *Grace*, 461 U. S. 171, 183 (1983).

ferent methodology to this case. Instead of asking whether "an honorable tradition" of anonymous speech has existed throughout American history, or what the "value" of anonymous speech might be, we should determine whether the phrase "freedom of speech, or of the press," as originally understood, protected anonymous political leafletting. I believe that it did.

I

The First Amendment states that the government "shall make no law . . . abridging the freedom of speech, or of the press." U. S. Const., Amdt. 1. When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905). We have long recognized that the meaning of the Constitution "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states." *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721 (1838). See also *INS* v. *Chadha*, 462 U. S. 919, 959 (1983). We should seek the original understanding when we interpret the Speech and Press Clauses, just as we do when we read the Religion Clauses of the First Amendment. When the Framers did not discuss the precise question at issue, we have turned to "what history reveals was the contemporaneous understanding of [the Establishment Clause's] guarantees." *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984). "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers." *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 294 (1963) (Brennan, J., concurring); see also *Lee* v. *Weisman*, 505 U. S. 577, 632–633 (1992) (SCALIA, J., dissenting).

II

Unfortunately, we have no record of discussions of anonymous political expression either in the First Congress, which drafted the Bill of Rights, or in the state ratifying conventions. Thus, our analysis must focus on the practices and beliefs held by the Founders concerning anonymous political articles and pamphlets. As an initial matter, we can safely maintain that the leaflets at issue in this case implicate the freedom of the press. When the Framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world. Instead, they employed the term "the press" to refer to the many independent printers who circulated small newspapers or published writers' pamphlets for a fee. See generally B. Bailyn & J. Hench, The Press & the American Revolution (1980); L. Levy, Emergence of a Free Press (1985); B. Bailyn, The Ideological Origins of the American Revolution (1967). "It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution occurred." 1 B. Bailyn, Pamphlets of the American Revolution 3 (1965). This practice continued during the struggle for ratification. See, *e. g.*, Pamphlets on the Constitution of the United States (P. Ford ed. 1888). Regardless of whether one designates the right involved here as one of press or one of speech, however, it makes little difference in terms of our analysis, which seeks to determine only whether the First Amendment, as originally understood, protects anonymous writing.

There is little doubt that the Framers engaged in anonymous political writing. The essays in the Federalist Papers, published under the pseudonym of "Publius," are only the most famous example of the outpouring of anonymous political writing that occurred during the ratification of the Constitution. Of course, the simple fact that the Framers engaged in certain conduct does not necessarily prove that they forbade its prohibition by the government. See *post*, at 373

(SCALIA, J., dissenting). In this case, however, the historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the "freedom of the press."

For example, the earliest and most famous American experience with freedom of the press, the 1735 Zenger trial, centered around anonymous political pamphlets. The case involved a printer, John Peter Zenger, who refused to reveal the anonymous authors of published attacks on the Crown Governor of New York. When the Governor and his council could not discover the identity of the authors, they prosecuted Zenger himself for seditious libel. See J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 9–19 (S. Katz ed. 1972). Although the case set the Colonies afire for its example of a jury refusing to convict a defendant of seditious libel against Crown authorities, it also signified at an early moment the extent to which anonymity and the freedom of the press were intertwined in the early American mind.

During the Revolutionary and Ratification periods, the Framers' understanding of the relationship between anonymity and freedom of the press became more explicit. In 1779, for example, the Continental Congress attempted to discover the identity of an anonymous article in the Pennsylvania Packet signed by the name "Leonidas." Leonidas, who actually was Dr. Benjamin Rush, had attacked the Members of Congress for causing inflation throughout the States and for engaging in embezzelment and fraud. 13 Letters of Delegates to Congress 1774–1789, p. 141, n. 1 (G. Gawalt & R. Gephart eds. 1986). Elbridge Gerry, a delegate from Massachusetts, moved to haul the printer of the newspaper before Congress to answer questions concerning Leonidas. Several Members of Congress then rose to oppose Gerry's motion on the ground that it invaded the freedom of the press. Merriweather Smith of Virginia rose, quoted from

the offending article with approval, and then finished with a declaration that "[w]hen the liberty of the Press shall be restrained . . . the liberties of the People will be at an end." Henry Laurens, Notes of Debates, July 3, 1779, *id.*, at 139. Supporting Smith, John Penn of North Carolina argued that the writer "no doubt had *good designs*," and that "[t]he liberty of the Press ought not to be restrained." *Ibid.* In the end, these arguments persuaded the assembled delegates, who "sat mute" in response to Gerry's motion. *Id.*, at 141. Neither the printer nor Dr. Rush ever appeared before Congress to answer for their publication. D. Teeter, Press Freedom and the Public Printing: Pennsylvania, 1775–83, 45 Journalism Q. 445, 451 (1968).

At least one of the state legislatures shared Congress' view that the freedom of the press protected anonymous writing. Also in 1779, the upper house of the New Jersey State Legislature attempted to punish the author of a satirical attack on the Governor and the College of New Jersey (now Princeton) who had signed his work "Cincinnatus." R. Hixson, Isaac Collins: A Quaker Printer in 18th Century America 95 (1968). Attempting to enforce the crime of seditious libel, the State Legislative Council ordered Isaac Collins—the printer and editor of the newspaper in which the article had appeared—to reveal the author's identity. Refusing, Collins declared: " 'Were I to comply . . . I conceive I should betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press.' " *Id.*, at 96. Apparently, the State Assembly agreed that anonymity was protected by the freedom of the press, as it voted to support the editor and publisher by frustrating the council's orders. *Id.*, at 95.

By 1784, the same Governor of New Jersey, William Livingston, was at work writing anonymous articles that defended the right to publish anonymously as part of the freedom of the press. Under the pseudonym "Scipio,"

Livingston wrote several articles attacking the legislature's failure to lower taxes, and he accused a state officer of stealing or losing state funds during the British invasion of New Jersey. *Id.*, at 107–109; Scipio, Letter to the Printer, Feb. 24, 1784, The New-Jersey Gazette. Responding to the allegations, the officer called upon Scipio "to avow your publication, give up your real name." S. Tucker, To Scipio, Mar. 2, 1784, The New-Jersey Gazette. Livingston replied with a four-part series defending "the Liberty of the Press." Although Livingston at first defended anonymity because it encouraged authors to discuss politics without fear of reprisal, he ultimately invoked the liberty of the press as the guardian for anonymous political writing. "I hope [Tucker] is not seriously bent upon a total subversion of our political system," Scipio wrote. "And pray may not a man, in a free country, convey thro' the press his sentiments on publick grievances . . . without being obliged to send a certified copy of the *baptismal register* to prove his name." Scipio, On the Liberty of the Press IV, Apr. 26, 1784, The New-Jersey Gazette.

To be sure, there was some controversy among newspaper editors over publishing anonymous articles and pamphlets. But this controversy was resolved in a manner that indicates that the freedom of the press protected an author's anonymity. The tempest began when a Federalist, writing anonymously himself, expressed fear that "emissaries" of "foreign enemies" would attempt to scuttle the Constitution by "fill-[ing] the press with objections" against the proposal. Boston Independent Chronicle, Oct. 4, 1787, in 13 Documentary History of the Ratification of the Constitution 315 (J. Kaminski & G. Saladino eds. 1981) (hereinafter Documentary History). He called upon printers to refrain from publishing when the author "chooses to remain concealed." *Ibid.* Benjamin Russell, the editor of the prominent Federalist newspaper the Massachusetts Centinel, immediately adopted a policy of refusing to publish Anti-Federalist pieces unless the

author provided his identity to be "handed to the publick, if required." Massachusetts Centinel, Oct. 10, 1787, *id.*, at 312, 315–316. A few days later, the Massachusetts Gazette announced that it would emulate the example set by the Massachusetts Centinel. Massachusetts Gazette, Oct. 16, 1787, *id.*, at 317. In the same issue, the Gazette carried an article claiming that requiring an anonymous writer to leave his name with the printer, so that anyone who wished to know his identity could be informed, "appears perfectly reasonable, and is perfectly consistent with the liberty of the press." A Citizen, Massachusetts Gazette, Oct. 16, 1787, *id.*, at 316. Federalists expressed similar thoughts in Philadelphia. See A Philadelphia Mechanic, Philadelphia Independent Gazetteer, Oct. 29, 1787, *id.*, at 318–319; Galba, Philadelphia Independent Gazetteer, Oct. 31, 1787, *id.*, at 319. The Jewel, Philadelphia Independent Gazetteer, Nov. 2, 1787, *id.*, at 320.

Ordinarily, the fact that some founding-era editors as a matter of policy decided not to publish anonymous articles would seem to shed little light upon what the Framers thought the *government* could do. The widespread criticism raised by the Anti-Federalists, however, who were the driving force behind the demand for a Bill of Rights, indicates that they believed the freedom of the press to include the right to author anonymous political articles and pamphlets.[1] That most other Americans shared this understanding is reflected in the Federalists' hasty retreat before the withering criticism of their assault on the liberty of the press.

Opposition to Russell's declaration centered in Philadelphia. Three Philadelphia papers published the "Citizen" piece that had run in the Massachusetts Gazette. *Id.*, at

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[1] The Anti-Federalists recognized little difficulty in what today would be a state-action problem, because they considered Federalist conduct in supporting the Constitution as a preview of the tyranny to come under the new Federal Government.

318–320.[2] In response, one of the leading Anti-Federalist writers, the "Federal Farmer," attacked Russell's policy: "What can be the views of those gentlemen in Boston, who countenanced the Printers in shutting up the press against a fair and free investigation of this important system in the usual way?" Letters From the Federal Farmer No. 5, Oct. 13, 1787, in 2 The Complete Anti-Federalist 254 (H. Storing ed. 1981). Another Anti-Federalist, "Philadelphiensis," also launched a substantial attack on Russell and his defenders for undermining the freedom of the press. "In this desperate situation of affairs . . . the friends of this despotic scheme of government, were driven to the last and only alternative from which there was any probability of success; namely, the abolition of *the freedom of the Press.*" Philadelphiensis, Essay I, Independent Gazetteer, Nov. 7, 1787, 3 *id.*, at 102. In Philadelphiensis' eyes, Federalist attempts to suppress the Anti-Federalist press by requiring the disclosure of authors' identities only foreshadowed the oppression permitted by the new Constitution. "Here we see pretty plainly through [the Federalists'] excellent regulation of the press, how things are to be carried on after the adoption of the new constitution." *Id.*, at 103. According to Philadelphiensis, Federalist policies had already ruined freedom in Massachusetts: "In Boston the liberty of the press is now completely abolished; and hence all other privileges and rights of the people will in a short time be destroyed." *Id.*, at 104.

Not limited to Philadelphia, the Anti-Federalist attack was repeated widely throughout the States. In New York, one writer exclaimed that the Federalist effort to suppress ano-

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[2] As noted earlier, several pieces in support appeared in the Federalist newspaper, the Philadelphia Independent Gazetteer. They were immediately answered by two Anti-Federalists in the Philadelphia Freeman's Journal. These Anti-Federalists accused the Federalists of "preventing that freedom of enquiry which truth and honour never dreads, but which tyrants and tyranny could never endure." 13 Documentary History 317–318.

nymity would "REVERSE the important doctrine *of the freedom of the press*," whose "truth" was "universally acknowledged." Detector, New York Journal, Oct. 25, 1787, in 13 Documentary History 318. "Detector" proceeded to proclaim that Russell's policy was "the introduction of this first trait of slavery into your country!" *Ibid.* Responding to the Federalist editorial policy, a Rhode Island Anti-Federalist wrote: "The Liberty of the Press, or the Liberty which *every Person* in the United States *at present* enjoys . . . is a Privilege of infinite Importance . . . for which . . . we have fought and bled," and that the attempt by "our aristocratical Gentry, to have every Person's Name published who should write against the proposed Federal Constitution, has given many of us a just Alarm." Argus, Providence United States Chronicle, Nov. 8, 1787, *id.*, at 320–321. Edward Powars, editor of the Anti-Federalist Boston American Herald, proclaimed that *his* pages would remain "FREE and OPEN to all parties." Boston American Herald, Oct. 15, 1787, *id.*, at 316. In the Boston Independent Chronicle of Oct. 18, 1787, "Solon" accused Russell of attempting to undermine a "*freedom* and *independence* of *sentiments*" which "should never be *checked* in a *free* country" and was "so *essential* to the *existance* of free Governments." *Id.*, at 313.

The controversy over Federalist attempts to prohibit anonymous political speech is significant for several reasons. First, the Anti-Federalists clearly believed the right to author and publish anonymous political articles and pamphlets was protected by the liberty of the press. Second, although printers' editorial policies did not constitute state action, the Anti-Federalists believed that the Federalists were merely flexing the governmental powers they would fully exercise upon the Constitution's ratification. Third, and perhaps most significantly, it appears that the Federalists agreed with the Anti-Federalist critique. In Philadelphia, where opposition to the ban was strongest, there is no record that any newspaper adopted the nonanonymity policy, nor that of

any city or State aside from Russell's Massachusetts Centinel and the Federalist Massachusetts Gazette. Moreover, these two papers' bark was worse than their bite. In the face of widespread criticism, it appears that Russell retreated from his policy and, as he put it, "'readily'" reprinted several anonymous Federalist and Anti-Federalist essays to show that claims that he had suppressed freedom of the press "'had not any foundation in truth.'" 13 Documentary History 313–314. Likewise, the Massachusetts Gazette refused to release the names of Anti-Federalist writers when requested. *Ibid.* When Federalist attempts to ban anonymity are followed by a sharp, widespread Anti-Federalist defense in the name of the freedom of the press, and then by an open Federalist retreat on the issue, I must conclude that both Anti-Federalists and Federalists believed that the freedom of the press included the right to publish without revealing the author's name.

III

The historical record is not as complete or as full as I would desire. For example, there is no evidence that, after the adoption of the First Amendment, the Federal Government attempted to require writers to attach their names to political documents. Nor do we have any indication that the federal courts of the early Republic would have squashed such an effort as a violation of the First Amendment. The understanding described above, however, when viewed in light of the Framers' universal practice of publishing anonymous articles and pamphlets, indicates that the Framers shared the belief that such activity was firmly part of the freedom of the press. It is only an innovation of modern times that has permitted the regulation of anonymous speech.

The large quantity of newspapers and pamphlets the Framers produced during the various crises of their generation show the remarkable extent to which the Framers relied upon anonymity. During the break with Great Britain, the

revolutionaries employed pseudonyms both to conceal their identity from Crown authorities and to impart a message. Often, writers would choose names to signal their point of view or to invoke specific classical and modern "crusaders in an agelong struggle against tyranny." A. Schlesinger, Prelude to Independence 35 (1958). Thus, leaders of the struggle for independence would adopt descriptive names such as "Common Sense," a "Farmer," or "A True Patriot," or historical ones such as "Cato" (a name used by many to refer to the Roman Cato and to Cato's letters), or "Mucius Scaevola." *Id.*, at xii–xiii. The practice was even more prevalent during the great outpouring of political argument and commentary that accompanied the ratification of the Constitution. Besides "Publius," prominent Federalists signed their articles and pamphlets with names such as "An American Citizen," "Marcus," "A Landholder," "Americanus"; Anti-Federalists replied with the pseudonyms "Cato," "Centinel," "Brutus," the "Federal Farmer," and "The Impartial Examiner." See generally 1–2 Debate on the Constitution (B. Bailyn ed. 1993). The practice of publishing one's thoughts anonymously or under pseudonym was so widespread that only two major Federalist or Anti-Federalist pieces appear to have been signed by their true authors, and they may have had special reasons to do so.[3]

If the practice of publishing anonymous articles and pamphlets fell into disuse after the Ratification, one might infer that the custom of anonymous political speech arose only in response to the unusual conditions of the 1776–1787 period.

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[3] See Mason, Objections to the Constitution, Virginia Journal, Nov. 22, 1787, 1 Debate on the Constitution 345 (B. Bailyn ed. 1993); Martin, The Genuine Information, Maryland Gazette, Dec. 28, 1787–Feb. 8, 1788, *id.*, at 631. Both men may have made an exception to the general practice because they both had attended the Philadelphia Convention, but had refused to sign the Constitution. As leaders of the fight against ratification, both men may have believed that they owed a personal explanation to their constituents of their decision not to sign.

After all, the Revolution and the Ratification were not "elections," *per se*, either for candidates or for discrete issues. Records from the first federal elections indicate, however, that anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates. In Pennsylvania, for example, writers for or against the Federalist and Anti-Federalist candidates wrote under the names "Numa," "Pompilius," "A Friend to Agriculture, Trade, and Good Laws," "A Federal Centinel," a "Freeman," "Centinel," "A Real Patriot to All True Federalists," "A Mechanic," "Justice," "A German Federalist," and so on. See generally 1 Documentary History of the First Federal Elections 1788–1790, pp. 246–362 (M. Jensen & R. Becker eds. 1976). This appears to have been the practice in all of the major States of which we have substantial records today. See 1 *id.*, at 446–464 (Massachusetts); 2 *id.*, at 108–122, 175–229 (Maryland); 2 *id.*, at 387–397 (Virginia); 3 *id.*, at 204–216, 436–493 (New York). It seems that actual names were used rarely, and usually only by candidates who wanted to explain their positions to the electorate.

The use of anonymous writing extended to issues as well as candidates. The ratification of the Constitution was not the only issue discussed via anonymous writings in the press. James Madison and Alexander Hamilton, for example, resorted to pseudonyms in the famous "Helvidius" and "Pacificus" debates over President Washington's declaration of neutrality in the war between the British and French. See Hamilton, Pacificus No. 1, June 29, 1793, in 15 Papers of Alexander Hamilton 33–43 (H. Syrett ed. 1969); Madison, Helvidius No. 1, Aug. 24, 1793, in 15 Papers of James Madison 66–73 (T. Mason, R. Rutland, J. Sisson eds. 1985). Anonymous writings continued in such Republican papers as the Aurora and Federalists organs such as the Gazette of the United States at least until the election of Thomas Jefferson. See generally J. Smith, Freedom's Fetters (1956).

IV

This evidence leads me to agree with the majority's result, but not its reasoning. The majority fails to seek the original understanding of the First Amendment, and instead attempts to answer the question in this case by resorting to three approaches. First, the majority recalls the historical practice of anonymous writing from Shakespeare's works to the Federalist Papers to Mark Twain. *Ante*, at 341, and n. 4, 342–343, and n. 6, 357. Second, it finds that anonymous speech has an expressive value both to the speaker and to society that outweighs public interest in disclosure. Third, it finds that § 3599.09(A) cannot survive strict scrutiny because it is a "content-based" restriction on speech.

I cannot join the majority's analysis because it deviates from our settled approach to interpreting the Constitution and because it superimposes its modern theories concerning expression upon the constitutional text. Whether "great works of literature"—by Voltaire or George Eliot have been published anonymously should be irrelevant to our analysis, because it sheds no light on what the phrases "free speech" or "free press" meant to the people who drafted and ratified the First Amendment. Similarly, whether certain types of expression have "value" today has little significance; what *is* important is whether the Framers in 1791 believed anonymous speech sufficiently valuable to deserve the protection of the Bill of Rights. And although the majority faithfully follows our approach to "content-based" speech regulations, we need not undertake this analysis when the original understanding provides the answer.

While, like JUSTICE SCALIA, I am loath to overturn a century of practice shared by almost all of the States, I believe the historical evidence from the framing outweighs recent tradition. When interpreting other provisions of the Constitution, this Court has believed itself bound by the text of the Constitution and by the intent of those who drafted and ratified it. It should hold itself to no less a standard when

interpreting the Speech and Press Clauses. After reviewing the weight of the historical evidence, it seems that the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in an anonymous fashion. Because the majority has adopted an analysis that is largely unconnected to the Constitution's text and history, I concur only in the judgment.

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

At a time when both political branches of Government and both political parties reflect a popular desire to leave more decisionmaking authority to the States, today's decision moves in the opposite direction, adding to the legacy of inflexible central mandates (irrevocable even by Congress) imposed by this Court's constitutional jurisprudence. In an opinion which reads as though it is addressing some peculiar law like the Los Angeles municipal ordinance at issue in *Talley* v. *California*, 362 U. S. 60 (1960), the Court invalidates a species of protection for the election process that exists, in a variety of forms, in every State except California, and that has a pedigree dating back to the end of the 19th century. Preferring the views of the English utilitarian philosopher John Stuart Mill, *ante*, at 357, to the considered judgment of the American people's elected representatives from coast to coast, the Court discovers a hitherto unknown right-to-be-unknown while engaging in electoral politics. I dissent from this imposition of free-speech imperatives that are demonstrably not those of the American people today, and that there is inadequate reason to believe were those of the society that begat the First Amendment or the Fourteenth.

I

The question posed by the present case is not the easiest sort to answer for those who adhere to the Court's (and the

society's) traditional view that the Constitution bears its original meaning and is unchanging. Under that view, "[o]n every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." T. Jefferson, Letter to William Johnson (June 12, 1823), in 15 Writings of Thomas Jefferson 439, 449 (A. Lipscomb ed. 1904). That technique is simple of application when government conduct that is claimed to violate the Bill of Rights or the Fourteenth Amendment is shown, upon investigation, to have been engaged in without objection at the very time the Bill of Rights or the Fourteenth Amendment was adopted. There is no doubt, for example, that laws against libel and obscenity do not violate "the freedom of speech" to which the First Amendment refers; they existed and were universally approved in 1791. Application of the principle of an unchanging Constitution is also simple enough at the other extreme, where the government conduct at issue was *not* engaged in at the time of adoption, and there is ample evidence that the *reason* it was not engaged in is that it was thought to violate the right embodied in the constitutional guarantee. Racks and thumbscrews, well-known instruments for inflicting pain, were not in use because they were regarded as cruel punishments.

The present case lies between those two extremes. Anonymous electioneering was not prohibited by law in 1791 or in 1868. In fact, it was widely practiced at the earlier date, an understandable legacy of the revolutionary era in which political dissent could produce governmental reprisal. I need not dwell upon the evidence of that, since it is described at length in today's concurrence. See *ante*, at 360–369 (THOMAS, J., concurring in judgment). The practice of anonymous electioneering may have been less general in 1868,

when the Fourteenth Amendment was adopted, but at least as late as 1837 it was respectable enough to be engaged in by Abraham Lincoln. See 1 A. Beveridge, Abraham Lincoln 1809–1858, pp. 215–216 (1928); 1 Uncollected Works of Abraham Lincoln 155–161 (R. Wilson ed. 1947).

But to prove that anonymous electioneering was used frequently is not to establish that it is a constitutional right. Quite obviously, not every restriction upon expression that did not exist in 1791 or in 1868 is *ipso facto* unconstitutional, or else modern election laws such as those involved in *Burson* v. *Freeman*, 504 U. S. 191 (1992), and *Buckley* v. *Valeo*, 424 U. S. 1 (1976), would be prohibited, as would (to mention only a few other categories) modern antinoise regulation of the sort involved in *Kovacs* v. *Cooper*, 336 U. S. 77 (1949), and *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), and modern parade-permitting regulation of the sort involved in *Cox* v. *New Hampshire*, 312 U. S. 569 (1941).

Evidence that anonymous electioneering was regarded as a constitutional right is sparse, and as far as I am aware evidence that it was *generally* regarded as such is nonexistent. The concurrence points to "freedom of the press" objections that were made against the refusal of some Federalist newspapers to publish unsigned essays opposing the proposed Constitution (on the ground that they might be the work of foreign agents). See *ante*, at 364–366 (THOMAS, J., concurring in judgment). But, of course, if every partisan cry of "freedom of the press" were accepted as valid, our Constitution would be unrecognizable; and if one were to generalize from these particular cries, the First Amendment would be not only a protection *for* newspapers, but a restriction *upon* them. Leaving aside, however, the fact that no governmental action was involved, the Anti-Federalists had a point, inasmuch as the editorial proscription of anonymity applied only to *them*, and thus had the vice of viewpoint discrimination. (Hence the comment by Philadelphiensis,

quoted in the concurrence: "'Here we see pretty plainly through [the Federalists'] excellent regulation of the press, how things are to be carried on after the adoption of the new constitution.'" *Ante*, at 365 (quoting Philadelphiensis, Essay I, Independent Gazetteer, Nov. 7, 1787, in 3 Complete Anti-Federalist 103 (H. Storing ed. 1981)).)

The concurrence recounts other pre- and post-Revolution examples of defense of anonymity in the name of "freedom of the press," but not a single one involves the context of restrictions imposed in connection with a free, democratic election, which is all that is at issue here. For many of them, moreover, such as the 1735 Zenger trial, *ante*, at 361, the 1779 "Leonidas" controversy in the Continental Congress, *ibid.*, and the 1779 action by the New Jersey Legislative Council against Isaac Collins, *ante*, at 362, the issue of anonymity was incidental to the (unquestionably free-speech) issue of whether criticism of the government could be *punished* by the state.

Thus, the sum total of the historical evidence marshaled by the concurrence for the principle of *constitutional entitlement* to anonymous electioneering is partisan claims in the debate on ratification (which was *almost* like an election) that a viewpoint-based restriction on anonymity by newspaper editors violates freedom of speech. This absence of historical testimony concerning the point before us is hardly remarkable. The issue of a governmental prohibition upon anonymous electioneering in particular (as opposed to a government prohibition upon anonymous publication in general) simply never arose. Indeed, there probably never arose even the abstract question whether electoral openness and regularity was worth such a governmental restriction upon the normal right to anonymous speech. The idea of close government regulation of the electoral process is a more modern phenomenon, arriving in this country in the late 1800's. See *Burson* v. *Freeman*, *supra*, at 203–205.

What we have, then, is the most difficult case for determining the meaning of the Constitution. No accepted existence of governmental restrictions of the sort at issue here demonstrates their constitutionality, but neither can their nonexistence clearly be attributed to constitutional objections. In such a case, constitutional adjudication necessarily involves not just history but judgment: judgment as to whether the government action under challenge is consonant with the concept of the protected freedom (in this case, the freedom of speech and of the press) that existed when the constitutional protection was accorded. In the present case, *absent other indication,* I would be inclined to agree with the concurrence that a society which used anonymous political debate so regularly would not regard as constitutional even moderate restrictions made to improve the election process. (I would, however, want further evidence of common practice in 1868, since I doubt that the Fourteenth Amendment time-warped the post-Civil War States back to the Revolution.)

But there *is* other indication, of the most weighty sort: the widespread and longstanding traditions of our people. Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's consciousness. A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality. And that is what we have before us here. Ohio Rev. Code Ann. § 3599.09(A) (1988) was enacted by the General Assembly of the State of Ohio almost 80 years ago. See Act of May 27, 1915, 1915 Ohio Leg. Acts 350. Even at the time of its adoption, there was nothing unique or extraordinary about it. The earliest statute of this sort was adopted by Massachusetts in 1890, little more than 20 years after the Fourteenth Amendment was ratified. No

less than 24 States had similar laws by the end of World War I,[1] and today every State of the Union except California has one,[2] as does the District of Columbia, see D. C. Code

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[1] See Act of June 19, 1915, No. 171, § 9, 1915 Ala. Acts 250, 254–255; Act of Mar. 12, 1917, ch. 47, § 1, 1917 Ariz. Sess. Laws 62, 62–63; Act of Apr. 2, 1913, No. 308, § 6, 1913 Ark. Gen. Acts 1252, 1255; Act of Mar. 15, 1901, ch. 138, § 1, 1901 Cal. Stats. 297; Act of June 6, 1913, ch. 6470, § 9, 1913 Fla. Laws 268, 272–273; Act of June 26, 1917, § 1, 1917 Ill. Laws 456, 456–457; Act of Mar. 14, 1911, ch. 137, § 1, 1911 Kan. Sess. Laws 221; Act of July 11, 1912, No. 213, § 14, 1912 La. Acts 447, 454; Act of June 3, 1890, ch. 381, 1890 Mass. Acts 342; Act of June 20, 1912, Ex. Sess. ch. 3, § 7, 1912 Minn. Laws 23, 26; Act of Apr. 21, 1906, S. B. No. 191, 1906 Miss. Gen. Laws 295 (enacting Miss. Code Ann. § 3728 (1906)); Act of Apr. 9, 1917, § 1, 1917 Mo. Laws 272, 273; Act of Nov. 1912, § 35, 1912 Mont. Laws 593, 608; Act of Mar. 31, 1913, ch. 282, § 34, 1913 Nev. Stats. 476, 486–487; Act of Apr. 21, 1915, ch. 169, § 7, 1915 N. H. Laws 234, 236; Act of Apr. 20, 1911, ch. 188, § 9, 1911 N. J. Laws 329, 334; Act of Mar. 12, 1913, ch. 164, § 1(k), 1913 N. C. Sess. Laws 259, 261; Act of May 27, 1915, 1915 Ohio Leg. Acts 350; Act of June 23, 1908, ch. 3, § 35, 1909 Ore. Laws 15, 30; Act of June 26, 1895, No. 275, 1895 Pa. Laws 389; Act of Mar. 13, 1917, ch. 92, § 23, 1917 Utah Laws 258, 267; Act of Mar. 12, 1909, ch. 82, § 8, 1909 Wash. Laws 169, 177–178; Act of Feb. 20, 1915, ch. 27, § 13, 1915 W. Va. Acts 246, 255; Act of July 11, 1911, ch. 650, §§ 94–14 to 94–16, 1911 Wis. Laws 883, 890.

[2] See Ala. Code § 17–22A–13 (Supp. 1994); Alaska Stat. Ann. § 15.56.010 (1988); Ariz. Rev. Stat. Ann. § 16–912 (Supp. 1994); Ark. Code Ann. § 7–1–103 (1993); Colo. Rev. Stat. § 1–13–108 (Supp. 1994); Conn. Gen. Stat. § 9–333w (Supp. 1994); Del. Code Ann., Tit. 15, §§ 8021, 8023 (1993); Fla. Stat. §§ 106.143 and 106.1437 (1992); Ga. Code Ann. § 21–2–415 (1993); Haw. Rev. Stat. § 11–215 (1988); Idaho Code § 67–6614A (Supp. 1994); Ill. Comp. Stat. § 5/29–14 (1993); Ind. Code § 3–14–1–4 (Supp. 1994); Iowa Code § 56.14 (1991); Kan. Stat. Ann. §§ 25–2407 and 25–4156 (Supp. 1991); Ky. Rev. Stat. Ann. § 121.190 (Baldwin Supp. 1994); La. Rev. Stat. Ann. § 18:1463 (West Supp. 1994); Me. Rev. Stat. Ann., Tit. 21–A, § 1014 (1993); Md. Ann. Code, Art. 33, § 26–17 (1993); Mass. Gen. Laws § 41 (1990); Mich. Comp. Laws Ann. § 169.247 (West 1989); Minn. Stat. § 211B.04 (1994); Miss. Code Ann. § 23–15–899 (1990); Mo. Rev. Stat. § 130.031 (Supp. 1994); Mont. Code Ann. § 13–35–225 (1993); Neb. Rev. Stat. § 49–1474.01 (1993); Nev. Rev. Stat. § 294A.320 (Supp. 1993); N. H. Rev. Stat. Ann. § 664:14 (Supp. 1992); N. J. Stat. Ann. § 19:34–38.1 (West 1989); N. M. Stat. Ann. §§ 1–19–16 and 1–19–17 (1991); N. Y. Elec. Law § 14–106 (McKinney 1978); N. C. Gen. Stat. § 163–274 (Supp. 1994); N. D. Cent. Code § 16.1–10–04.1 (1981); Ohio Rev.

Ann. § 1–1420 (1992), and as does the Federal Government where advertising relating to candidates for federal office is concerned, see 2 U. S. C. § 441d(a). Such a universal[3] and long-established American legislative practice must be given precedence, I think, over historical and academic speculation regarding a restriction that assuredly does not go to the heart of free speech.

It can be said that we ignored a tradition as old, and almost as widespread, in *Texas* v. *Johnson*, 491 U. S. 397 (1989), where we held unconstitutional a state law prohibiting desecration of the United States flag. See also *United States* v. *Eichman*, 496 U. S. 310 (1990). But those cases merely

Code Ann. § 3599.09(A) (1988); Okla. Stat., Tit. 21, § 1840 (Supp. 1995); Ore. Rev. Stat. § 260.522 (1991); 25 Pa. Cons. Stat. § 3258 (1994); R. I. Gen. Laws § 17–23–2 (1988); S. C. Code Ann. § 8–13–1354 (Supp. 1993); S. D. Comp. Laws Ann. § 12–25–4.1 (Supp. 1994); Tenn. Code Ann. § 2–19–120 (Supp. 1994); Tex. Elec. Code Ann. § 255.001 (Supp. 1995); Utah Code Ann. § 20–14–24 (Supp. 1994); Vt. Stat. Ann., Tit. 17, § 2022 (1982); Va. Code Ann. § 24.2–1014 (1993); Wash. Rev. Code § 42.17.510 (Supp. 1994); W. Va. Code § 3–8–12 (1994); Wis. Stat. § 11.30 (Supp. 1994); Wyo. Stat. § 22–25–110 (1992).

Courts have declared some of these laws unconstitutional in recent years, relying upon our decision in *Talley* v. *California*, 362 U. S. 60 (1960). See, *e. g.*, *State* v. *Burgess*, 543 So. 2d 1332 (La. 1989); *State* v. *North Dakota Ed. Assn.*, 262 N. W. 2d 731 (N. D. 1978); *People* v. *Duryea*, 76 Misc. 2d 948, 351 N. Y. S. 2d 978 (Sup.), aff'd, 44 App. Div. 2d 663, 354 N. Y. S. 2d 129 (1974). Other decisions, including all pre-*Talley* decisions I am aware of, have upheld the laws. See, *e. g.*, *Commonwealth* v. *Evans*, 156 Pa. Super. 321, 40 A. 2d 137 (1944); *State* v. *Freeman*, 143 Kan. 315, 55 P. 2d 362 (1936); *State* v. *Babst*, 104 Ohio St. 167, 135 N. E. 525 (1922).

[3] It might be accurate to say that, insofar as the judicially unconstrained judgment of American legislatures is concerned, approval of the law before us here is universal. California, although it had enacted an election disclosure requirement as early as 1901, see Act of Mar. 15, 1901, ch. 138, § 1, 1901 Cal. Stats. 297, abandoned its law (then similar to Ohio's) in 1983, see Act of Sept. 11, 1983, ch. 668, 1983 Cal. Stats. 2621, after a California Court of Appeal, relying primarily on our decision in *Talley*, had declared the provision unconstitutional, see *Schuster* v. *Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), cert. denied, 450 U. S. 1042 (1981).

stand for the proposition that postadoption tradition cannot alter the core meaning of a constitutional guarantee. As we said in *Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." 491 U. S., at 414. Prohibition of expression of contempt for the flag, whether by contemptuous words, see *Street* v. *New York*, 394 U. S. 576 (1969), or by burning the flag, came, we said, within that "bedrock principle." The law at issue here, by contrast, forbids the expression of no idea, but merely requires identification of the speaker when the idea is uttered in the electoral context. It is at the periphery of the First Amendment, like the law at issue in *Burson*, where we took guidance from tradition in upholding against constitutional attack restrictions upon electioneering in the vicinity of polling places, see 504 U. S., at 204–206 (plurality opinion); *id.*, at 214–216 (SCALIA, J., concurring in judgment).

II

The foregoing analysis suffices to decide this case for me. Where the meaning of a constitutional text (such as "the freedom of speech") is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine. Even if I were to close my eyes to practice, however, and were to be guided exclusively by deductive analysis from our case law, I would reach the same result.

Three basic questions must be answered to decide this case. Two of them are readily answered by our precedents; the third is readily answered by common sense and by a decent regard for the practical judgment of those more familiar with elections than we are. The first question is whether protection of the election process justifies limitations upon speech that cannot constitutionally be imposed generally. (If not, *Talley* v. *California*, which invalidated a flat ban on

all anonymous leafletting, controls the decision here.) Our cases plainly answer that question in the affirmative—indeed, they suggest that no justification for regulation is more compelling than protection of the electoral process. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). The State has a "compelling interest in preserving the integrity of its election process." *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 231 (1989). So significant have we found the interest in protecting the electoral process to be that we have approved the prohibition of political speech *entirely* in areas that would impede that process. *Burson*, *supra*, at 204–206 (plurality opinion).

The second question relevant to our decision is whether a "right to anonymity" is such a prominent value in our constitutional system that even protection of the electoral process cannot be purchased at its expense. The answer, again, is clear: no. Several of our cases have held that *in peculiar circumstances* the compelled disclosure of a person's identity would unconstitutionally deter the exercise of First Amendment associational rights. See, *e. g.*, *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U. S. 87 (1982); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). But those cases did not acknowledge any general right to anonymity, or even any right on the part of *all* citizens to ignore the particular laws under challenge. Rather, they recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a "reasonable probability" that the compelled disclosure would result in "threats, harassment, or reprisals from either Government officials or private parties." This last quotation is from *Buckley* v. *Valeo*, 424 U. S., at 74 *(per curiam)*, which prescribed the safety valve of a similar exemption in upholding the disclosure requirements of the Federal Election Campaign Act. That is the answer our case law pro-

vides to the Court's fear about the "tyranny of the majority," *ante*, at 357, and to its concern that "'[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all,'" *ante*, at 342 (quoting *Talley*, 362 U. S., at 64). Anonymity can still be enjoyed by those who require it, without utterly destroying useful disclosure laws. The record in this case contains not even a hint that Mrs. McIntyre feared "threats, harassment, or reprisals"; indeed, she placed her name on some of her fliers and meant to place it on all of them. See App. 12, 36–40.

The existence of a generalized right of anonymity in speech was rejected by this Court in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 (1913), which held that newspapers desiring the privilege of second-class postage could be required to provide to the Postmaster General, and to publish, a statement of the names and addresses of their editors, publishers, business managers, and owners. We rejected the argument that the First Amendment forbade the requirement of such disclosure. *Id.*, at 299. The provision that gave rise to that case still exists, see 39 U. S. C. § 3685, and is still enforced by the Postal Service. It is one of several federal laws seemingly invalidated by today's opinion.

The Court's unprecedented protection for anonymous speech does not even have the virtue of establishing a clear (albeit erroneous) rule of law. For after having announced that this statute, because it "burdens core political speech," requires "'exacting scrutiny'" and must be "narrowly tailored to serve an overriding state interest," *ante*, at 347 (ordinarily the kiss of death), the opinion goes on to proclaim soothingly (and unhelpfully) that "a State's enforcement interest might justify a more limited identification requirement," *ante*, at 353. See also *ante*, at 358 (GINSBURG, J., concurring) ("We do not . . . hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity"). Perhaps, then, not

all the state statutes I have alluded to are invalid, but just *some* of them; or indeed maybe *all* of them remain valid in "larger circumstances"! It may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field. And in other areas, of course, a whole new boutique of wonderful First Amendment litigation opens its doors. Must a parade permit, for example, be issued to a group that refuses to provide its identity, or that agrees to do so only under assurance that the identity will not be made public? Must a municipally owned theater that is leased for private productions book anonymously sponsored presentations? Must a government periodical that has a "letters to the editor" column disavow the policy that most newspapers have against the publication of anonymous letters? Must a public university that makes its facilities available for a speech by Louis Farrakhan or David Duke refuse to disclose the on-campus or off-campus group that has sponsored or paid for the speech? Must a municipal "public-access" cable channel permit anonymous (and masked) performers? The silliness that follows upon a generalized right to anonymous speech has no end.

The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. In answering this question no, the Justices of the majority set their own views—on a practical matter that bears closely upon the real-life experience of elected politicians and *not* upon that of unelected judges—up against the views of 49 (and perhaps all 50, see n. 4, *supra*) state legislatures and the Federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. See, *e. g.*, Commonwealth Electoral Act 1918, § 328 (Australia); Canada Elections Act, R. S. C., ch. E–2, § 261 (1985); Representation of the People Act, 1983, § 110 (England). How is it, one must wonder, that

all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?

The Court says that the State has not explained "why it can more easily enforce the direct bans on disseminating false documents against anonymous authors and distributors than against wrongdoers who might use false names and addresses in an attempt to avoid detection." *Ante*, at 352–353. I am not sure what this complicated comparison means. I am sure, however, that (1) a person who is required to put his name to a document is much less likely to lie than one who can lie anonymously, and (2) the distributor of a leaflet which is unlawful because it is anonymous runs much more risk of immediate detection and punishment than the distributor of a leaflet which is unlawful because it is false. Thus, people will be more likely to observe a signing requirement than a naked "no falsity" requirement; and, having observed that requirement, will then be significantly less likely to lie in what they have signed.

But the usefulness of a signing requirement lies not only in promoting observance of the law against campaign falsehoods (though that alone is enough to sustain it). It lies also in promoting a civil and dignified level of campaign debate—which the State has no power to command, but ample power to encourage by such undemanding measures as a signature requirement. Observers of the past few national elections have expressed concern about the increase of character assassination—"mudslinging" is the colloquial term—engaged in by political candidates and their supporters to the detriment of the democratic process. Not all of this, in fact not much of it, consists of actionable untruth; most is innuendo, or demeaning characterization, or mere disclosure of items of personal life that have no bearing upon suitability for office.

Imagine how much all of this would increase if it could be done anonymously. The principal impediment against it is the reluctance of most individuals and organizations to be publicly associated with uncharitable and uncivil expression. Consider, moreover, the increased potential for "dirty tricks." It is not unheard-of for campaign operatives to circulate material over the name of their opponents or their opponents' supporters (a violation of election laws) in order to attract or alienate certain interest groups. See, *e. g.*, B. Felknor, Political Mischief: Smear, Sabotage, and Reform in U. S. Elections 111–112 (1992) (fake United Mine Workers' newspaper assembled by the National Republican Congressional Committee); *New York* v. *Duryea*, 76 Misc. 2d 948, 351 N. Y. S. 2d 978 (Sup. 1974) (letters purporting to be from the "Action Committee for the Liberal Party" sent by Republicans). How much easier—and sanction free!—it would be to circulate anonymous material (for example, a *really* tasteless, though not actionably false, attack upon one's own candidate) with the hope and expectation that it will be attributed to, and held against, the other side.

The Court contends that demanding the disclosure of the pamphleteer's identity is no different from requiring the disclosure of any other information that may reduce the persuasiveness of the pamphlet's message. See *ante*, at 348–349. It cites *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), which held it unconstitutional to require a newspaper that had published an editorial critical of a particular candidate to furnish space for that candidate to reply. But it is not *usual* for a speaker to put forward the best arguments against himself, and it is a great imposition upon free speech to make him do so. Whereas it is quite usual—it is expected—for a speaker to *identify* himself, and requiring that is (at least when there are no special circumstances present) virtually no imposition at all.

We have approved much more onerous disclosure requirements in the name of fair elections. In *Buckley* v. *Valeo*, 424

U. S. 1 (1976), we upheld provisions of the Federal Election Campaign Act that required private individuals to report to the Federal Election Commission independent expenditures made for communications advocating the election or defeat of a candidate for federal office. *Id.*, at 80. Our primary rationale for upholding this provision was that it served an "informational interest" by "increas[ing] the fund of information concerning those who support the candidates." *Id.*, at 81. The provision before us here serves the same informational interest, as well as more important interests, which I have discussed above. The Court's attempt to distinguish *Buckley*, see *ante*, at 356, would be unconvincing, even if it were accurate in its statement that the disclosure requirement there at issue "reveals far less information" than requiring disclosure of the identity of the author of a specific campaign statement. That happens not to be accurate, since the provision there at issue required not merely "[d]isclosure of an expenditure and its use, without more." *Ante*, at 355. It required, among other things:

> "the identification of *each person to whom expenditures have been made* . . . within the calendar year in an aggregate amount or value in excess of $100, the amount, date, *and purpose* of each such expenditure and the name and address of, and office sought by, *each candidate on whose behalf* such expenditure was made." 2 U. S. C. § 434(b)(9) (1970 ed., Supp. IV) (emphasis added).

See also 2 U. S. C. § 434(e) (1970 ed., Supp. IV). (Both reproduced in Appendix to *Buckley*, *supra*, at 158, 160.) Surely in many if not most cases, this information will readily permit identification of the particular message that the would-be-anonymous campaigner sponsored. Besides which the burden of complying with this provision, which includes the filing of quarterly reports, is infinitely more onerous than Ohio's simple requirement for signature of

campaign literature. If *Buckley* remains the law, this is an easy case.

* * *

I do not know where the Court derives its perception that "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Ante*, at 357. I can imagine no reason why an anonymous leaflet is any more honorable, as a general matter, than an anonymous phone call or an anonymous letter. It facilitates wrong by eliminating accountability, which is ordinarily the very purpose of the anonymity. There are of course exceptions, and where anonymity is needed to avoid "threats, harassment, or reprisals" the First Amendment will require an exemption from the Ohio law. Cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958). But to strike down the Ohio law in its general application—and similar laws of 49 other States and the Federal Government—on the ground that all anonymous communication is in our society traditionally sacrosanct, seems to me a distortion of the past that will lead to a coarsening of the future.

I respectfully dissent.

Syllabus

STONE *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

No. 93–1199. Argued November 28, 1994—Decided April 19, 1995

In 1988, an Immigration Judge ordered petitioner Stone deported. The Board of Immigration Appeals (BIA) affirmed on July 26, 1991, and denied Stone's motion to reopen and/or reconsider the deportation in February 1993. Shortly thereafter, he petitioned the Court of Appeals for review of both the deportation and reconsideration orders. The court dismissed the petition for want of jurisdiction to the extent that it sought review of the underlying deportation determination, holding that the filing of the reconsideration motion did not toll the running of the 90-day filing period for review of final deportation orders specified in § 106(a)(1) of the Immigration and Nationality Act (INA).

Held: A timely motion for reconsideration of a BIA decision does not toll the running of § 106(a)(1)'s 90-day period. Pp. 390–406.

(a) The parties agree that a deportation order becomes final upon the BIA's dismissal of an appeal and that the 90-day appeal period started to run in this case on July 26, 1991. It is also clear that the Hobbs Administrative Orders Review Act, which Congress has directed governs review of deportation orders, embraces a tolling rule: The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. *ICC* v. *Locomotive Engineers,* 482 U. S. 270. That conventional tolling rule would apply to this case had Congress specified using the Hobbs Act to govern review of deportation orders without further qualification. Pp. 390–393.

(b) However, Congress instead specified 10 exceptions to the use of Hobbs Act procedures, one of which is decisive here. Section 106(a)(6), added to the INA in 1990, provides that whenever a petitioner seeks review of an order under § 106, "any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." By its terms, § 106(a)(6) contemplates two petitions for review and directs the courts to consolidate the matters. The direction that the motion to reopen or reconsider is to be consolidated with the review of the underlying order, not the other way around, indicates that the action to review the underlying order remains active and pending before the court. Were a motion for reconsideration to render the underlying order nonfinal, there would be, in the normal

course, only one petition for review filed and hence nothing for the Judiciary to consolidate. Since it appears that only the no-tolling rule would give rise to two separate petitions for review simultaneously before the courts, which it is plain § 106(a)(6) contemplates, it would seem that only that rule gives meaning to the section. Pp. 393–395.

(c) Petitioner's construction of § 106(a)(6)—which presumes that a reconsideration motion renders the underlying order nonfinal if the motion is filed before a petition for review but that finality is unaffected if the reconsideration motion is filed after the petition for review—is unacceptable. It is implausible that Congress would direct different results in the two circumstances. Moreover, it is presumed that Congress intends its amendment of a statute to have real and substantial effect, yet under petitioner's construction the consolidation provision would have effect only in the rarest of circumstances. Pp. 395–398.

(d) Underlying considerations of administrative and judicial efficiency, as well as fairness to the alien, support the conclusion that Congress intended to depart from the conventional tolling rule in deportation cases. While an appeal of a deportation order results in an automatic stay, a motion for agency reconsideration does not. Congress might not have wished to impose on aliens the Hobson's choice of petitioning for reconsideration at the risk of immediate deportation or forgoing reconsideration and petitioning for review to obtain the automatic stay. In addition, the tolling rule's policy of delayed review would be at odds with Congress' fundamental purpose in enacting § 106, which was to abbreviate the judicial review process in order to prevent aliens from forestalling deportation by dilatory tactics in the courts. Pp. 398–401.

(e) A consideration of the analogous practice of appellate court review of district court judgments confirms the correctness of this Court's construction of Congress' language. The filing of a motion for relief from judgment more than 10 days after judgment under Federal Rule of Civil Procedure 60(b)—the closest analogy to the petition for agency reconsideration here—does not affect the finality of a district court's judgment. If filed before the appeal is taken, it does not toll the running of the time to take an appeal; if filed after the notice of appeal, appellate court jurisdiction is not divested. Each case gives rise to two separate appellate proceedings that can be consolidated. However, if a post-trial motion that renders an underlying judgment nonfinal is filed before an appeal, it tolls the time for review, and if filed afterwards, it divests the appellate court of jurisdiction. Thus, it gives rise to only one appeal in which all matters are reviewed. In contrast, the hybrid tolling rule suggested by the dissent—that a reconsideration motion before the BIA renders the original order nonfinal if made before a petition for judicial review is filed but does not affect the finality of the order if filed after-

wards—has no analogue at all in the appellate court-district court context. Pp. 401–406.

13 F. 3d 934, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, THOMAS, and GINSBURG, JJ., joined. BREYER, J., filed a dissenting opinion, in which O'CONNOR and SOUTER, JJ., joined, *post*, p. 406.

Alan B. Morrison argued the cause for petitioner. On the briefs was *David Eric Funke*.

Beth S. Brinkmann argued the cause for respondent. With her on the brief were *Solicitor General Days*, *Assistant Attorney General Hunger*, and *Deputy Solicitor General Kneedler*.

JUSTICE KENNEDY delivered the opinion of the Court.

We consider whether the filing of a timely motion for reconsideration of a decision by the Board of Immigration Appeals tolls the running of the 90-day period for seeking judicial review of the decision.

I

Petitioner, Marvin Stone, is a citizen of Canada and a businessman and lawyer by profession. He entered the United States in 1977 as a nonimmigrant visitor for business and has since remained in the United States.

On January 3, 1983, Stone was convicted of conspiracy and mail fraud, in violation of 18 U. S. C. §§ 371 and 1341. He served 18 months of a 3-year prison term. In March 1987, after his release, the Immigration and Naturalization Service (INS) served him with an order to show cause why he should not be deported as a nonimmigrant who had remained in the United States beyond the period authorized by law. In January 1988, after a series of hearings, an Immigration Judge ordered Stone deported. The IJ concluded that under the regulations in effect when Stone entered the United States, an alien on a nonimmigrant for business visa

could remain in the country for an initial period not to exceed six months with the privilege of seeking extensions, which could be granted in 6-month increments. 8 CFR § 214.2 (b) (1977). The IJ ordered deportation under 8 U. S. C. § 1251(a)(2) (now § 1251(a)(1)(B) (1988 ed., Supp. V)) based on petitioner's testimony that he had remained in the United States since 1977 without seeking any extension. The IJ denied Stone's application for suspension of deportation under 8 U. S. C. § 1254(a)(1), concluding that Stone's conviction of mail fraud and 18-month incarceration barred him, as a matter of law, from establishing "good moral character" as required by § 1254. See § 1101(f)(7).

Stone's administrative appeals were as follows: he appealed to the Board of Immigration Appeals, which affirmed the IJ's determinations and dismissed the appeal on July 26, 1991; he filed a "Motion to Reopen and/or to Reconsider" with the BIA in August 1991; on February 3, 1993, some 17 months later, the BIA denied the reconsideration motion as frivolous.

Judicial review was sought next. The record does not give the precise date, but, sometime in February or March 1993, Stone petitioned the Court of Appeals for the Sixth Circuit for review of both the July 26, 1991, deportation order and the February 3, 1993, order denying reconsideration. The Court of Appeals dismissed the petition for want of jurisdiction to the extent the petition sought review of the July 26, 1991, order, the underlying deportation determination. The court held that the filing of the reconsideration motion did not toll the running of the 90-day filing period for review of final deportation orders. 13 F. 3d 934, 938–939 (1994). We granted certiorari, 511 U. S. 1105 (1994), to resolve a conflict among the Circuits on the question, compare *Akrap* v. *INS*, 966 F. 2d 267, 271 (CA7 1992), and *Nocon* v. *INS*, 789 F. 2d 1028, 1033 (CA3 1986) (agreeing that the filing of a reconsideration motion does not toll the statutory time limit for seeking review of a deportation order), with *Fleary*

v. *INS*, 950 F. 2d 711, 713 (CA11 1992), *Pierre* v. *INS*, 932 F. 2d 418, 421 (CA5 1991) *(per curiam)*, *Attoh* v. *INS*, 606 F. 2d 1273, 1275, n. 15 (CADC 1979), and *Bregman* v. *INS*, 351 F. 2d 401, 402–403 (CA9 1965) (holding that a petition to review a deportation order is timely if filed within the statutory period following the disposition of a timely filed reconsideration motion). We now affirm.

II

A

Section 106(a)(1) of the Immigration and Nationality Act (INA) specifies that "a petition for review [of a final deportation order] may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order." 8 U. S. C. § 1105a(a)(1) (1988 ed. and Supp. V). The clause pertaining to an "aggravated felony" is not a factor in the analysis, petitioner's offense not being within that defined term. See § 1101(a)(43). He had the benefit of the full 90-day filing period. There is no dispute that a deportation order "become[s] final upon dismissal of an appeal by the Board of Immigration Appeals," 8 CFR § 243.1 (1977), and, the parties agree, the 90-day period started on July 26, 1991.

The parties disagree, however, regarding the effect that petitioner's later filing of a timely motion to reconsider had on the finality of the order. Petitioner contends that a timely motion to reconsider renders the underlying order nonfinal, and that a petition seeking review of both the order and the reconsideration denial is timely if filed (as this petition was) within 90 days of the reconsideration denial. The INS argues that the finality and reviewability of an order are unaffected by the filing of a motion to reconsider or to reopen. In its view the Court of Appeals had jurisdiction to review the denial of the motion to reconsider but not to review the original order.

We considered the timeliness of a review petition where there is a motion to reconsider or reopen an agency's order in *ICC* v. *Locomotive Engineers*, 482 U. S. 270 (1987). The Interstate Commerce Commission's governing statute provided that, with certain exceptions, judicial review of ICC orders would be governed by the Hobbs Administrative Orders Review Act, 28 U. S. C. § 2341 *et seq.* See *Locomotive Engineers*, 482 U. S., at 277. We held that "the timely petition for administrative reconsideration stayed the running of the Hobbs Act's limitation period until the petition had been acted upon by the Commission." *Id.*, at 284. Our conclusion, we acknowledged, was in some tension with the language of both the Hobbs Act, which permits an aggrieved party to petition for review "within 60 days after [the] entry" of a final order, 28 U. S. C. § 2344, and of 49 U. S. C. § 10327(i), "which provides that, '[n]otwithstanding' the provision authorizing the Commission to reopen and reconsider its orders (§ 10327(g)), 'an action of the Commission . . . is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.'" *Locomotive Engineers*, *supra*, at 284. We found the controlling language similar to the corresponding provision of the Administrative Procedure Act (APA), 5 U. S. C. § 704, which provides that "agency action otherwise final is final for the purposes of this section [entitled 'Actions Reviewable'] whether or not there has been presented or determined an application for . . . any form of reconsideratio[n]"— "language [that] has long been construed . . . merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review . . . but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal." *Locomotive Engineers*, *supra*, at 284–285 (citation omitted).

In support of that longstanding construction of the APA language, we cited dicta in two earlier cases, *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532, 541

(1970); *CAB* v. *Delta Air Lines, Inc.*, 367 U. S. 316, 326–327 (1961), and the holding in *Outland* v. *CAB*, 284 F. 2d 224, 227 (CADC 1960), a decision cited with approval in both *Black Ball* and *Delta*. *Outland* justified treating orders as nonfinal for purposes of review during the pendency of a motion for reconsideration in terms of judicial economy: "[W]hen the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." *Outland*, *supra*, at 227.

As construed in *Locomotive Engineers* both the APA and the Hobbs Act embrace a tolling rule: The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. In consequence, pendency of reconsideration renders the underlying decision not yet final, and it is implicit in the tolling rule that a party who has sought rehearing cannot seek judicial review until the rehearing has concluded. 4 K. Davis, Administrative Law Treatise § 26:12 (2d ed. 1988); *United Transportation Union* v. *ICC*, 871 F. 2d 1114, 1118 (CADC 1989); *Bellsouth Corp.* v. *FCC*, 17 F. 3d 1487, 1489–1490 (CADC 1994). Indeed, those Circuits that apply the tolling rule have so held. See *Fleary*, 950 F. 2d, at 711–712 (deportation order not reviewable during pendency of motion to reopen); *Hyun Joon Chung* v. *INS*, 720 F. 2d 1471, 1474 (CA9 1984) (same).

Section 106 of the INA provides that "[t]he procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation . . . ." 8 U. S. C. § 1105a(a) (1988 ed. and Supp. V). The reference to chapter 158 of Title 28 is a reference to the Hobbs Act. In light of our construction of the Hobbs Act in *Locomotive Engineers*, had Congress used that Act to govern review of deportation orders without further qualification, it would follow that the so-called tolling rule applied.

The INS, however, proffers a different reading of *Locomotive Engineers*. Relying on our statement that the provision of the APA, 5 U. S. C. § 704, has been construed "not to *prevent* petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal," 482 U. S., at 285 (emphasis supplied), the INS understands *Locomotive Engineers* to set forth merely a default rule from which agencies may choose to depart. It argues that it did so here.

If the case turned on this theory, the question would arise whether an agency subject to either the APA or the Hobbs Act has the authority to specify whether the finality of its orders for purposes of judicial review is affected by the filing of a motion to reconsider. The question is not presented here. Both the Hobbs Act and the APA are congressional enactments, and Congress may alter or modify their application in the case of particular agencies. We conclude that in amending the INA Congress chose to depart from the ordinary judicial treatment of agency orders under reconsideration.

B

Congress directed that the Hobbs Act procedures would govern review of deportation orders, except for 10 specified qualifications. See 8 U. S. C. § 1105a(a). Two of those exceptions are pertinent. The first, contained in § 106(a)(1) of the INA, provides an alien with 90 days to petition for review of a final deportation order (30 days for aliens convicted of an aggravated felony), instead of the Hobbs Act's 60-day period. See 8 U. S. C. § 1105a(a)(1) (1988 ed., Supp. V). The second and decisive exception is contained in § 106(a)(6), a provision added when Congress amended the INA in 1990. The section provides:

> "[W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be

consolidated with the review of the order." 8 U. S. C. § 1105a(a)(6).

By its terms, § 106(a)(6) contemplates two petitions for review and directs the courts to consolidate the matters. The words of the statute do not permit us to say that the filing of a petition for reconsideration or reopening dislodges the earlier proceeding reviewing the underlying order. The statute, in fact, directs that the motion to reopen or reconsider is to be consolidated with the review of the order, not the other way around. This indicates to us that the action to review the underlying order remains active and pending before the court. We conclude that the statute is best understood as reflecting an intent on the part of Congress that deportation orders are to be reviewed in a timely fashion after issuance, irrespective of the later filing of a motion to reopen or reconsider.

Were a motion for reconsideration to render the underlying order nonfinal, there would be, in the normal course, only one petition for review filed and hence nothing for the judiciary to consolidate. As in *Locomotive Engineers* itself, review would be sought after denial of reconsideration, and both the underlying order and the denial of reconsideration would be reviewed in a single proceeding, insofar, at least, as denial of reconsideration would be reviewable at all. See *Locomotive Engineers*, 482 U. S., at 280. Indeed, the Ninth Circuit, which before the 1990 amendment had held that pendency of a reconsideration motion did render a deportation order nonfinal, understood that the tolling rule contemplates just one petition for review: "Congress visualized a single administrative proceeding in which all questions relating to an alien's deportation would be raised and resolved, followed by a single petition in a court of appeals for judicial review . . . ." *Yamada* v. *INS*, 384 F. 2d 214, 218 (CA9 1967). The tolling rule is hard to square with the existence of two separate judicial review proceedings.

Under the no-tolling rule, by contrast, two separate petitions for review will exist in the normal course. An order would be final when issued, irrespective of the later filing of a reconsideration motion, and the aggrieved party would seek judicial review of the order within the specified period. Upon denial of reconsideration, the petitioner would file a separate petition to review that second final order. Because it appears that only the no-tolling rule could give rise to two separate petitions for review simultaneously before the courts, which it is plain § 106(a)(6) contemplates, it would seem that only that rule gives meaning to the section.

Although the consolidation provision does not mention tolling, see *post,* at 408 (BREYER, J., dissenting), tolling would be the logical consequence if the statutory scheme provided for the nonfinality of orders upon the filing of a reconsideration motion. *Locomotive Engineers*' conclusion as to tolling followed as a necessary consequence from its conclusion about finality. Finality is the antecedent question, and as to that matter the consolidation provision speaks volumes. All would agree that the provision envisions two petitions for review. See *post,* at 408 (BREYER, J., dissenting). Because only "final deportation order[s]" may be reviewed, 8 U. S. C. § 1105a(a)(1), it follows by necessity that the provision requires for its operation the existence of two separate final orders, the petitions for review of which could be consolidated. The two orders cannot remain final and hence the subject of separate petitions for review if the filing of the reconsideration motion rendered the original order nonfinal. It follows that the filing of the reconsideration motion does not toll the time to petition for review. By speaking to finality, the consolidation provision does say quite a bit about tolling.

Recognizing this problem, petitioner at oral argument sought to give meaning to § 106(a)(6) by offering a different version of what often might occur. Petitioner envisioned an alien who petitioned for review of a final deportation order,

and, while the petition was still pending, went back to the agency to seek its reconsideration or, if new evidence had arisen, reopening. If, upon denial of reconsideration or reopening, the alien sought review, and the review of the original order were still pending, § 106(a)(6) would apply and the two petitions would be consolidated. The dissent relies on the same assumed state of events. See *post*, at 409–410.

That construct, however, is premised on a view of finality quite inconsistent with the tolling rule petitioner himself proposes. If, as petitioner advocates, the filing of a timely petition for reconsideration before seeking judicial review renders the underlying order nonfinal, so that a reviewing court would lack jurisdiction to review the order until after disposition of the reconsideration motion, one wonders how a court retains jurisdiction merely because the petitioner delays the reconsideration motions until after filing the petition for judicial review of the underlying order. The policy supporting the nonfinality rule—that "when the party elects to seek a rehearing there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary," *Outland*, 284 F. 2d, at 227—applies with equal force where the party seeks agency rehearing after filing a petition for judicial review. Indeed, the Court of Appeals for the District of Columbia Circuit, whose decision in *Outland* we cited in support of our construction in *Locomotive Engineers*, has so held in the years following our decision. See *Wade* v. *FCC*, 986 F. 2d 1433, 1434 (1993) *(per curiam)* ("The danger of wasted judicial effort . . . arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal or petition for judicial review") (citations omitted). The *Wade* holding rested on, and is consistent with, our decision in a somewhat analogous context that the filing of a Federal Rule of Civil Procedure 59 motion to alter or amend a district court's judgment strips the appellate court of jurisdiction, whether the Rule 59 motion is filed before or after the notice of appeal. See *Griggs*

v. *Provident Consumer Discount Co.*, 459 U. S. 56, 61 (1982) *(per curiam)*. Our decision, based on a construction of Federal Rule of Appellate Procedure 4(a)(4), noted the "theoretical inconsistency" of permitting the district court to retain jurisdiction to decide the Rule 59 motion while treating the notice of appeal as "adequate for purposes of beginning the appeals process." *Griggs, supra*, at 59.

We need not confirm the correctness of the *Wade* decision, but neither should we go out of our way to say it is incorrect, as petitioner and the dissent would have us do. The inconsistency in petitioner's construction of § 106(a)(6) is the same inconsistency that we noted in *Griggs*. Petitioner assumes that a reconsideration motion renders the underlying order nonfinal if the motion is filed before a petition for review, but that finality is unaffected if the reconsideration motion is filed one day after the petition for review. It is implausible that Congress would direct different results in the two circumstances. At any rate, under petitioner's construction the consolidation provision would have effect only in the rarest of circumstances.

When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect. See *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979) (Court must construe statute to give effect, if possible, to every provision); *Moskal* v. *United States*, 498 U. S. 103, 109–111 (1990) (same). Had Congress intended review of INS orders to proceed in a manner no different from review of other agencies, as petitioner appears to argue, there would have been no reason for Congress to have included the consolidation provision. The reasonable construction is that the amendment was enacted as an exception, not just to state an already existing rule. Section 106(a)(6) is an explicit exception to the general applicability of the Hobbs Act procedures, so it must be construed as creating a procedure different from normal practice under the Act. We conclude, as did the Court of Appeals, see 13 F. 3d, at 938, and the Seventh

Circuit, see *Akrap,* 966 F. 2d, at 271, that the consolidation provision Congress inserted when it amended the Act in 1990 is best understood as reflecting its expectation that in the particular context of INS deportation orders the normal tolling rule will not apply.

C

Underlying considerations of administrative and judicial efficiency, as well as fairness to the alien, support our conclusion that Congress intended to depart from the conventional tolling rule in deportation cases.

Deportation orders are self-executing orders, not dependent upon judicial enforcement. This accounts for the automatic stay mechanism, the statutory provision providing that service of the petition for review of the deportation order stays the deportation absent contrary direction from the court or the alien's aggravated felony status. See 8 U. S. C. § 1105a(a)(3). The automatic stay would be all but a necessity for preserving the jurisdiction of the court, for the agency might not otherwise refrain from enforcement. Indeed, the INA provides that "nothing in this section [Judicial review of orders of deportation and exclusion] shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section." 8 U. S. C. § 1105a(a)(8) (1988 ed., Supp. V). And it has been the longstanding view of the INS, a view we presume Congress understood when it amended the Act in 1990, that a motion for reconsideration does not serve to stay the deportation order. 8 CFR § 3.8 (1977). Cf. *Delta Air Lines,* 367 U. S., at 325–327 (certificate of public convenience and necessity effective when issued though not final for purposes of judicial review because of pendency of reconsideration motion).

Were the tolling rule to apply here, aliens subject to deportation orders might well face a Hobson's choice: petition for agency reconsideration at the risk of immediate deporta-

tion, or forgo reconsideration and petition for review to obtain the automatic stay. The choice is a hard one in deportation cases, in that the consequences of deportation are so final, unlike orders in some other administrative contexts. Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity. See 8 U. S. C. § 1105a(c). This choice is one Congress might not have wished to impose on the alien.

An alien who had filed for agency reconsideration might seek to avoid immediate deportation by seeking a judicial stay. At oral argument, petitioner suggested a habeas corpus action as one solution to the dilemma. Even on the assumption that a habeas corpus action would be available, see § 1105a(a) (Exclusiveness of procedure), the solution is unsatisfactory. In evaluating those stay applications the courts would be required to assess the probability of the alien's prevailing on review, turning the stay proceedings into collateral previews of the eventual petitions for review—indeed a preview now implicating the district court, not just the court of appeals. By inviting duplicative review in multiple courts, the normal tolling rule would frustrate, rather than promote, its stated goal of judicial economy.

From an even more fundamental standpoint, the policies of the tolling rule are at odds with Congress' policy in adopting the judicial review provisions of the INA. The tolling rule reflects a preference to postpone judicial review to ensure completion of the administrative process. Reconsideration might eliminate the need for judicial intervention, and the resultant saving in judicial resources ought not to be diminished by premature adjudication. By contrast, Congress' "fundamental purpose" in enacting § 106 of the INA was "to abbreviate the process of judicial review . . . in order to frustrate certain practices . . . whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti* v. *INS*, 375 U. S. 217, 224 (1963). Congress' concern reflected the reality that "in a deportation

proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *INS* v. *Doherty*, 502 U. S. 314, 321–325 (1992). Congress' intent in adopting and then amending the INA was to expedite both the initiation and the completion of the judicial review process. The tolling rule's policy of delayed review would be at odds with the congressional purpose.

The dissent does not dispute that a principal purpose of the 1990 amendments to the INA was to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions. In the Immigration Act of 1990, Pub. L. 101–649, 104 Stat. 5048, Congress took five steps to reduce or eliminate these abuses. First, it directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file. § 545(b). Second, it instructed the Attorney General to promulgate regulations specifying the maximum time period for the filing of those motions, hinting that a 20-day period would be appropriate. See *ibid.* Third, Congress cut in half the time for seeking judicial review of the final deportation order, from 180 to 90 days. See *ibid.* Fourth, Congress directed the Attorney General to define "frivolous behavior for which attorneys may be sanctioned" in connection with administrative appeals and motions. See § 545(a). In the dissent's view, a fifth measure, the consolidation provision, was added for no apparent reason and bears no relation to the other amendments Congress enacted at the same time. It is more plausible that when Congress took the first four steps to solve a problem, the fifth—the consolidation provision—was also part of the solution, and not a step in the other direction. By envisioning that a final deportation order will remain final and reviewable for 90 days from the date of its issuance irrespective of the later filing of a reconsideration motion, Congress' amendment eliminates much if not all of the incen-

tive to file a meritless reconsideration motion, and, like the other amendments adopted at the same time, expedites the time within which the judicial review process of the deportation order begins.

D

A consideration of the analogous practice of appellate court review of district court judgments confirms the correctness of our construction of Congress' language. The closest analogy to the INS' discretionary petition for agency reconsideration is the motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The effect of Rule 60(b) motions (at least when made more than 10 days after judgment, an exception discussed below), on the finality and appealability of district court judgments is comparable to the effect of reconsideration motions on INS orders. With the exception noted, the filing of a Rule 60(b) motion does not toll the running of the time for taking an appeal, see Fed. Rule Civ. Proc. 60(b); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2871 (1973) (Wright & Miller), and the pendency of the motion before the district court does not affect the continuity of a prior-taken appeal. See *ibid.* And last but not least, the pendency of an appeal does not affect the district court's power to grant Rule 60 relief. See *Standard Oil Co. of Cal.* v. *United States*, 429 U. S. 17, 18–19 (1976) *(per curiam);* Wright & Miller § 2873 (1994 Supp.). A litigant faced with an unfavorable district court judgment must appeal that judgment within the time allotted by Federal Rule of Appellate Procedure 4, whether or not the litigant first files a Rule 60(b) motion (where the Rule 60 motion is filed more than 10 days following judgment). Either before or after filing his appeal, the litigant may also file a Rule 60(b) motion for relief with the district court. The denial of the motion is appealable as a separate final order, and if the original appeal is still pending it would seem that the court of appeals can consolidate the proceedings. In each of these respects, the practice of litigants under Rule 60(b) is, under

our construction, identical to that of aliens who file motions for reconsideration before the BIA. In each case two separate postdecision appeals are filed.

For reasons not relevant here, in 1991 the Rules of Appellate Procedure were amended to provide that Rule 60(b) motions filed within 10 days of a district court's judgment do toll the time for taking an appeal. See Fed. Rule App. Proc. 4(a)(4)(F). That amendment added Rule 60(b) motions filed within 10 days of judgment to a list of other post-trial motions that toll the running of the time for appeal, a list that includes Rule 59 motions to alter or amend a judgment. See Fed. Rule App. Proc. 4(a)(4)(C). A consideration of this provision of the appellate rules is quite revealing. The list of post-trial motions that toll the time for appeal is followed, and hence qualified, by the language interpreted in *Griggs*, language that provides in express terms that these motions also serve to divest the appellate court of jurisdiction where the motions are filed after appeal is taken.

The language of Rule 4 undermines the dissent's reliance on a presumption that appellate court jurisdiction once asserted is not divested by further proceedings at the trial or agency level. See *post*, at 410. Indeed, the practice is most often to the contrary where appellate court review of district court judgments subject to post-trial motions is concerned. See Fed. Rule App. Proc. 4(a)(4) (specifying that the majority of postjudgment motions filed with the district court divest the appellate court of jurisdiction that had once existed). A district court judgment subject to one of these enumerated motions, typified by Rule 59, is reviewable only after, and in conjunction with, review of the denial of the post-trial motion, and just one appeal pends before the appellate court at any one time.

In short, the Rules of Appellate Procedure evince a consistent and coherent view of the finality and appealability of district court judgments subject to post-trial motions. The majority of post-trial motions, such as Rule 59, render the

underlying judgment nonfinal both when filed before an appeal is taken (thus tolling the time for taking an appeal), and when filed after the notice of appeal (thus divesting the appellate court of jurisdiction). Other motions, such as Rule 60(b) motions filed more than 10 days after judgment, do not affect the finality of a district court's judgment, either when filed before the appeal (no tolling), or afterwards (appellate court jurisdiction not divested). Motions that do toll the time for taking appeal give rise to only one appeal in which all matters are reviewed; motions that do not toll the time for taking an appeal give rise to two separate appellate proceedings that can be consolidated.

E

Our colleagues in dissent agree that the consolidation provision envisions the existence of two separate petitions for review. See *post,* at 408. To give the provision meaning while at the same time concluding that the tolling rule applies, the dissent is compelled to conclude that a reconsideration motion before the BIA renders the original order nonfinal if made before a petition for judicial review is filed but does not affect the finality of the order if filed afterwards. See *post,* at 413–414. The hybrid tolling rule the dissent suggests has no analogue at all in the appellate court-district court context. On the contrary, as we have just observed, the uniform principle where appellate review of district court judgments is concerned is that motions that toll produce but one appeal, motions that do not toll produce two. It is only by creating this new hybrid that the dissent can give meaning to the consolidation provision, and avoid the Hobson's choice for the alien. While litigants who practice before the district courts and the BIA will have familiarity with both types of post-trial motions discussed above, and will have no difficulty practicing under the rule we announce today, practitioners would have no familiarity with the hy-

brid tolling rule the dissent is compelled to devise in order to give the consolidation provision meaning.

It is worthwhile pausing to consider just how many steps the dissent must take to reconcile the consolidation provision with the tolling rule it prefers. The dissent's construction would require that the Court conclude, without any briefing, that our decision in *Griggs* does not apply to agency review. The dissent would as well disrupt administrative law in general by overturning the practice of the Court of Appeals with the most experience reviewing agency decisions when faced with agency reconsideration motions made after petition for review (the District of Columbia Circuit), thereby resolving a circuit split without any briefing or argument. See *post*, at 412. Our construction avoids each of these extraordinary steps. It creates a practice parallel to that of appellate courts reviewing district court judgments subject to pending Rule 60(b) motions filed more than 10 days after judgment and requires us to take no firm position on whether *Griggs* applies to agency review where tolling does occur.

But the full import of our decision in *Griggs*, and the concomitant problem addressed in *Wade*, are in some sense secondary to our fundamental point of dispute with the dissent. In our view the consolidation provision reflects Congress' intent to depart from the normal tolling rule in this context, whereas on the dissent's view it does not. Congress itself was explicit in stating that the consolidation provision is an exception to the applicability of the Hobbs Act procedures, see *supra*, at 393, and it took the deliberate step of amending the Act in 1990 to add the provision. The challenge for the dissent is not, then, just to give the consolidation provision some work to do that is consistent with the tolling rule, but to give it some work as an exception to the applicability of the Hobbs Act procedures, a meaning that explains why Congress might have taken trouble to add it. The dissent's construction of the consolidation provision gives it effect, if any, only in what must be those rare instances where aliens first

petition for judicial review and then seek agency reconsideration. And, more important, its construction cannot account for Congress' decision to amend the Act in 1990 to provide that the Hobbs Act procedures, which in the normal course include the tolling rule, shall apply "except" for the consolidation provision.

F

Whatever assessment Congress might have made in enacting the judicial review provisions of the INA in the first instance, we conclude from the consolidation provision added in 1990 that it envisioned two separate petitions filed to review two separate final orders. To be sure, it would have been preferable for Congress to have spoken with greater clarity. Judicial review provisions, however, are jurisdictional in nature and must be construed with strict fidelity to their terms. As we have explained:

> "Section 106(a) is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 212 (1968).

This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, "mandatory and jurisdictional," *Missouri* v. *Jenkins*, 495 U. S. 33, 45 (1990), and are not subject to equitable tolling. See Fed. Rule App. Proc. 26(b).

* * *

The consolidation provision in § 106(a)(6) reflects Congress' understanding that a deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider. The order being final when issued, an alien has 90 days from that date to seek review. The alien, if he chooses, may also seek agency re-

consideration of the order and seek review of the disposition upon reconsideration within 90 days of its issuance. Where the original petition is still before the court, the court shall consolidate the two petitions. See 8 U. S. C. § 1105a(a)(6) (1988 ed., Supp. V).

Because Stone's petition was filed more than 90 days after the issuance of the BIA's July 26, 1991, decision, the Court of Appeals lacked jurisdiction to review that order.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, dissenting.

The majority reads § 106(a) of the Immigration and Nationality Act (INA), 8 U. S. C. § 1105a(a) (1988 ed., Supp. V), as creating an exception to the ordinary legal rules that govern the interaction of (1) motions for agency reconsideration with (2) time limits for appeals. In my view, the statute does not create such an exception. And, reading it to do so risks unnecessary complexity in the technical, but important, matter of how one petitions a court for judicial review of an adverse agency decision. For these reasons, I dissent.

This Court, in *ICC* v. *Locomotive Engineers*, 482 U. S. 270 (1987), considered the interaction between reconsideration motions and appeal time limits when one wants to petition a court of appeals to review an adverse judgment of an administrative agency (which I shall call an "agency/court" appeal). The Court held that this interaction resembled that which takes place between (1) an appeal from a district court judgment to a court of appeals (which I shall call a "court/court" appeal) and (2) certain motions for district court reconsideration, namely, those filed soon after entry of the district court judgment. See Fed. Rule App. Proc. 4(a)(4). The relevant statute (commonly called the Hobbs Act) said that a petition for review of a final agency order may be filed in the court

of appeals "within 60 days after its entry." 28 U. S. C. § 2344. The Court concluded, on the basis of precedent, that the filing of a proper petition for reconsideration, "within the period allotted for judicial review of the original order . . . tolls the period for judicial review of the original order." 482 U. S., at 279. That order can "be appealed to the courts . . . after the petition for reconsideration is denied." *Ibid.* See also *id.*, at 284–285.

In my view, we should interpret the INA as calling for tolling, just as we interpreted the Hobbs Act in *Locomotive Engineers.* For one thing, the appeals time limit language in the INA is similar to that in the Hobbs Act. Like the Hobbs Act, the INA does not mention tolling explicitly; it simply says that "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." INA § 106(a)(1), 8 U. S. C. § 1105a(a)(1) (1988 ed., Supp. V). More importantly, the INA explicitly states that the "procedure prescribed by, and all the provisions of [the Hobbs Act, 28 U. S. C. § 2341 *et seq.*,] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation." INA § 106(a), 8 U. S. C. § 1105a(a). This statutory phrase is not conclusive because it is followed by several exceptions, one of which is the subsection setting the "[t]ime for filing [a] petition" for review. INA § 106(a)(1), 8 U. S. C. § 1105a(a)(1). But, the context suggests that the reason for calling the latter clause an exception lies in the *number of days* permitted for filing—90 in the INA, as opposed to 60 in the Hobbs Act. Nothing in the language of § 106(a) (which was amended three years after *Locomotive Engineers*, see Immigration Act of 1990, § 545(b), 104 Stat. 5065) suggests any further exception in respect to tolling.

Finally, interpreting the INA and the Hobbs Act consistently makes it easier for the bar to understand, and to follow, these highly technical rules. With consistent rules, a non-immigration-specialist lawyer (say, a lawyer used to working

in the ordinary agency/court context) who seeks reconsideration of a Board of Immigration Appeals (BIA) decision is less likely to lose his client's right to appeal simply through inadvertence.

The majority reaches a different conclusion because it believes that one subsection of the INA, § 106(a)(6), is inconsistent with the ordinary *Locomotive Engineers* tolling rule. That subsection says that

> "whenever a petitioner seeks [(1)] review of [a final deportation] order . . . any [(2)] review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U. S. C. § 1105a(a)(6) (1988 ed., Supp. V).

This "consolidation" subsection, however, says nothing about tolling. Indeed, it does not address, even in a general way, the timing of petitions for judicial review; it just says what must happen when two reviews make it separately to the court of appeals and are on the court's docket at the same time (*i. e.*, they must be consolidated). And, the legislative history is likewise silent on the matter. See, *e. g.*, H. R. Conf. Rep. No. 101–955, pp. 132–133 (1990). Given that § 106(a)(6) was enacted only three years after *Locomotive Engineers*, it seems unlikely that Congress consciously created a significantly different approach to the review-deadline/reconsideration-petition problem (with the consequent risk of confusing lawyers) in so indirect a manner.

Nevertheless, the majority believes this subsection is *inconsistent* with the ordinary *Locomotive Engineers* tolling rule because application of the ordinary tolling rule would normally lead an alien to appeal both (1) the original deportation order and (2) a denial of agency reconsideration, in a single petition, after the denial takes place. Thus, in the majority's view, one could never find (1) a petition to review an original deportation order and (2) a petition to review a denial of a motion to reconsider that order, properly together

in the court of appeals at the same time. And, for that reason, there would be nothing to "consolidate" under the statute. An opposite rule (one which denies tolling) would, in the majority's view, sometimes produce (simultaneously) both (1) an initial appeal from the original order and (2) an appeal from a denial of reconsideration (if the reconsideration motion were decided, and the second appeal taken, before the court could decide the initial appeal). The "no-tolling" rule would therefore sometimes produce two appeals, ready for consolidation. The majority concludes that it must infer this "no-tolling" rule in order to give the "consolidation" subsection some work to do and thereby make it legally meaningful.

I do not believe it necessary, however, to create a special exception from the ordinary *Locomotive Engineers* tolling rule in order to make the "consolidation" subsection meaningful, for even under that ordinary tolling rule, the "consolidation" subsection will have work to do. Consider the following case: The BIA enters a final deportation order on Day Zero. The alien files a timely petition for review in a court of appeals on Day 50. Circumstances suddenly change—say, in the alien's home country—and on Day 70 the alien then files a motion to reopen with the agency. (The majority says such a filing "must be" a "rare" happening, *ante*, at 404, but I do not see why. New circumstances justifying reopening or reconsideration might arise at any time. Indeed, this situation must arise with some frequency, since INS regulations expressly recognize that a motion to reopen or reconsider may be filed after judicial review has been sought. See, *e. g.*, 8 CFR §3.8(a) (1994) (requiring that motions to reopen or reconsider state whether the validity of the order to be reopened has been, or is, the subject of a judicial proceeding).) The agency denies the reconsideration motion on Day 100. The alien then appeals that denial on Day 110. In this case, the court of appeals would have before it two appeals: the appeal filed on Day 50 and the appeal filed on

Day 110. The "consolidation" subsection tells the court of appeals to consolidate those two appeals and decide them together. (In fact, the alien might well have informed the court of appeals, say on Day 70, about the reconsideration motion, in which case the court, unless it thought the motion a frivolous stalling device, might have postponed decision on the merits of the initial appeal, awaiting the results of the reconsideration decision, an appeal from which it could then consolidate with the initial appeal. See, *e. g.*, *Gebremichael* v. *INS*, 10 F. 3d 28, 33, n. 13 (CA1 1993) (decision on appeal stayed until the agency resolved alien's motion for reconsideration; initial appeal then consolidated with the appeal from the denial of rehearing).) In this example, the subsection would have meaning as an "exception" to the Hobbs Act, cf. *ante*, at 404–405, since nothing in the Hobbs Act requires the consolidation of court reviews.

The majority understands this counterexample, but rejects it, for fear of creating both a conceptual and a precedential problem. Neither of those perceived problems, however, is significant. The conceptual problem the majority fears arises out of the fact that, under the ordinary tolling rule, the filing of a petition for reconsideration is deemed to render an otherwise "final" initial (but not-yet-appealed) order "nonfinal" for purposes of court review. Hence, one may not appeal the merits of that initial order until the district court or agency finally decides the reconsideration petition. The majority believes that the reconsideration petition in the counterexample above (a petition filed *after* an appeal is taken from the initial order) also renders "nonfinal," and hence not properly appealable, the initial order, removing the initial appeal from the court of appeals, and thereby leaving nothing to consolidate.

The answer to this conceptual argument lies in the "general principle" that "jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised." *United States* v. *The*

Little Charles, 26 F. Cas. 979, 982 (No. 15,612) (CC Va. 1818) (Marshall, C. J., Circuit Justice), quoted in *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. 80 (1992). The first appeal, as of Day 50, has reached the court of appeals. Thus, conceptually speaking, one should not consider a later filed motion for reconsideration as having "divested" the court of jurisdiction. And, practically speaking, it makes sense to leave the appeal there, permitting the court of appeals to decide it, or to delay it, as circumstances dictate (say, depending upon the extent to which effort and resources already have been expended in prosecuting and deciding the appeal). After all, we have long recognized that courts have inherent power to stay proceedings and "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936); cf. 28 U. S. C. § 1367(c)(3) (1988 ed., Supp. V) (providing that district court may, but need not, decline to exercise supplemental jurisdiction over a claim when it has dismissed all claims over which it has original jurisdiction).

The precedential problem, in the majority's view, arises out of *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56 (1982) *(per curiam)*, a court/court case in which this Court held that the filing of a reconsideration motion under Federal Rule of Civil Procedure 59 caused an earlier filed notice of appeal to "'self-destruc[t],'" 459 U. S., at 61, despite the fact that the earlier-filed notice had "vested" the Court of Appeals with "jurisdiction." Were the same principle to apply in the agency/court context, then the reconsideration motion filed on Day 70 would cause the earlier filed petition for review, filed on Day 50, to "self-destruct," leaving nothing for the court of appeals to consolidate with an eventual appeal from an agency denial of a reconsideration motion (on Day 100).

Griggs, however, does not apply in the agency/court context. This Court explicitly rested its decision in *Griggs* upon the fact that a specific Federal Rule of Appellate Proce-

dure, Rule 4(a)(4), provides for the "self-destruction." That Rule says that upon the filing of, say, a Rule 59 motion to amend a district court judgment, a "notice of appeal filed before the disposition of [*e. g.*, that Rule 59 motion] shall have no effect." By its terms, Rule 4(a)(4) applies only in the court/court context; and, to my knowledge, there is no comparable provision applicable in agency/court contexts such as this one. In the absence of such a provision, *Griggs* explicitly adds that the "district courts and courts of appeals *would both have had the power to modify the same judgment*," 459 U. S., at 60 (emphasis added)—as I believe the agency and the Court of Appeals have here.

I recognize that at least one Court of Appeals has adopted an agency/court rule analogous to the "self-destruct" rule set forth in Rule 4(a)(4). *Wade* v. *FCC*, 986 F. 2d 1433, 1434 (CADC 1993) *(per curiam);* see also *Losh* v. *Brown*, 6 Vet. App. 87, 89 (1993). But see *Berroteran-Melendez* v. *INS*, 955 F. 2d 1251, 1254 (CA9 1992) (court retains jurisdiction when motion to reopen is filed after the filing of a petition for judicial review); *Lozada* v. *INS*, 857 F. 2d 10, 12 (CA1 1988) (court retained jurisdiction over petition for review notwithstanding later filed motion to reopen, but held case in abeyance pending agency's decision on the motion). That court's conclusion, however, was based upon a single observation: that "[t]he danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal." *Wade*, *supra*, at 1434 (citations omitted) (referring to the danger that the agency's ruling might change the order being appealed, thereby mooting the appeal and wasting any appellate effort expended). While this observation is true enough, it does not justify the "self-destruct" rule, because it fails to take into account other important factors, namely, (a) the principle that jurisdiction, once vested, is generally not divested, and (b) the fact that, in some cases (say, when

briefing and argument already have been completed in the court of appeals) judicial economy may actually weigh *against* stripping the court of jurisdiction. On this last point, it is significant that under the Federal Rules, the motions to revise or reopen court judgments that cause an earlier filed appeal to "self-destruct" must be filed within a few days after the entry of judgment. See, *e. g.,* Fed. Rule Civ. Proc. 4(a)(4) (10 days). The agency rules before us, in contrast, permit a motion for reconsideration (or reopening) well after the entry of the agency's final order. See 8 CFR § 3.8(a) (1994) (no time limit on motion for reconsideration filed with BIA). See also, *e. g.,* 10 CFR § 2.734(a)(1) (1995) (Nuclear Regulatory Commission may consider untimely motion to reopen where "grave issue" raised). This timing difference means that it is less likely in the court/court context than in the agency/court context that "self-destruction" of an earlier filed notice of appeal would interrupt (and therefore waste) a court of appeals review already well underway. Consequently, this Court should not simply assume that the court/court rule applies in the agency/court context.

The majority ultimately says we ought not decide whether the "self-destruct" rule applies in the agency/court context. *Ante,* at 397, 404. But, the decision cannot be avoided. That is because the *majority's* basic argument—that a tolling rule would deprive the consolidation subsection of meaning—depends upon the assumption that the "self-destruct" rule does apply. And, for the reasons stated above, that assumption is not supported by any statutory or rule-based authority.

Because this matter is so complicated, an analogy to the court/court context may help. In that context, in a normal civil case, a losing party has 30 days to file an appeal (60, if the Government is a party). Fed. Rule App. Proc. 4(a)(1). The Rules then distinguish between two kinds of reconsideration motions: those filed within 10 days (including motions for relief from judgment under Federal Rule of Civil Proce-

dure 60(b)), which toll the time for appeal, and those filed after 10 days (in the main, other Rule 60(b) motions), which do not toll the time for appeal. See Fed. Rule App. Proc. 4(a)(4). When a party files a motion of the first sort (which I shall call an "immediate" reconsideration motion), a previously filed notice of appeal "self-destructs." *Ibid.* When a party files a motion of the second sort (which I shall call a "distant" reconsideration motion), a previously filed notice of appeal remains valid. A complex set of rules creates this system, and lawyers normally refer to those rules in order to understand what they are supposed to do. See Fed. Rule App. Proc. 4(a) (and Rules of Civil Procedure cited therein).

Agency reconsideration motions are sometimes like "immediate" court reconsideration motions, filed soon after entry of a final order, but sometimes they are like "distant" reconsideration motions, filed long after entry of a final order. (Petitioner in this case filed his motion 35 days after entry of an order that he had 90 days to appeal.) The problem before us is that we lack precise rules, comparable to the Federal Rules of Appellate and Civil Procedure, that distinguish (for appeal preserving purposes) between the "immediate" and the "distant" reconsideration motion. We therefore must read an immigration statute, silent on these matters, in one of three possible ways: (1) as creating rules that make Federal Rules-type distinctions; (2) in effect, as analogizing an agency reconsideration motion to the "distant" court reconsideration motion (and denying tolling); or (3) in effect, as analogizing an agency reconsideration motion to the "immediate" court reconsideration motion (and permitting tolling).

The first possibility is a matter for the appropriate Rules Committees, not this Court. Those bodies can focus directly upon the interaction of reconsideration motions and appellate time limits; they can consider relevant similarities and differences between agency/court and court/court appeals; and they can consider the relevance of special, immigration-

related circumstances, such as the fact that the filing of a petition for review from a "final" deportation order automatically stays deportation, INA § 106(a)(3), 8 U. S. C. § 1105a(a)(3) (1988 ed., Supp. V). The second possibility (that adopted by the majority) creates a serious risk of unfair loss of a right to appeal, because it is inconsistent with *Locomotive Engineers* (thereby multiplying complexity). And, it has no basis in the INA, which generally incorporates the procedures of the Hobbs Act and the text and history of which simply do not purport to make an exception denying tolling. The third possibility, in my view, is the best of the three, for it promotes uniformity in practice among the agencies; it is consistent with the Hobbs Act, whose procedures the INA generally adopts; and it thereby helps to avoid inadvertent or unfair loss of the right to appeal.

The upshot is that *Locomotive Engineers*, *Griggs*, the language of the immigration statute before us, the language of the Federal Rules, and various practical considerations together argue for an interpretation of INA § 106(a) that both (1) permits the filing of a motion for reconsideration to toll the time for petitioning for judicial review (when no petition for review has yet been filed), and (2) permits court review that has already "vested" in the court of appeals to continue there (when the petition for review was filed prior to the filing of the motion for reconsideration). This interpretation simply requires us to read the language of the INA as this Court read the Hobbs Act in *Locomotive Engineers*. It would avoid creating any "Hobson's choice" for the alien, cf. *ante*, at 398–399, for an alien could both appeal (thereby obtaining an automatic stay of deportation, INA § 106(a)(3), 8 U. S. C. § 1105a(a)(3)), and then also petition for reconsideration. And, it would avoid entrapping the unwary lawyer who did not immediately file a petition for court review, thinking that a reconsideration petition would toll the appeal time limit as it does in other agency/court contexts.

This approach does not undermine Congress' goal of expediting the deportation-order review process. Although the court of appeals might postpone decision of an appeal pending the agency's decision on a later filed motion to reopen or reconsider, it need not do so. If the motion is frivolous, or made for purposes of delay, the INS can call that fact to the court's attention. And, of course, the agency can simply decide the motion quickly. The alien could prevent the court of appeals from acting by not filing an appeal from the original order, but, instead (as here) simply filing a reconsideration motion. That motion would toll the time for taking an appeal. But, the fact that the alien would lose the benefit of the automatic stay would act as a check on aliens filing frivolous reconsideration motions (without filing an appeal) solely for purposes of delay.

The majority, and the parties, compare and contrast the tolling and nontolling rules in various court-efficiency and delay-related aspects. But, on balance, these considerations do not argue strongly for one side or the other. When Congress amended the INA in 1990 (adding, among other things, the consolidation subsection) it did hope to diminish delays. But, the statute explicitly set forth several ways of directly achieving this objective. See, *e. g.*, Immigration Act of 1990, § 545(a), 104 Stat. 5063 (creating INA § 242B(d), 8 U. S. C. § 1252b(d), directing the Attorney General to issue regulations providing for summary dismissal of, and attorney sanctions for, frivolous administrative appeals); § 545(b)(1) (reducing time for petitioning for review from 6 months to 90 days); § 545(d)(1) (directing the Attorney General to issue regulations limiting the number of motions to reopen and to reconsider an alien may file and setting a maximum time period for the filing of such motions); § 545(d)(2) (directing the Attorney General to do the same with respect to the number and timing of administrative appeals). Significantly, the statute did not list an antitolling rule as one of those ways. At the same time, Congress enacted certain

measures apparently designed to make the deportation-order review process more efficient. See, *e. g.*, § 545(d)(2) (asking the Attorney General to issue regulations specifying that the administrative appeal of a deportation order must be consolidated with the appeal of all motions to reopen or reconsider that order; providing for the filing of appellate and reply briefs; and identifying the items to be included in the notice of administrative appeal). In light of these last mentioned provisions, the consolidation subsection would seem consistent with Congress' purposes in 1990 even without an implicit no-tolling rule.

Indeed, the Attorney General has construed one of these last mentioned 1990 amendments as authorizing, in a somewhat analogous situation, a tolling provision roughly similar to that in *Locomotive Engineers.* In § 545(d)(2) of the 1990 Act, Congress asked the Attorney General to issue regulations with respect to "the *consolidation* of motions to reopen or to reconsider [an Immigration Judge's deportation order] with the appeal [to the BIA] of [that] order." 104 Stat. 5066 (emphasis added). In response, the Attorney General has proposed a regulation saying, among other things, that "[a] motion to reopen a decision rendered by an Immigration Judge . . . that is pending when an appeal [to the BIA] is filed . . . shall be deemed a motion to remand [the administrative appeal] for further proceedings before the Immigration Judge . . . . Such motion . . . shall be consolidated with, and considered by the Board [later] in connection with, the appeal to the Board . . . ." 59 Fed. Reg. 29386, 29388 (1994) (proposed new 8 CFR § 3.2(c)(4)). See also 59 Fed. Reg., at 29387 (proposed new § 3.2(b) (parallel provision for motions to reconsider)). This approach, which is comparable to the *Locomotive Engineers* tolling rule, would govern the interaction of administrative appeals and motions to reopen the decision of an Immigration Judge. It seems logical that Congress might want the same rule to govern the analogous situation concerning the interaction of petitions for judicial

review and motions to reconsider or reopen a decision of the BIA.

One final point. The INS argues that the Court should defer to one of its regulations, 8 CFR § 243.1 (1994), which, it says, interprets INA § 106(a) as eliminating the tolling rule. See, *e. g.*, *Shalala* v. *Guernsey Memorial Hospital*, *ante*, at 94–95; *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). The regulation in question, however, says nothing about tolling. To the contrary, it simply defines "final order of deportation," using language very similar to the language this Court, in *Locomotive Engineers*, interpreted as embodying the tolling rule. Compare the regulation here at issue, 8 CFR § 243.1 (1994) ("[A]n order of deportation . . . shall become final upon [the BIA's] dismissal of an appeal" from the order of a single immigration judge), with the language at issue in *Locomotive Engineers*, 49 U. S. C. § 10327(i) ("[A]n action of the [Interstate Commerce] Commission . . . is final on the date on which it is served"). A lawyer reading the regulation simply would not realize that the INS intended to create an unmentioned exception to a critically important technical procedure. Moreover, the INS itself has apparently interpreted the regulation somewhat differently at different times. Compare Brief for Respondent 13–17 (arguing that the regulation embodies a no-tolling rule) with *Chu* v. *INS*, 875 F. 2d 777, 779 (CA9 1989) (in which INS argued that a reconsideration motion makes the initial order nonfinal, and thereby implies tolling). See, *e. g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. 504, 514–515 (1994) (inconsistent interpretation entitled to "considerably less deference" than consistently held agency view). For these reasons, I do not accept the INS' claim that its silent regulation creates a "no tolling" rule.

I would reverse the judgment of the Court of Appeals.

Syllabus

KYLES *v.* WHITLEY, WARDEN

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

No. 93–7927. Argued November 7, 1994—Decided April 19, 1995

Petitioner Kyles was convicted of first-degree murder by a Louisiana jury and sentenced to death. Following the affirmance of his conviction and sentence on direct appeal, it was revealed on state collateral review that the State had never disclosed certain evidence favorable to him. That evidence included, *inter alia*, (1) contemporaneous eyewitness statements taken by the police following the murder; (2) various statements made to the police by an informant known as "Beanie," who was never called to testify; and (3) a computer printout of license numbers of cars parked at the crime scene on the night of the murder, which did not list the number of Kyles's car. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. He then sought relief on federal habeas, claiming, among other things, that his conviction was obtained in violation of *Brady* v. *Maryland*, 373 U. S. 83, 87, which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. The Federal District Court denied relief, and the Fifth Circuit affirmed.

Held:

1. Under *United States* v. *Bagley*, 473 U. S. 667, four aspects of materiality for *Brady* purposes bear emphasis. First, favorable evidence is material, and constitutional error results from its suppression by the government, if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Thus, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. 473 U. S., at 682, 685. *United States* v. *Agurs*, 427 U. S. 97, 112–113, distinguished. Second, *Bagley* materiality is not a sufficiency of evidence test. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Third, contrary to the Fifth Circuit's assumption, once a reviewing court applying *Bagley* has found constitutional error, there is no need for further harmless-error review, since the constitutional standard for materi-

ality under *Bagley* imposes a higher burden than the harmless-error standard of *Brecht* v. *Abrahamson*, 507 U. S. 619, 623. Fourth, the state's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. 473 U. S., at 675, and n. 7. Thus, the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. To hold otherwise would amount to a serious change of course from the *Brady* line of cases. As the more likely reading of the Fifth Circuit's opinion shows a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, it is questionable whether that court evaluated the significance of the undisclosed evidence in this case under the correct standard. Pp. 432–441.

2. Because the net effect of the state-suppressed evidence favoring Kyles raises a reasonable probability that its disclosure would have produced a different result at trial, the conviction cannot stand, and Kyles is entitled to a new trial. Pp. 441–454.

(a) A review of the suppressed statements of eyewitnesses—whose testimony identifying Kyles as the killer was the essence of the State's case—reveals that their disclosure not only would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense, but also would have substantially reduced or destroyed the value of the State's two best witnesses. Pp. 441–445.

(b) Similarly, a recapitulation of the suppressed statements made to the police by Beanie—who, by the State's own admission, was essential to its investigation and, indeed, "made the case" against Kyles—reveals that they were replete with significant inconsistencies and affirmatively self-incriminating assertions, that Beanie was anxious to see Kyles arrested for the murder, and that the police had a remarkably uncritical attitude toward Beanie. Disclosure would therefore have raised opportunities for the defense to attack the thoroughness and even the good faith of the investigation, and would also have allowed the defense to question the probative value of certain crucial physical evidence. Pp. 445–449.

(c) While the suppression of the prosecution's list of the cars at the crime scene after the murder does not rank with the failure to disclose the other evidence herein discussed, the list would have had some value as exculpation of Kyles, whose license plate was not included thereon, and as impeachment of the prosecution's arguments to the jury that the killer left his car at the scene during the investigation and that a grainy

photograph of the scene showed Kyles's car in the background. It would also have lent support to an argument that the police were irresponsible in relying on inconsistent statements made by Beanie. Pp. 450–451.

(d) Although not every item of the State's case would have been directly undercut if the foregoing *Brady* evidence had been disclosed, it is significant that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. While the inconclusiveness of that evidence does not prove Kyles's innocence, and the jury might have found the unimpeached eyewitness testimony sufficient to convict, confidence that the verdict would have been the same cannot survive a recap of the suppressed evidence and its significance for the prosecution. Pp. 451–454.

5 F. 3d 806, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 454. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY and THOMAS, JJ., joined, *post*, p. 456.

James S. Liebman argued the cause for petitioner. On the briefs were *George W. Healy III*, *Nicholas J. Trenticosta*, *Denise Leboeuf*, and *Gerard A. Rault, Jr.*

Jack Peebles argued the cause for respondent. With him on the brief was *Harry F. Connick*.

JUSTICE SOUTER delivered the opinion of the Court.

After his first trial in 1984 ended in a hung jury, petitioner Curtis Lee Kyles was tried again, convicted of first-degree murder, and sentenced to death. On habeas review, we follow the established rule that the state's obligation under *Brady* v. *Maryland*, 373 U. S. 83 (1963), to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention. Because the net effect of the evidence withheld by the State in this case raises

a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial.

I

Following the mistrial when the jury was unable to reach a verdict, Kyles's subsequent conviction and sentence of death were affirmed on direct appeal. *State* v. *Kyles*, 513 So. 2d 265 (La. 1987), cert. denied, 486 U. S. 1027 (1988). On state collateral review, the trial court denied relief, but the Supreme Court of Louisiana remanded for an evidentiary hearing on Kyles's claims of newly discovered evidence. During this state-court proceeding, the defense was first able to present certain evidence, favorable to Kyles, that the State had failed to disclose before or during trial. The state trial court nevertheless denied relief, and the State Supreme Court denied Kyles's application for discretionary review. *State ex rel. Kyles* v. *Butler*, 566 So. 2d 386 (La. 1990).

Kyles then filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, which denied the petition. The Court of Appeals for the Fifth Circuit affirmed by a divided vote. 5 F. 3d 806 (1993). As we explain, *infra*, at 440–441, there is reason to question whether the Court of Appeals evaluated the significance of undisclosed evidence under the correct standard. Because "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case," *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987),[1] we granted certiorari, 511 U. S. 1051 (1994), and now reverse.

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[1] The dissent suggests that *Burger* is not authority for error correction in capital cases, at least when two previous reviewing courts have found no error. *Post*, at 457. We explain, *infra*, at 440–441, that this is not a case of simple error correction. As for the significance of prior review, *Burger* cautions that this Court should not "substitute speculation" for the "considered opinions" of two lower courts. 483 U. S., at 785. No one could disagree that "speculative" claims do not carry much weight against careful evidentiary review by two prior courts. There is nothing speculative, however, about Kyles's *Brady* claim.

II

A

The record indicates that, at about 2:20 p.m. on Thursday, September 20, 1984, 60-year-old Dolores Dye left the Schwegmann Brothers' store (Schwegmann's) on Old Gentilly Road in New Orleans after doing some food shopping. As she put her grocery bags into the trunk of her red Ford LTD, a man accosted her and after a short struggle drew a revolver, fired into her left temple, and killed her. The gunman took Dye's keys and drove away in the LTD.

New Orleans police took statements from six eyewitnesses,[2] who offered various descriptions of the gunman. They agreed that he was a black man, and four of them said that he had braided hair. The witnesses differed significantly, however, in their descriptions of height, age, weight, build, and hair length. Two reported seeing a man of 17 or 18, while another described the gunman as looking as old as 28. One witness described him as 5'4" or 5'5", medium build, 140–150 pounds; another described the man as slim and close to six feet. One witness said he had a mustache; none of the others spoke of any facial hair at all. One witness said the murderer had shoulder-length hair; another described the hair as "short."

Since the police believed the killer might have driven his own car to Schwegmann's and left it there when he drove off in Dye's LTD, they recorded the license numbers of the cars remaining in the parking lots around the store at 9:15 p.m. on the evening of the murder. Matching these numbers with registration records produced the names and addresses of the owners of the cars, with a notation of any owner's police

[2] The record reveals that statements were taken from Edward Williams and Lionel Plick, both waiting for a bus nearby; Isaac Smallwood, Willie Jones, and Henry Williams, all working in the Schwegmann's parking lot at the time of the murder; and Robert Territo, driving a truck waiting at a nearby traffic light at the moment of the shooting, who gave a statement to police on Friday, the day after the murder.

record. Despite this list and the eyewitness descriptions, the police had no lead to the gunman until the Saturday evening after the shooting.

At 5:30 p.m., on September 22, a man identifying himself as James Joseph called the police and reported that on the day of the murder he had bought a red Thunderbird from a friend named Curtis, whom he later identified as petitioner, Curtis Kyles. He said that he had subsequently read about Dye's murder in the newspapers and feared that the car he purchased was the victim's. He agreed to meet with the police.

A few hours later, the informant met New Orleans Detective John Miller, who was wired with a hidden body microphone, through which the ensuing conversation was recorded. See App. 221–257 (transcript). The informant now said his name was Joseph Banks and that he was called Beanie. His actual name was Joseph Wallace.[3]

His story, as well as his name, had changed since his earlier call. In place of his original account of buying a Thunderbird from Kyles on Thursday, Beanie told Miller that he had not seen Kyles at all on Thursday, *id.*, at 249–250, and had bought a red LTD the previous day, Friday, *id.*, at 221–222, 225. Beanie led Miller to the parking lot of a nearby bar, where he had left the red LTD, later identified as Dye's.

Beanie told Miller that he lived with Kyles's brother-in-law (later identified as Johnny Burns),[4] whom Beanie repeatedly called his "partner." *Id.*, at 221. Beanie described Kyles as slim, about 6-feet tall, 24 or 25 years old, with a "bush" hairstyle. *Id.*, at 226, 252. When asked if Kyles ever wore

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[3] Because the informant had so many aliases, we will follow the convention of the court below and refer to him throughout this opinion as Beanie.

[4] Johnny Burns is the brother of a woman known as Pinky Burns. A number of trial witnesses referred to the relationship between Kyles and Pinky Burns as a common-law marriage (Louisiana's civil law notwithstanding). Kyles is the father of several of Pinky Burns's children.

his hair in plaits, Beanie said that he did but that he "had a bush" when Beanie bought the car. *Id.*, at 249.

During the conversation, Beanie repeatedly expressed concern that he might himself be a suspect in the murder. He explained that he had been seen driving Dye's car on Friday evening in the French Quarter, admitted that he had changed its license plates, and worried that he "could have been charged" with the murder on the basis of his possession of the LTD. *Id.*, at 231, 246, 250. He asked if he would be put in jail. *Id.*, at 235, 246. Miller acknowledged that Beanie's possession of the car would have looked suspicious, *id.*, at 247, but reassured him that he "didn't do anything wrong," *id.*, at 235.

Beanie seemed eager to cast suspicion on Kyles, who allegedly made his living by "robbing people," and had tried to kill Beanie at some prior time. *Id.*, at 228, 245, 251. Beanie said that Kyles regularly carried two pistols, a .38 and a .32, and that if the police could "set him up good," they could "get that same gun" used to kill Dye. *Id.*, at 228–229. Beanie rode with Miller and Miller's supervisor, Sgt. James Eaton, in an unmarked squad car to Desire Street, where he pointed out the building containing Kyles's apartment. *Id.*, at 244–246.

Beanie told the officers that after he bought the car, he and his "partner" (Burns) drove Kyles to Schwegmann's about 9 p.m. on Friday evening to pick up Kyles's car, described as an orange four-door Ford.[5] *Id.*, at 221, 223, 231–232, 242. When asked where Kyles's car had been parked, Beanie replied that it had been "[o]n the same side [of the lot] where the woman was killed at." *Id.*, at 231. The officers later drove Beanie to Schwegmann's, where he indicated the space where he claimed Kyles's car had been parked. Beanie went on to say that when he and Burns had brought Kyles to pick

[5] According to photographs later introduced at trial, Kyles's car was actually a Mercury and, according to trial testimony, a two-door model. Tr. 210 (Dec. 7, 1984).

up the car, Kyles had gone to some nearby bushes to retrieve a brown purse, *id.*, at 253–255, which Kyles subsequently hid in a wardrobe at his apartment. Beanie said that Kyles had "a lot of groceries" in Schwegmann's bags and a new baby's potty "in the car." *Id.*, at 254–255. Beanie told Eaton that Kyles's garbage would go out the next day and that if Kyles was "smart" he would "put [the purse] in [the] garbage." *Id.*, at 257. Beanie made it clear that he expected some reward for his help, saying at one point that he was not "doing all of this for nothing." *Id.*, at 246. The police repeatedly assured Beanie that he would not lose the $400 he paid for the car. *Id.*, at 243, 246.

After the visit to Schwegmann's, Eaton and Miller took Beanie to a police station where Miller interviewed him again on the record, which was transcribed and signed by Beanie, using his alias "Joseph Banks." See *id.*, at 214–220. This statement, Beanie's third (the telephone call being the first, then the recorded conversation), repeats some of the essentials of the second one: that Beanie had purchased a red Ford LTD from Kyles for $400 on Friday evening; that Kyles had his hair "combed out" at the time of the sale; and that Kyles carried a .32 and a .38 with him "all the time."

Portions of the third statement, however, embellished or contradicted Beanie's preceding story and were even internally inconsistent. Beanie reported that after the sale, he and Kyles unloaded Schwegmann's grocery bags from the trunk and back seat of the LTD and placed them in Kyles's own car. Beanie said that Kyles took a brown purse from the front seat of the LTD and that they then drove in separate cars to Kyles's apartment, where they unloaded the groceries. *Id.*, at 216–217. Beanie also claimed that, a few hours later, he and his "partner" Burns went with Kyles to Schwegmann's, where they recovered Kyles's car and a "big brown pocket book" from "next to a building." *Id.*, at 218. Beanie did not explain how Kyles could have picked up his car and recovered the purse at Schwegmann's, after Beanie

had seen Kyles with both just a few hours earlier. The police neither noted the inconsistencies nor questioned Beanie about them.

Although the police did not thereafter put Kyles under surveillance, Tr. 94 (Dec. 6, 1984), they learned about events at his apartment from Beanie, who went there twice on Sunday. According to a fourth statement by Beanie, this one given to the chief prosecutor in November (between the first and second trials), he first went to the apartment about 2 p.m., after a telephone conversation with a police officer who asked whether Kyles had the gun that was used to kill Dye. Beanie stayed in Kyles's apartment until about 5 p.m., when he left to call Detective John Miller. Then he returned about 7 p.m. and stayed until about 9:30 p.m., when he left to meet Miller, who also asked about the gun. According to this fourth statement, Beanie "rode around" with Miller until 3 a.m. on Monday, September 24. Sometime during those same early morning hours, detectives were sent at Sgt. Eaton's behest to pick up the rubbish outside Kyles's building. As Sgt. Eaton wrote in an interoffice memorandum, he had "reason to believe the victims *[sic]* personal papers and the Schwegmann's bags will be in the trash." Record, Defendant's Exh. 17.

At 10:40 a.m., Kyles was arrested as he left the apartment, which was then searched under a warrant. Behind the kitchen stove, the police found a .32-caliber revolver containing five live rounds and one spent cartridge. Ballistics tests later showed that this pistol was used to murder Dye. In a wardrobe in a hallway leading to the kitchen, the officers found a homemade shoulder holster that fit the murder weapon. In a bedroom dresser drawer, they discovered two boxes of ammunition, one containing several .32-caliber rounds of the same brand as those found in the pistol. Back in the kitchen, various cans of cat and dog food, some of them of the brands Dye typically purchased, were found in Schwegmann's sacks. No other groceries were identified as

possibly being Dye's, and no potty was found. Later that afternoon at the police station, police opened the rubbish bags and found the victim's purse, identification, and other personal belongings wrapped in a Schwegmann's sack.

The gun, the LTD, the purse, and the cans of pet food were dusted for fingerprints. The gun had been wiped clean. Several prints were found on the purse and on the LTD, but none was identified as Kyles's. Dye's prints were not found on any of the cans of pet food. Kyles's prints were found, however, on a small piece of paper taken from the front passenger-side floorboard of the LTD. The crime laboratory recorded the paper as a Schwegmann's sales slip, but without noting what had been printed on it, which was obliterated in the chemical process of lifting the fingerprints. A second Schwegmann's receipt was found in the trunk of the LTD, but Kyles's prints were not found on it. Beanie's fingerprints were not compared to any of the fingerprints found. Tr. 97 (Dec. 6, 1984).

The lead detective on the case, John Dillman, put together a photo lineup that included a photograph of Kyles (but not of Beanie) and showed the array to five of the six eyewitnesses who had given statements. Three of them picked the photograph of Kyles; the other two could not confidently identify Kyles as Dye's assailant.

B

Kyles was indicted for first-degree murder. Before trial, his counsel filed a lengthy motion for disclosure by the State of any exculpatory or impeachment evidence. The prosecution responded that there was "no exculpatory evidence of any nature," despite the government's knowledge of the following evidentiary items: (1) the six contemporaneous eyewitness statements taken by police following the murder; (2) records of Beanie's initial call to the police; (3) the tape recording of the Saturday conversation between Beanie and officers Eaton and Miller; (4) the typed and signed statement

given by Beanie on Sunday morning; (5) the computer printout of license numbers of cars parked at Schwegmann's on the night of the murder, which did not list the number of Kyles's car; (6) the internal police memorandum calling for the seizure of the rubbish after Beanie had suggested that the purse might be found there; and (7) evidence linking Beanie to other crimes at Schwegmann's and to the unrelated murder of one Patricia Leidenheimer, committed in January before the Dye murder.

At the first trial, in November, the heart of the State's case was eyewitness testimony from four people who were at the scene of the crime (three of whom had previously picked Kyles from the photo lineup). Kyles maintained his innocence, offered supporting witnesses, and supplied an alibi that he had been picking up his children from school at the time of the murder. The theory of the defense was that Kyles had been framed by Beanie, who had planted evidence in Kyles's apartment and his rubbish for the purposes of shifting suspicion away from himself, removing an impediment to romance with Pinky Burns, and obtaining reward money. Beanie did not testify as a witness for either the defense or the prosecution.

Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested. Even so, after four hours of deliberation, the jury became deadlocked on the issue of guilt, and a mistrial was declared.

After the mistrial, the chief trial prosecutor, Cliff Strider, interviewed Beanie. See App. 258–262 (notes of interview). Strider's notes show that Beanie again changed important elements of his story. He said that he went with Kyles to retrieve Kyles's car from the Schwegmann's lot on Thursday, the day of the murder, at some time between 5 and 7:30 p.m., not on Friday, at 9 p.m., as he had said in his second and third statements. (Indeed, in his second statement, Beanie said that he had not seen Kyles at all on Thursday. *Id.*, at

249–250.) He also said, for the first time, that when they had picked up the car they were accompanied not only by Johnny Burns but also by Kevin Black, who had testified for the defense at the first trial. Beanie now claimed that after getting Kyles's car they went to Black's house, retrieved a number of bags of groceries, a child's potty, and a brown purse, all of which they took to Kyles's apartment. Beanie also stated that on the Sunday after the murder he had been at Kyles's apartment two separate times. Notwithstanding the many inconsistencies and variations among Beanie's statements, neither Strider's notes nor any of the other notes and transcripts were given to the defense.

In December 1984, Kyles was tried a second time. Again, the heart of the State's case was the testimony of four eyewitnesses who positively identified Kyles in front of the jury. The prosecution also offered a blown-up photograph taken at the crime scene soon after the murder, on the basis of which the prosecutors argued that a seemingly two-toned car in the background of the photograph was Kyles's. They repeatedly suggested during cross-examination of defense witnesses that Kyles had left his own car at Schwegmann's on the day of the murder and had retrieved it later, a theory for which they offered no evidence beyond the blown-up photograph. Once again, Beanie did not testify.

As in the first trial, the defense contended that the eyewitnesses were mistaken. Kyles's counsel called several individuals, including Kevin Black, who testified to seeing Beanie, with his hair in plaits, driving a red car similar to the victim's about an hour after the killing. Tr. 209 (Dec. 7, 1984). Another witness testified that Beanie, with his hair in braids, had tried to sell him the car on Thursday evening, shortly after the murder. *Id.*, at 234–235. Another witness testified that Beanie, with his hair in a "Jheri curl," had attempted to sell him the car on Friday. *Id.*, at 249–251. One witness, Beanie's "partner," Burns, testified that he had seen Beanie on Sunday at Kyles's apartment, stooping down near

the stove where the gun was eventually found, and the defense presented testimony that Beanie was romantically interested in Pinky Burns. To explain the pet food found in Kyles's apartment, there was testimony that Kyles's family kept a dog and cat and often fed stray animals in the neighborhood.

Finally, Kyles again took the stand. Denying any involvement in the shooting, he explained his fingerprints on the cash register receipt found in Dye's car by saying that Beanie had picked him up in a red car on Friday, September 21, and had taken him to Schwegmann's, where he purchased transmission fluid and a pack of cigarettes. He suggested that the receipt may have fallen from the bag when he removed the cigarettes.

On rebuttal, the prosecutor had Beanie brought into the courtroom. All of the testifying eyewitnesses, after viewing Beanie standing next to Kyles, reaffirmed their previous identifications of Kyles as the murderer. Kyles was convicted of first-degree murder and sentenced to death. Beanie received a total of $1,600 in reward money. See Tr. of Hearing on Post-Conviction Relief 19–20 (Feb. 24, 1989); *id.*, at 114 (Feb. 20, 1989).

Following direct appeal, it was revealed in the course of state collateral review that the State had failed to disclose evidence favorable to the defense. After exhausting state remedies, Kyles sought relief on federal habeas, claiming, among other things, that the evidence withheld was material to his defense and that his conviction was thus obtained in violation of *Brady*. Although the United States District Court denied relief and the Fifth Circuit affirmed,[6] Judge

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[6] Pending appeal, Kyles filed a motion under Federal Rules of Civil Procedure 60(b)(2) and (6) to reopen the District Court judgment. In that motion, he charged that one of the eyewitnesses who testified against him at trial committed perjury. In the witness's accompanying affidavit, Darlene Kersh (formerly Cahill), the only such witness who had not given a contemporaneous statement, swears that she told the prosecutors and

King dissented, writing that "[f]or the first time in my fourteen years on this court . . . I have serious reservations about whether the State has sentenced to death the right man." 5 F. 3d, at 820.

III

The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady* v. *Maryland*, 373 U. S. 83 (1963). See *id.*, at 86 (relying on *Mooney* v. *Holohan*, 294 U. S. 103, 112 (1935), and *Pyle* v. *Kansas*, 317 U. S. 213, 215–216 (1942)). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U. S., at 87; see *Moore* v. *Illinois*, 408 U. S. 786, 794–795

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detectives she did not have an opportunity to view the assailant's face and could not identify him. Nevertheless, Kersh identified Kyles untruthfully, she says, after being "told by some people . . . [who] I think . . . were district attorneys and police, that the murderer would be the guy seated at the table with the attorney and that that was the one I should identify as the murderer. One of the people there was at the D. A.'s table at the trial. To the best of my knowledge there was only one black man sitting at the counsel table and I pointed him out as the one I had seen shoot the lady." Kersh claims to have agreed to the State's wishes only after the police and district attorneys assured her that "all the other evidence pointed to [Kyles] as the killer." Affidavit of Darlene Kersh 5, 7.

The District Court denied the motion as an abuse of the writ, although its order was vacated by the Court of Appeals for the Fifth Circuit with instructions to deny the motion on the ground that a petitioner may not use a Rule 60(b) motion to raise constitutional claims not included in the original habeas petition. That ruling is not before us. After denial of his Rule 60(b) motion, Kyles again sought state collateral review on the basis of Kersh's affidavit. The Supreme Court of Louisiana granted discretionary review and ordered the trial court to conduct an evidentiary hearing; all state proceedings are currently stayed pending our review of Kyles's federal habeas petition.

(1972). In *United States* v. *Agurs*, 427 U. S. 97 (1976), however, it became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation. There, the Court distinguished three situations in which a *Brady* claim might arise: first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured, 427 U. S., at 103–104;[7] second, where the Government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence, *id.*, at 104–107; and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way. The Court found a duty on the part of the Government even in this last situation, though only when suppression of the evidence would be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Id.*, at 108.

In the third prominent case on the way to current *Brady* law, *United States* v. *Bagley*, 473 U. S. 667 (1985), the Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, *i. e.*, the "specific-request" and "general- or no-request" situations. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been differ-

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[7] The Court noted that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U. S., at 103 (footnote omitted). As the ruling pertaining to Kersh's affidavit is not before us, we do not consider the question whether Kyles's conviction was obtained by the knowing use of perjured testimony and our decision today does not address any claim under the first *Agurs* category. See n. 6, *supra*.

ent." 473 U. S., at 682 (opinion of Blackmun, J.); *id.*, at 685 (White, J., concurring in part and concurring in judgment).

Four aspects of materiality under *Bagley* bear emphasis. Although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). *Id.*, at 682 (opinion of Blackmun, J.) (adopting formulation announced in *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984)); *Bagley*, *supra*, at 685 (White, J., concurring in part and concurring in judgment) (same); see 473 U. S., at 680 (opinion of Blackmun, J.) (*Agurs* "rejected a standard that would require the defendant to demonstrate that the evidence if disclosed probably would have resulted in acquittal"); cf. *Strickland*, *supra*, at 693 ("[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case"); *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under *Strickland*"). *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial." *Bagley*, 473 U. S., at 678.

The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the incul-

patory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.[8]

Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F. 3d, at 818, once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U. S., at 682 (opinion of Blackmun, J.); *id.*, at 685 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993), quoting *Kotteakos* v. *United States*, 328 U. S. 750, 776 (1946). This is amply confirmed by the development of the respective governing standards. Although

[8] This rule is clear, and none of the *Brady* cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed. See *post*, at 463 (possibility that Beanie planted evidence "is perfectly consistent" with Kyles's guilt), *ibid.* ("[T]he jury could well have believed [portions of the defense theory] and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken"), *post*, at 468 (the *Brady* evidence would have left two prosecution witnesses "totally untouched"), 469 (*Brady* evidence "can be logically separated from the incriminating evidence that would have remained unaffected").

Chapman v. *California*, 386 U. S. 18, 24 (1967), held that a conviction tainted by constitutional error must be set aside unless the error complained of "was harmless beyond a reasonable doubt," we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht*, *supra*, at 622–623. Under *Kotteakos* a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, *supra*, at 776. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs*, 427 U. S., at 112. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*. In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*.[9]

The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.[10] As Justice Blackmun emphasized in the portion of his opinion written for the Court, the Constitution is not violated every time the

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[9] See also *Hill* v. *Lockhart*, 28 F. 3d 832, 839 (CA8 1994) ("[I]t is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel").

[10] The dissent accuses us of overlooking this point and of assuming that the favorable significance of a given item of undisclosed evidence is enough to demonstrate a *Brady* violation. We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion, at Part IV–D, *infra*.

government fails or chooses not to disclose evidence that might prove helpful to the defense. 473 U. S., at 675, and n. 7. We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate. See ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3–3.11(a) (3d ed. 1993) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused"); ABA Model Rule of Professional Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith

or bad faith, see *Brady,* 373 U. S., at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial, Brief for Respondent 25, 27, 30, 31, and it suggested below that it should not be held accountable under *Bagley* and *Brady* for evidence known only to police investigators and not to the prosecutor.[11] To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases. In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio* v. *United States,* 405 U. S. 150, 154 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Short of doing that, we were asked at oral argument to raise the threshold of materiality because the *Bagley* standard "makes it difficult . . . to know" from the "perspective [of the prosecutor at] trial . . . exactly what might become important later on." Tr. of Oral Arg. 33. The State asks for "a certain amount of leeway in making a judgment call" as to the disclosure of any given piece of evidence. *Ibid.*

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[11] The State's counsel retreated from this suggestion at oral argument, conceding that the State is "held to a disclosure standard based on what all State officers at the time knew." Tr. of Oral Arg. 40.

Uncertainty about the degree of further "leeway" that might satisfy the State's request for a "certain amount" of it is the least of the reasons to deny the request. At bottom, what the State fails to recognize is that, with or without more leeway, the prosecution cannot be subject to any disclosure obligation without at some point having the responsibility to determine when it must act. Indeed, even if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence (leaving harmless error as the government's only fallback), the prosecutor would still be forced to make judgment calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record. Since the prosecutor would have to exercise some judgment even if the State were subject to this most stringent disclosure obligation, it is hard to find merit in the State's complaint over the responsibility for judgment under the existing system, which does not tax the prosecutor with error for any failure to disclose, absent a further showing of materiality. Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs*, 427 U. S., at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure"). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U. S. 78, 88 (1935).

And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations. See *Rose* v. *Clark*, 478 U. S. 570, 577–578 (1986); *Estes* v. *Texas*, 381 U. S. 532, 540 (1965); *United States* v. *Leon*, 468 U. S. 897, 900–901 (1984) (recognizing general goal of establishing "procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth' " (quoting *Alderman* v. *United States*, 394 U. S. 165, 175 (1969)). The prudence of the careful prosecutor should not therefore be discouraged.

There is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence. Although the majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been "exposed to any or all of the undisclosed materials," 5 F. 3d, at 817, the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone. See, *e. g.*, *id.*, at 812 ("We do not agree that this statement made the transcript material and so mandated disclosure . . . . Beanie's statement . . . is itself not decisive"), 814 ("The nondisclosure of this much of the transcript was insignificant"), 815 ("Kyles has not shown on this basis that the three statements were material"), 815 ("In light of the entire record . . . we cannot conclude that [police reports relating to discovery of the purse in the trash] would, in reasonable probability, have moved the jury to embrace the theory it otherwise discounted"), 816 ("We are not persuaded that these notes [relating to discovery of the gun] were material"), 816 ("[W]e are not persuaded that [the printout of the license plate numbers] would, in reasonable probability, have induced reasonable doubt where the jury did not find it. . . . the rebuttal of the photograph would have made no differ-

ence"). The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*, as the ensuing discussion will show.

IV

In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.

A

As the District Court put it, "the essence of the State's case" was the testimony of eyewitnesses, who identified Kyles as Dye's killer. 5 F. 3d, at 853 (Appendix A). Disclosure of their statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense. To begin with, the value of two of those witnesses would have been substantially reduced or destroyed.

The State rated Henry Williams as its best witness, who testified that he had seen the struggle and the actual shooting by Kyles. The jury would have found it helpful to probe this conclusion in the light of Williams's contemporaneous statement, in which he told the police that the assailant was "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build" and that "his hair looked like it was platted." App. 197. If cross-examined on this description, Williams would have had trouble explaining how he could have described Kyles, 6-feet tall and thin, as a man more than half a foot shorter with a medium build.[12] Indeed, since Beanie was 22 years old, 5'5" tall, and 159 pounds,

[12] The record makes numerous references to Kyles being approximately six feet tall and slender; photographs in the record tend to confirm these descriptions. The description of Beanie in the text comes from his police file. Record photographs of Beanie also depict a man possessing a medium build.

the defense would have had a compelling argument that Williams's description pointed to Beanie but not to Kyles.[13]

The trial testimony of a second eyewitness, Isaac Smallwood, was equally damning to Kyles. He testified that Kyles was the assailant, and that he saw him struggle with Dye. He said he saw Kyles take a ".32, a small black gun" out of his right pocket, shoot Dye in the head, and drive off in her LTD. When the prosecutor asked him whether he actually saw Kyles shoot Dye, Smallwood answered "Yeah." Tr. 41–48 (Dec. 6, 1984).

Smallwood's statement taken at the parking lot, however, was vastly different. Immediately after the crime, Small-

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[13] The defense could have further underscored the possibility that Beanie was Dye's killer through cross-examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such *Brady* evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer murder as early as September, he was not interviewed by the police about it until after Kyles's second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding JUSTICE SCALIA's suggestion that Beanie would have been "stupid" to inject himself into the investigation, *post,* at 461, the *Brady* evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports). See *supra,* at 425–426. For a discussion of further *Brady* evidence to attack the investigation, see especially Part IV–B, *infra.*

wood claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. "I heard a lound [sic] pop," he said. "When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." App. 189. Smallwood said that he got a look at the culprit, a black teenage male with a mustache and shoulder-length braided hair, as the victim's red Thunderbird passed where he was standing. When a police investigator specifically asked him whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman "was already in the car and coming toward me." *Id.*, at 188–190.

A jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to an "LTD"; and he saw fit to say nothing about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the prosecutor had coached him to give it.[14]

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[14] The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury. At the first trial, Smallwood testified that he looked around only after he heard something go off, that Dye was already on the ground, and that he "watched the guy get in the car." Tr. 50–51 (Nov. 26, 1984). When asked to describe the killer, Smallwood stated that he "just got a glance of him from the side" and "couldn't even get a look in the face." *Id.*, at 52, 54.

The State contends that this change actually cuts in its favor under *Brady*, since it provided Kyles's defense with grounds for impeachment

Since the evolution over time of a given eyewitness's description can be fatal to its reliability, cf. *Manson* v. *Brathwaite*, 432 U. S. 98, 114 (1977) (reliability depends in part on the accuracy of prior description); *Neil* v. *Biggers*, 409 U. S. 188, 199 (1972) (reliability of identification following impermissibly suggestive lineup depends in part on accuracy of witness's prior description), the Smallwood and Williams identifications would have been severely undermined by use of their suppressed statements. The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses. See Tr. of Closing Arg. 49 (Dec. 7, 1984) (After discussing Territo's and Kersh's testimony: "Isaac Smallwood, have you ever seen a better witness[?] . . . What's better than that is Henry Williams. . . . Henry Williams was the closest of them all

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without any need to disclose Smallwood's statement. Brief for Respondent 17–18. This is true, but not true enough; inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted. While Smallwood's testimony at the first trial was similar to his contemporaneous account in some respects (for example, he said he looked around only after he heard the gunshot and that Dye was already on the ground), it differed in one of the most important: Smallwood's version at the first trial already included his observation of the gunman outside the car. Defense counsel was not, therefore, clearly put on notice that Smallwood's capacity to identify the killer's body type was open to serious attack; even less was he informed that Smallwood had answered "no" when asked if he had seen the killer outside the car. If Smallwood had in fact seen the gunman only after the assailant had entered Dye's car, as he said in his original statement, it would have been difficult if not impossible for him to notice two key characteristics distinguishing Kyles from Beanie, their heights and builds. Moreover, in the first trial, Smallwood specifically stated that the killer's hair was "kind of like short . . . knotted up on his head." Tr. 60 (Nov. 26, 1984). This description was not inconsistent with his testimony at the second trial but directly contradicted his statement at the scene of the murder that the killer had shoulder-length hair. The dissent says that Smallwood's testimony would have been "barely affected" by the expected impeachment, *post*, at 468; that would have been a brave jury argument.

right here"). Nor, of course, would the harm to the State's case on identity have been confined to their testimony alone. The fact that neither Williams nor Smallwood could have provided a consistent eyewitness description pointing to Kyles would have undercut the prosecution all the more because the remaining eyewitnesses called to testify (Territo and Kersh) had their best views of the gunman only as he fled the scene with his body partly concealed in Dye's car. And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before. See *Agurs*, 427 U. S., at 112–113, n. 21.

B

Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Tr. of Closing Arg. 13 (Dec. 7, 1984). Contrary to what one might hope for from such a source, however, Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police.

If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies. A short recapitulation of some of them will make the point. In Beanie's initial meeting with the police, and in his signed statement, he said he bought Dye's LTD and helped Kyles retrieve his car from the Schwegmann's lot on Friday. In his first call to the po-

lice, he said he bought the LTD on Thursday, and in his conversation with the prosecutor between trials it was again on Thursday that he said he helped Kyles retrieve Kyles's car. Although none of the first three versions of this story mentioned Kevin Black as taking part in the retrieval of the car and transfer of groceries, after Black implicated Beanie by his testimony for the defense at the first trial, Beanie changed his story to include Black as a participant. In Beanie's several accounts, Dye's purse first shows up variously next to a building, in some bushes, in Kyles's car, and at Black's house.

Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. See, *e. g.*, *Bowen* v. *Maynard*, 799 F. 2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"); *Lindsey* v. *King*, 769 F. 2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld *Brady* evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case").[15]

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[15] The dissent, *post*, at 464, suggests that for jurors to count the sloppiness of the investigation against the probative force of the State's evidence would have been irrational, but of course it would have been no such thing. When, for example, the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it. See discussion of purse and gun, *infra*, at 447–449.

By demonstrating the detectives' knowledge of Beanie's affirmatively self-incriminating statements, the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence. In his initial meeting with police, Beanie admitted twice that he changed the license plates on the LTD. This admission enhanced the suspiciousness of his possession of the car; the defense could have argued persuasively that he was no bona fide purchaser. And when combined with his police record, evidence of prior criminal activity near Schwegmann's, and his status as a suspect in another murder, his devious behavior gave reason to believe that he had done more than buy a stolen car. There was further self-incrimination in Beanie's statement that Kyles's car was parked in the same part of the Schwegmann's lot where Dye was killed. Beanie's apparent awareness of the specific location of the murder could have been based, as the State contends, on television or newspaper reports, but perhaps it was not. Cf. App. 215 (Beanie saying that he knew about the murder because his brother-in-law had seen it "on T. V. and in the paper" and had told Beanie). Since the police admittedly never treated Beanie as a suspect, the defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman, who testified that Beanie was never a suspect, Tr. 103–105, 107 (Dec. 6, 1984), and that he had "no knowledge" that Beanie had changed the license plate, *id.*, at 95.

The admitted failure of the police to pursue these pointers toward Beanie's possible guilt could only have magnified the effect on the jury of explaining how the purse and the gun happened to be recovered. In Beanie's original recorded statement, he told the police that "[Kyles's] garbage goes out tomorrow," and that "if he's smart he'll put [the purse] in [the] garbage." App. 257. These statements, along with the internal memorandum stating that the police had "reason to believe" Dye's personal effects and Schwegmann's bags

would be in the garbage, would have supported the defense's theory that Beanie was no mere observer, but was determining the investigation's direction and success. The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence, Tr. of Hearing on Post-Conviction Relief 113 (Feb. 20, 1989), and by Detective John Miller's admission at the same hearing that he thought at the time that it "was a possibility" that Beanie had planted the incriminating evidence in the garbage, Tr. of Hearing on Post-Conviction Relief 51 (Feb. 24, 1989). If a police officer thought so, a juror would have, too.[16]

To the same effect would have been an enquiry based on Beanie's apparently revealing remark to police that "if you can set [Kyles] up good, you can get that same gun."[17] App. 228–229. While the jury might have understood that Beanie meant simply that if the police investigated Kyles, they would probably find the murder weapon, the jury could also have taken Beanie to have been making the more sinister

[16] The dissent, rightly, does not contend that Beanie would have had a hard time planting the purse in Kyles's garbage. See *post*, at 471 (arguing that it would have been difficult for Beanie to plant the gun and homemade holster). All that would have been needed was for Beanie to put the purse into a trash bag out on the curb. See Tr. 97, 101 (Dec. 6, 1984) (testimony of Detective Dillman; garbage bags were seized from "a common garbage area" on the street in "the early morning hours when there wouldn't be anyone on the street").

[17] The dissent, *post*, at 461–462, argues that it would have been stupid for Beanie to have tantalized the police with the prospect of finding the gun one day before he may have planted it. It is odd that the dissent thinks the *Brady* reassessment requires the assumption that Beanie was shrewd and sophisticated: the suppressed evidence indicates that within a period of a few hours after he first called police Beanie gave three different accounts of Kyles's recovery of the purse (and gave yet another about a month later).

suggestion that the police "set up" Kyles, and the defense could have argued that the police accepted the invitation. The prosecutor's notes of his interview with Beanie would have shown that police officers were asking Beanie the whereabouts of the gun all day Sunday, the very day when he was twice at Kyles's apartment and was allegedly seen by Johnny Burns lurking near the stove, where the gun was later found.[18] Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at Kyles's apartment on Sunday. Tr. 93, 101 (Dec. 6, 1984).[19]

[18] The dissent would rule out any suspicion because Beanie was said to have worn a "tank-top" shirt during his visits to the apartment, *post*, at 471; we suppose that a small handgun could have been carried in a man's trousers, just as a witness for the State claimed the killer had carried it, Tr. 52 (Dec. 6, 1984) (Williams). Similarly, the record photograph of the homemade holster indicates that the jury could have found it to be constructed of insubstantial leather or cloth, duct tape, and string, concealable in a pocket.

[19] In evaluating the weight of all these evidentiary items, it bears mention that they would not have functioned as mere isolated bits of good luck for Kyles. Their combined force in attacking the process by which the police gathered evidence and assembled the case would have complemented, and have been complemented by, the testimony actually offered by Kyles's friends and family to show that Beanie had framed Kyles. Exposure to Beanie's own words, even through cross-examination of the police officers, would have made the defense's case more plausible and reduced its vulnerability to credibility attack. Johnny Burns, for example, was subjected to sharp cross-examination after testifying that he had seen Beanie change the license plate on the LTD, that he walked in on Beanie stooping near the stove in Kyles's kitchen, that he had seen Beanie with handguns of various calibers, including a .32, and that he was testifying for the defense even though Beanie was his "best friend." Tr. 260, 262–263, 279, 280 (Dec. 7, 1984). On each of these points, Burns's testimony would have been consistent with the withheld evidence: that Beanie had spoken of Burns to the police as his "partner," had admitted to changing the LTD's license plate, had attended Sunday dinner at Kyles's apartment, and had a history of violent crime, rendering his use of guns more likely. With this information, the defense could have challenged the prosecution's

C

Next to be considered is the prosecution's list of the cars in the Schwegmann's parking lot at mid-evening after the murder. While its suppression does not rank with the failure to disclose the other evidence discussed here, it would have had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s standard of materiality is satisfied. On the police's assumption, argued to the jury, that the killer drove to the lot and left his car there during the heat of the investigation, the list without Kyles's registration would obviously have helped Kyles and would have had some value in countering an argument by the prosecution that a grainy enlargement of a photograph of the crime scene showed Kyles's car in the background. The list would also have shown that the police either knew that it was inconsistent with their informant's second and third statements (in which Beanie described retrieving Kyles's car after the time the list was compiled) or never even bothered to check the informant's story against known fact. Either way, the defense would have had further support for arguing that the police were irresponsible in relying on Beanie to tip them off to the location of evidence damaging to Kyles.

The State argues that the list was neither impeachment nor exculpatory evidence because Kyles could have moved his car before the list was created and because the list does

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good faith on at least some of the points of cross-examination mentioned and could have elicited police testimony to blunt the effect of the attack on Burns.

JUSTICE SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471–472. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

not purport to be a comprehensive listing of all the cars in the Schwegmann's lot. Such argument, however, confuses the weight of the evidence with its favorable tendency, and even if accepted would work against the State, not for it. If the police had testified that the list was incomplete, they would simply have underscored the unreliability of the investigation and complemented the defense's attack on the failure to treat Beanie as a suspect and his statements with a presumption of fallibility. But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to Kyles.

D

In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed. It is significant, however, that the physical evidence remaining unscathed would, by the State's own admission, hardly have amounted to overwhelming proof that Kyles was the murderer. See Tr. of Oral Arg. 56 ("The heart of the State's case was eye-witness identification"); see also Tr. of Hearing on Post-Conviction Relief 117 (Feb. 20, 1989) (testimony of chief prosecutor Strider) ("The crux of the case was the four eye-witnesses"). Ammunition and a holster were found in Kyles's apartment, but if the jury had suspected the gun had been planted the significance of these items might have been left in doubt. The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he

was right in describing the way it was priced at Schwegmann's market, where he commonly shopped.[20]

Similarly undispositive is the small Schwegmann's receipt on the front passenger floorboard of the LTD, the only physical evidence that bore a fingerprint identified as Kyles's. Kyles explained that Beanie had driven him to Schwegmann's on Friday to buy cigarettes and transmission fluid, and he theorized that the slip must have fallen out of the bag when he removed the cigarettes. This explanation is consistent with the location of the slip when found and with its small size. The State cannot very well argue that the fingerprint ties Kyles to the killing without also explaining how the 2-inch-long register slip could have been the receipt for a week's worth of groceries, which Dye had gone to Schwegmann's to purchase. *Id.*, at 181–182.[21]

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[20] Kyles testified that he believed the pet food to have been on sale because "they had a little sign there that said three for such and such, two for such and such at a cheaper price. It wasn't even over a dollar." Tr. 341 (Dec. 7, 1984). When asked about the sign, Kyles said it "wasn't big. . . [i]t was a little bitty piece of slip . . . on the shelf." *Id.*, at 342. Subsequently, the prices were revealed as in fact being "[t]hree for 89 [cents]" and "two for 77 [cents]," *id.*, at 343, which comported exactly with Kyles's earlier description. The director of advertising at Schwegmann's testified that the items purchased by Kyles had not been on sale, but also explained that the multiple pricing was thought to make the products "more attractive" to the customer. *Id.*, at 396. The advertising director stated that store policy was to not have signs on the shelves, but he also admitted that salespeople sometimes disregarded the policy and put signs up anyway, and that he could not say for sure whether there were signs up on the day Kyles said he bought the pet food. *Id.*, at 398–399. The dissent suggests, *post*, at 473, that Kyles must have been so "very poor" as to be unable to purchase the pet food. The total cost of the 15 cans of pet food found in Kyles's apartment would have been $5.67. See Tr. 188, 395 (Dec. 7, 1984). Rather than being "damning," *post*, at 472, the pet food evidence was thus equivocal and, in any event, was not the crux of the prosecution's case, as the State has conceded. See *supra*, at 451 and this page.

[21] The State's counsel admitted at oral argument that its case depended on the facially implausible notion that Dye had not made her typical weekly grocery purchases on the day of the murder (if she had, the receipt

The inconclusiveness of the physical evidence does not, to be sure, prove Kyles's innocence, and the jury might have found the eyewitness testimony of Territo and Kersh sufficient to convict, even though less damning to Kyles than that of Smallwood and Williams.[22] But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution. The jury would have been entitled to find

> (a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent to the point, for example, of including four different versions of the discovery of the victim's purse, and whose own behavior was enough to raise suspicions of guilt;
>
> (b) that the lead police detective who testified was either less than wholly candid or less than fully informed;
>
> (c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;
>
> (d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;
>
> (e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he

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would have been longer), but that she had indeed made her typical weekly purchases of pet food (hence the presence of the pet food in Kyles's apartment, which the State claimed were Dye's). Tr. of Oral Arg. 53–54.

[22] See *supra*, at 445. On remand, of course, the State's case will be weaker still, since the prosecution is unlikely to rely on Kersh, who now swears that she committed perjury at the two trials when she identified Kyles as the murderer. See n. 6, *supra*.

claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case; (f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post,* at 475; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

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 GINSBURG and JUSTICE BREYER join, concurring.

As the Court has explained, this case presents an important legal issue. See *ante,* at 440–441. Because JUSTICE

SCALIA so emphatically disagrees, I add this brief response to his criticism of the Court's decision to grant certiorari.

Proper management of our certiorari docket, as JUSTICE SCALIA notes, see *post*, at 456–460, precludes us from hearing argument on the merits of even a "substantial percentage" of the capital cases that confront us. Compare *Coleman* v. *Balkcom*, 451 U. S. 949 (1981) (STEVENS, J., concurring in denial of certiorari), with *id.*, at 956 (REHNQUIST, J., dissenting). Even aside from its legal importance, however, this case merits "favored treatment," cf. *post*, at 457, for at least three reasons. First, the fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred at the second trial were prejudicial. Second, cases in which the record reveals so many instances of the state's failure to disclose exculpatory evidence are extremely rare. Even if I shared JUSTICE SCALIA's appraisal of the evidence in this case—which I do not—I would still believe we should independently review the record to ensure that the prosecution's blatant and repeated violations of a well-settled constitutional obligation did not deprive petitioner of a fair trial. Third, despite my high regard for the diligence and craftsmanship of the author of the majority opinion in the Court of Appeals, my independent review of the case left me with the same degree of doubt about petitioner's guilt expressed by the dissenting judge in that court.

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this "generalizable principle," *post*, at 460, especially important. Cf. *Harris* v. *Alabama*, 513 U. S. 504, 519–520, and n. 5 (1995) (STEVENS, J., dissenting). I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant

duty conveys a message more significant than even the most penetrating legal analysis.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed. The defect of the latter system was described, with characteristic candor, by Justice Jackson:

> "Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done." *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (opinion concurring in result).

Since this Court has long shared Justice Jackson's view, today's opinion—which considers a fact-bound claim of error rejected by every court, state and federal, that previously heard it—is, so far as I can tell, wholly unprecedented. The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, certiorari should generally (*i. e.*, except in cases of the plainest error) be denied. *United States* v. *Johnston*, 268 U. S. 220, 227 (1925). That policy has been observed even when the fact-bound assessment of the federal court of appeals has differed from that of the district court, *Sumner* v. *Mata*, 449 U. S. 539, 543 (1981); and under what we have called the "two-court rule," the policy has been applied with particular rigor when dis-

trict court and court of appeals are in agreement as to what conclusion the record requires. See, *e. g.*, *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949). How much the more should the policy be honored in this case, a federal habeas proceeding where not only both lower federal courts but also the state courts on postconviction review have all reviewed and rejected precisely the fact-specific claim before us. Cf. 28 U. S. C. § 2254(d) (requiring federal habeas courts to accord a presumption of correctness to state-court findings of fact); *Sumner*, *supra*, at 550, n. 3. Instead, however, the Court not only grants certiorari to consider whether the Court of Appeals (and all the previous courts that agreed with it) was correct as to what the facts showed in a case where the answer is far from clear, but in the process of such consideration renders new findings of fact and judgments of credibility appropriate to a trial court of original jurisdiction. See, *e. g.*, *ante*, at 425 ("Beanie seemed eager to cast suspicion on Kyles"); *ante*, at 441, n. 12 ("Record photographs of Beanie . . . depict a man possessing a medium build"); *ante*, at 449, n. 18 ("the record photograph of the homemade holster indicates . . .").

The Court says that we granted certiorari "[b]ecause '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case,' *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987)." *Ante*, at 422. The citation is perverse, for the reader who looks up the quoted opinion will discover that the very next sentence confirms the traditional practice from which the Court today glaringly departs: "Nevertheless, when the lower courts have found that [no constitutional error occurred], . . . deference to the shared conclusion of two reviewing courts prevent[s] us from substituting speculation for their considered opinions." *Burger* v. *Kemp*, 483 U. S. 776, 785 (1987).

The greatest puzzle of today's decision is what could have caused *this* capital case to be singled out for favored treatment. Perhaps it has been randomly selected as a symbol,

to reassure America that the United States Supreme Court is reviewing capital convictions to make sure no factual error has been made. If so, it is a false symbol, for we assuredly do not do that. At, and during the week preceding, our February 24 Conference, for example, we considered and disposed of 10 petitions in capital cases, from seven States. We carefully considered whether the convictions and sentences in those cases had been obtained in reliance upon correct principles of federal law; but if we had tried to consider, in addition, whether those correct principles had been applied, not merely plausibly, but *accurately*, to the particular facts of each case, we would have done nothing else for the week. The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise.

Straining to suggest a legal error in the decision below that might warrant review, the Court asserts that "[t]here is room to debate whether the two judges in the majority in the Court of Appeals made an assessment of the cumulative effect of the evidence," *ante*, at 440. In support of this it quotes isolated sentences of the opinion below that supposedly "dismiss[ed] particular items of evidence as immaterial," *ibid.* This claim of legal error does not withstand minimal scrutiny. The Court of Appeals employed *precisely* the same legal standard that the Court does. Compare 5 F. 3d 806, 811 (CA5 1993) ("We apply the [*United States* v.] *Bagley*[, 473 U. S. 667 (1985),] standard here by examining whether it is reasonably probable that, had the undisclosed information been available to Kyles, the result would have been different"), with *ante*, at 441 ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable"). Nor did the Court of Appeals announce a rule of law, that might have precedential force in later cases, to the effect that *Bagley*

requires a series of independent materiality evaluations; in fact, the court said just the contrary. See 5 F. 3d, at 817 ("[W]e are not persuaded that it is reasonably probable that the jury would have found in Kyles' favor if exposed to any *or all* of the undisclosed materials") (emphasis added). If the decision is read, shall we say, cumulatively, it is clear beyond cavil that the court assessed the cumulative effect of the *Brady* evidence in the context of the whole record. See 5 F. 3d, at 807 (basing its rejection of petitioner's claim on "a complete reading of the record"); *id.*, at 811 ("Rather than reviewing the alleged *Brady* materials in the abstract, we will examine the evidence presented at trial and how the extra materials would have fit"); *id.*, at 813 ("We must bear [the eyewitness testimony] in mind while assessing the probable effect of other undisclosed information"). It is, in other words, the Court itself which errs in the manner that it accuses the Court of Appeals of erring: failing to consider the material under review as a whole. The isolated snippets it quotes from the decision merely do what the Court's own opinion acknowledges must be done: to "evaluate the tendency and force of the undisclosed evidence item by item; there is no other way." *Ante*, at 436, n. 10. Finally, the Court falls back on this: "The result reached by the Fifth Circuit majority is compatible with a series of independent materiality evaluations, rather than the cumulative evaluation required by *Bagley*," *ante*, at 441. In other words, even though the Fifth Circuit plainly enunciated the *correct* legal rule, since the outcome it reached would not properly follow from that rule, the Fifth Circuit must in fact (and unbeknownst to itself) have been applying an *incorrect* legal rule. This effectively eliminates all distinction between mistake in law and mistake in application.

What the Court granted certiorari to review, then, is not a decision on an issue of federal law that conflicts with a decision of another federal or state court; nor even a decision announcing a rule of federal law that because of its novelty

or importance might warrant review despite the lack of a conflict; nor yet even a decision that *patently* errs in its application of an old rule. What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err—precisely the type of case in which we are *most* inclined to deny certiorari. But despite all of that, I would not have dissented on the ground that the writ of certiorari should be dismissed as improvidently granted. Since the majority is as aware of the limits of our capacity as I am, there is little fear that the grant of certiorari in a case of this sort will often be repeated—which is to say little fear that today's grant has any generalizable principle behind it. I am still forced to dissent, however, because, having improvidently decided to review the facts of this case, the Court goes on to get the facts wrong. Its findings are in my view clearly erroneous, cf. Fed. Rule Civ. Proc. 52(a), and the Court's verdict would be reversed if there were somewhere further to appeal.

I

Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady* v. *Maryland*, 373 U. S. 83 (1963), that the materiality of a failure to disclose favorable evidence "must be evaluated in the context of the entire record." *United States* v. *Agurs*, 427 U. S. 97, 112 (1976). It is simply not enough to show that the undisclosed evidence would have allowed the defense to weaken, or even to "destro[y]," *ante*, at 441, the *particular* prosecution witnesses or items of prosecution evidence to which the undisclosed evidence relates. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. See *United States* v. *Bagley*, 473 U. S. 667, 682 (1985); *Agurs*,

supra, at 112–113. The Court's opinion fails almost entirely to take this principle into account. Having spent many pages assessing the effect of the *Brady* material on two prosecution witnesses and a few items of prosecution evidence, *ante*, at 441–451, it dismisses the remainder of the evidence against Kyles in a quick page-and-a-half, *ante*, at 451–453. This partiality is confirmed in the Court's attempt to "recap . . . *the suppressed evidence* and its significance for the prosecution," *ante*, at 453 (emphasis added), which omits the required comparison between that evidence and the evidence that was disclosed. My discussion of the record will present the half of the analysis that the Court omits, emphasizing the evidence concededly unaffected by the *Brady* violation which demonstrates the immateriality of the violation.

In any analysis of this case, the desperate implausibility of the theory that petitioner put before the jury must be kept firmly in mind. The first half of that theory—designed to neutralize the physical evidence (Mrs. Dye's purse in his garbage, the murder weapon behind his stove)—was that petitioner was the victim of a "frame-up" by the police informer and evil genius, Beanie. Now it is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else; and it is less common, but not unheard of, for a guilty person who is neither suspected nor subject to suspicion (because he has established a perfect alibi), to call attention to himself by coming forward to point the finger at an innocent person. But petitioner's theory is that the guilty Beanie, who *could* plausibly be accused of the crime (as petitioner's brief amply demonstrates), but who was *not* a suspect any more than Kyles was (the police as yet had no leads, see *ante*, at 424), injected both Kyles and himself into the investigation in order to get the innocent Kyles convicted.[1] If this were not stupid enough, the

[1] The Court tries to explain all this by saying that Beanie mistakenly thought that he had become a suspect. The only support it provides for this is the fact that, *after having come forward with the admission that*

wicked Beanie is supposed to have suggested that the police search his victim's premises *a full day before he got around to planting the incriminating evidence on the premises.*

The second half of petitioner's theory was that he was the victim of a quadruple coincidence, in which four eyewitnesses to the crime mistakenly identified him as the murderer—three picking him out of a photo array without hesitation, and all four affirming their identification in open court after comparing him with Beanie. The extraordinary mistake petitioner had to persuade the jury these four witnesses made was not simply to mistake the real killer, Beanie, for the very same innocent third party (hard enough to believe), but in addition to mistake him *for the very man Beanie had chosen to frame*—the last and most incredible level of coincidence. However small the chance that the jury would believe any one of those improbable scenarios, the likelihood that it would believe them all together is far smaller. The Court concludes that it is "reasonably probable" the undisclosed witness interviews would have persuaded the jury of petitioner's implausible theory of mistaken eyewitness testimony, and then argues that it is "reasonably probable" the undisclosed information regarding Beanie would have persuaded the jury of petitioner's implausible theory regarding the incriminating physical evidence. I think neither of those conclusions is remotely true, but even if they were the Court would still be guilty of a fallacy in declaring victory on each implausibility in turn, and thus victory on the whole,

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he had driven the dead woman's car, Beanie repeatedly inquired whether he himself was a suspect. See *ante,* at 442, n. 13. Of course at that point he well *should* have been worried about being a suspect. But there is no evidence that he erroneously considered himself a suspect beforehand. Moreover, even if he did, the notion that a guilty person would, on the basis of such an erroneous belief, come forward for the reward or in order to "frame" Kyles (rather than waiting for the police to approach him first) is quite simply implausible.

without considering the infinitesimal probability of the jury's swallowing the entire concoction of implausibility squared.

This basic error of approaching the evidence piecemeal is also what accounts for the Court's obsessive focus on the credibility or culpability of Beanie, who did not even testify at trial and whose credibility or innocence the State has never once avowed. The Court's opinion reads as if either petitioner or Beanie must be telling the truth, and any evidence tending to inculpate or undermine the credibility of the one would exculpate or enhance the credibility of the other. But the jury verdict in this case said only that petitioner was guilty of the murder. That is perfectly consistent with the possibilities that Beanie repeatedly lied, *ante*, at 445, that he was an accessory after the fact, cf. *ante*, at 445–446, or even that he planted evidence against petitioner, *ante*, at 448. Even if the undisclosed evidence would have allowed the defense to thoroughly impeach Beanie and to suggest the above possibilities, the jury could well have believed *all* of those things and yet have condemned petitioner because it could not believe that *all four* of the eyewitnesses were similarly mistaken.[2]

Of course even that much rests on the premise that competent counsel would run the terrible risk of calling Beanie, a witness whose "testimony almost certainly would have inculpated [petitioner]" and whom "any reasonable attorney would perceive . . . as a 'loose cannon.'" 5 F. 3d, at 818. Perhaps because that premise seems so implausible, the Court retreats to the possibility that petitioner's counsel,

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[2] There is no basis in anything I have said for the Court's charge that "the dissent appears to assume that Kyles must lose because there would still have been adequate [*i. e.*, sufficient] evidence to convict even if the favorable evidence had been disclosed." *Ante*, at 435, n. 8. I do assume, indeed I expressly argue, that petitioner must lose because there was, is, and will be *overwhelming* evidence to convict, so much evidence that disclosure would not "have made a different result reasonably probable." *Ante*, at 441.

even if not calling Beanie to the stand, could have used the evidence relating to Beanie to attack "the reliability of the investigation." *Ante*, at 446. But that is distinctly less effective than substantive evidence bearing on the guilt or innocence of the accused. In evaluating *Brady* claims, we assume jury conduct that is both rational and obedient to the law. We do not assume that even though the whole mass of the evidence, both disclosed and undisclosed, shows petitioner guilty beyond a reasonable doubt, the jury will punish sloppy investigative techniques by setting the defendant free. Neither Beanie nor the police were on trial in this case. Petitioner was, and no amount of collateral evidence could have enabled his counsel to move the mountain of direct evidence against him.

II

The undisclosed evidence does not create a "'reasonable probability' of a different result." *Ante*, at 434 (quoting *United States* v. *Bagley*, 473 U. S., at 682). To begin with the eyewitness testimony: Petitioner's basic theory at trial was that the State's four eyewitnesses happened to mistake Beanie, the real killer, for petitioner, the man whom Beanie was simultaneously trying to frame. Police officers testified to the jury, and petitioner has never disputed, that three of the four eyewitnesses (Territo, Smallwood, and Williams) were shown a photo lineup of six young men four days after the shooting and, without aid or duress, identified petitioner as the murderer; and that all of them, plus the fourth eyewitness, Kersh, reaffirmed their identifications at trial after petitioner and Beanie were made to stand side by side.

Territo, the first eyewitness called by the State, was waiting at a red light in a truck 30 or 40 yards from the Schwegmann's parking lot. He saw petitioner shoot Mrs. Dye, start her car, drive out onto the road, and pull up just behind Territo's truck. When the light turned green petitioner pulled

beside Territo and stopped while waiting to make a turn. Petitioner looked Territo full in the face. Territo testified, "I got a good look at him. If I had been in the passenger seat of the little truck, I could have reached out and not even stretched my arm out, I could have grabbed hold of him." Tr. 13–14 (Dec. 6, 1984). Territo also testified that a detective had shown him a picture of Beanie and asked him if the picture "could have been the guy that did it. I told him no." *Id.*, at 24. The second eyewitness, Kersh, also saw petitioner shoot Mrs. Dye. When asked whether she got "a good look" at him as he drove away, she answered "yes." *Id.*, at 32. She also answered "yes" to the question whether she "got to see the side of his face," *id.*, at 31, and said that while petitioner was stopped she had driven to within reaching distance of the driver's-side door of Mrs. Dye's car and stopped there. *Id.*, at 34. The third eyewitness, Smallwood, testified that he saw petitioner shoot Mrs. Dye, walk to the car, and drive away. *Id.*, at 42. Petitioner drove slowly by, within a distance of 15 or 25 feet, *id.*, at 43–45, and Smallwood saw his face from the side. *Id.*, at 43. The fourth eyewitness, Williams, who had been working outside the parking lot, testified that "the gentleman came up the side of the car," struggled with Mrs. Dye, shot her, walked around to the driver's side of the car, and drove away. *Id.*, at 52. Williams not only "saw him before he shot her," *id.*, at 54, but watched petitioner drive slowly by "within less than ten feet." *Ibid.* When asked "[d]id you get an opportunity to look at him good?", Williams said, "I did." *Id.*, at 55.

The Court attempts to dispose of this direct, unqualified, and consistent eyewitness testimony in two ways. First, by relying on a theory so implausible that it was apparently not suggested by petitioner's counsel until the oral-argument-*cum*-evidentiary-hearing held before us, perhaps because it is a theory that only the most removed appellate court could

love. This theory is that there is a reasonable probability that the jury would have changed its mind about the eyewitness identification because the *Brady* material would have permitted the defense to argue that the eyewitnesses only got a good look at the killer when he was sitting in Mrs. Dye's car, and thus could identify him, not by his height and build, but *only by his face.* Never mind, for the moment, that this is factually false, since the *Brady* material showed that only *one* of the four eyewitnesses, Smallwood, did not see the killer outside the car.[3] And never mind, also, the dubious premise that the build of a man 6-feet tall (like petitioner) is indistinguishable, when seated behind the wheel, from that of a man less than 5½-feet tall (like Beanie). To assert that unhesitant and categorical identification by four witnesses who viewed the killer, close-up and with the sun high in the sky, would not eliminate reasonable doubt if it were based *only* on *facial* characteristics, and not on height and build, is quite simply absurd. Facial features are *the primary means* by which human beings recognize one another. That is why police departments distribute "mug" shots of wanted felons, rather than Ivy-League-type posture pictures; it is why bank robbers wear stockings over their faces instead of floor-length capes over their shoulders; it is why the Lone Ranger wears a mask instead of a poncho; and it is why a criminal defense lawyer who seeks to destroy an

[3] Smallwood and Williams were the only eyewitnesses whose testimony was affected by the *Brady* material, and Williams's was affected not because it showed he did not observe the killer standing up, but to the contrary because it showed that his estimates of height and weight based on that observation did not match Kyles. The other two witnesses did observe the killer in full. Territo testified that he saw the killer running up to Mrs. Dye before the struggle began, and that after the struggle he watched the killer bend down, stand back up, and then "stru[t]" over to the car. Tr. 12 (Dec. 6, 1984). Kersh too had a clear opportunity to observe the killer's body type; she testified that she saw the killer and Mrs. Dye arguing, and that she watched him walk around the back of the car after Mrs. Dye had fallen. *Id.*, at 29–30.

identifying witness by asking "You admit that you saw only the killer's face?" will be laughed out of the courtroom.

It would be different, of course, if there were evidence that Kyles's and Beanie's faces looked like twins, or at least bore an unusual degree of resemblance. That facial resemblance *would* explain why, if Beanie committed the crime, all four witnesses picked out Kyles at first (though not why they continued to pick him out when he and Beanie stood side-by-side in court), and would render their failure to observe the height and build of the killer relevant. But without evidence of facial similarity, the question "You admit that you saw only the killer's face?" draws no blood; it does not explain *any* witness's identification of petitioner as the killer. While the assumption of facial resemblance between Kyles and Beanie underlies all of the Court's repeated references to the partial concealment of the killer's body from view, see, *e. g.*, *ante*, at 442–443, 443–444, n. 14, 445, the Court never actually says that such resemblance exists. That is because there is not the slightest basis for such a statement in the record. *No* court has found that Kyles and Beanie bear any facial resemblance. In fact, quite the opposite: *every* federal and state court that has reviewed the record photographs, or seen the two men, has found that they do not resemble each other in any respect. See 5 F. 3d, at 813 ("Comparing photographs of Kyles and Beanie, it is evident that the former is taller, thinner, and has a narrower face"); App. 181 (District Court opinion) ("The court examined all of the pictures used in the photographic line-up and compared Kyles' and Beanie's pictures; it finds that they did not resemble one another"); *id.*, at 36 (state trial court findings on postconviction review) ("[Beanie] clearly and distinctly did *not resemble* the defendant in this case") (emphasis in original). The District Court's finding controls because it is not clearly erroneous, Fed. Rule Civ. Proc. 52(a), and the state court's finding, because fairly supported by the record, must be presumed correct on habeas review. See 28 U. S. C. § 2254(d).

The Court's second means of seeking to neutralize the impressive and unanimous eyewitness testimony uses the same "build-is-everything" theory to exaggerate the effect of the State's failure to disclose the contemporaneous statement of Henry Williams. That statement would assuredly have permitted a sharp cross-examination, since it contained estimations of height and weight that fit Beanie better than petitioner. *Ante*, at 441–442. But I think it is hyperbole to say that the statement would have "substantially reduced or destroyed" the value of Williams' testimony. *Ante*, at 441. Williams saw the murderer drive slowly by less than 10 feet away, Tr. 54 (Dec. 6, 1984), and unhesitatingly picked him out of the photo lineup. The jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight.

The Court spends considerable time, see *ante*, at 443, showing how Smallwood's testimony could have been discredited to such a degree as to "rais[e] a substantial implication that the prosecutor had coached him to give it." *Ibid.* Perhaps so, but that is all irrelevant to this appeal, since *all* of that impeaching material (except the "facial identification" point I have discussed above) was available to the defense independently of the *Brady* material. See *ante*, at 443–444, n. 14. In sum, the undisclosed statements, credited with everything they could possibly have provided to the defense, leave two prosecution witnesses (Territo and Kersh) totally untouched; one prosecution witness (Smallwood) barely affected (he saw "only" the killer's face); and one prosecution witness (Williams) somewhat impaired (his description of the killer's height and weight did not match Kyles). We must keep all this in due perspective, remembering that the relevant question in the materiality inquiry is not how many points the defense could have scored off the prosecution witnesses, but whether it is reasonably probable that the new evidence would have caused the jury to accept the basic thesis that all four witnesses were mistaken. I think it plainly

is not. *No* witness involved in the case ever identified *anyone* but petitioner as the murderer. Their views of the crime and the escaping criminal were obtained in bright daylight from close at hand; and their identifications were reaffirmed before the jury. After the side-by-side comparison between Beanie and Kyles, the jury heard Territo say that there was "[n]o doubt in my mind" that petitioner was the murderer, Tr. 378 (Dec. 7, 1984); heard Kersh say "I know it was him. . . . I seen his face and I know the color of his skin. I know it. I know it's him," *id.*, at 383; heard Smallwood say "I'm positive . . . [b]ecause that's the man who I seen kill that woman," *id.*, at 387; and heard Williams say "[n]o doubt in my mind," *id.*, at 391. With or without the *Brady* evidence, there could be no doubt in the mind of the jury either.

There remains the argument that is the major contribution of today's opinion to *Brady* litigation; with our endorsement, it will surely be trolled past appellate courts in all future failure-to-disclose cases. The Court argues that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Ante*, at 445 (citing *Agurs* v. *United States*, 427 U. S., at 112–113, n. 21). It would be startling if we *had* "said [this] before," since it assumes irrational jury conduct. The weakening of one witness's testimony does not weaken the unconnected testimony of another witness; and to entertain the possibility that the jury will give it such an effect is incompatible with the whole idea of a materiality standard, which presumes that the incriminating evidence that would have been destroyed by proper disclosure can be logically separated from the incriminating evidence that would have remained unaffected. In fact we have said nothing like what the Court suggests. The opinion's only authority for its theory, the cited footnote from *Agurs*, was appended to the proposition that "[a *Brady*] omission must be evaluated in the context of the entire record," 427 U. S.,

at 112. In accordance with that proposition, the footnote recited a hypothetical that shows how a witness's testimony could have been destroyed by withheld evidence *that contradicts the witness.*[4] That is worlds apart from having it destroyed by the corrosive effect of withheld evidence that impeaches (or, as here, merely weakens) *some other corroborating witness.*

The physical evidence confirms the immateriality of the nondisclosures. In a garbage bag outside petitioner's home the police found Mrs. Dye's purse and other belongings. Inside his home they found, behind the kitchen stove, the .32-caliber revolver used to kill Mrs. Dye; hanging in a wardrobe, a homemade shoulder holster that was "a perfect fit" for the revolver, Tr. 74 (Dec. 6, 1984) (Detective Dillman); in a dresser drawer in the bedroom, two boxes of gun cartridges, one containing only .32-caliber rounds of the same brand found in the murder weapon, another containing .22, .32, and .38-caliber rounds; in a kitchen cabinet, eight empty Schwegmann's bags; and in a cupboard underneath that cabinet, one Schwegmann's bag containing 15 cans of pet food. Petitioner's account at trial was that Beanie planted the purse, gun, and holster, that petitioner received the ammunition from Beanie as collateral for a loan, and that petitioner had bought the pet food the day of the murder. That account strains credulity to the breaking point.

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[4] "'If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only a brief glimpse, the result might well be different.'" *Agurs*, 427 U. S., at 112–113, n. 21 (quoting Comment, *Brady v. Maryland* and The Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 125 (1972)).

The Court is correct that the *Brady* material would have supported the claim that Beanie planted Mrs. Dye's belongings in petitioner's garbage and (to a lesser degree) that Beanie planted the gun behind petitioner's stove. *Ante*, at 448. But we must see the whole story that petitioner presented to the jury. Petitioner would have it that Beanie did not plant the incriminating evidence until the day *after* he incited the police to search petitioner's home. Moreover, he succeeded in surreptitiously placing the gun behind the stove, and the matching shoulder holster in the wardrobe, while *at least 10 and as many as 19 people* were present in petitioner's small apartment.[5] Beanie, who was wearing blue jeans and either a "tank-top" shirt, Tr. 302 (Dec. 7, 1984) (Cathora Brown), or a short-sleeved shirt, *id.*, at 351 (petitioner), would have had to be concealing about his person not only the shoulder holster and the murder weapon, but also a different gun with tape wrapped around the barrel that he showed to petitioner. *Id.*, at 352. Only appellate judges could swallow such a tale. Petitioner's only supporting evidence was Johnny Burns's testimony that he saw Beanie stooping behind the stove, presumably to plant the gun. *Id.*, at 262–263. Burns's credibility on the stand can perhaps best be gauged by observing that the state judge who presided over petitioner's trial stated, in a postconviction proceeding, that "[I] ha[ve] chosen to totally disregard everything that [Burns] has said," App. 35. See also *id.*, at 165 (District Court opinion) ("Having reviewed the entire record, this court without hesitation concurs with the trial court's determination concerning the credibility of [Burns]"). Burns, by the way, who repeatedly stated at trial that Beanie was his "best friend," Tr. 279 (Dec. 7, 1984), has since been

[5] The estimates varied. See Tr. 269 (Dec. 7, 1984) (Johnny Burns) (18 or 19 people); *id.*, at 298 (Cathora Brown) (6 adults, 4 children); *id.*, at 326 (petitioner) ("about 16 . . . about 18 or 19"); *id.*, at 340 (petitioner) (13 people).

tried and convicted for killing Beanie. See *State* v. *Burnes*, 533 So. 2d 1029 (La. App. 1988).[6]

Petitioner did not claim that the ammunition had been planted. The police found a .22-caliber rifle under petitioner's mattress and two boxes of ammunition, one containing .22, .32, and .38-caliber rounds, another containing only .32-caliber rounds of the same brand as those found loaded in the murder weapon. Petitioner's story was that Beanie gave him the rifle and the .32-caliber shells as security for a loan, but that he had taken the .22-caliber shells out of the box. Tr. 353, 355 (Dec. 7, 1984). Put aside that the latter detail was contradicted by the facts; but consider the inherent implausibility of Beanie's giving petitioner collateral in the form of a box containing *only* .32 shells, if it were true that petitioner did not own a .32-caliber gun. As the Fifth Circuit wrote, "[t]he more likely inference, apparently chosen by the jury, is that [petitioner] possessed .32-caliber ammunition because he possessed a .32-caliber firearm." 5 F. 3d, at 817.

We come to the evidence of the pet food, so mundane and yet so very damning. Petitioner's confused and changing explanations for the presence of 15 cans of pet food in a Schwegmann's bag under the sink must have fatally undermined his credibility before the jury. See App. 36 (trial judge finds that petitioner's "obvious lie" concerning the pet food "may have been a crucial bit of evidence in the minds of the jurors which caused them to discount the entire de-

[6] The Court notes that "neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials." *Ante*, at 450, n. 19. That is obviously true. But it is just as obviously true that because we have no findings about Burns's credibility from the jury and no direct method of asking what they thought, the only way that *we* can assess the jury's appraisal of Burns's credibility is by asking (1) whether the state trial judge, who saw Burns's testimony along with the jury, thought it was credible; and (2) whether Burns was in fact credible—a question on which his later behavior towards his "best friend" is highly probative.

fense in this case"). The Court disposes of the pet food evidence as follows:

> "The fact that pet food was found in Kyles's apartment was consistent with the testimony of several defense witnesses that Kyles owned a dog and that his children fed stray cats. The brands of pet food found were only two of the brands that Dye typically bought, and these two were common, whereas the one specialty brand that was found in Dye's apartment after her murder, Tr. 180 (Dec. 7, 1984), was not found in Kyles's apartment, *id.*, at 188. Although Kyles was wrong in describing the cat food as being on sale the day he said he bought it, he was right in describing the way it was priced at Schwegmann's market, where he commonly shopped." *Ante*, at 451–452; see also *ante*, at 452, n. 20.

The full story is this. Mr. and Mrs. Dye owned two cats and a dog, Tr. 178 (Dec. 7, 1984), for which she regularly bought varying brands of pet food, several different brands at a time. *Id.*, at 179, 180. Found in Mrs. Dye's home after her murder were the brands Nine Lives, Kalkan, and Puss n' Boots. *Id.*, at 180. Found in petitioner's home were eight cans of Nine Lives, four cans of Kalkan, and three cans of Cozy Kitten. *Id.*, at 188. Since we know that Mrs. Dye had been shopping that day and that the murderer made off with her goods, petitioner's possession of these items was powerful evidence that he was the murderer. Assuredly the jury drew that obvious inference. Pressed to explain why he just happened to buy *15 cans* of pet food that very day (keep in mind that petitioner was a very poor man, see *id.*, at 329, who supported a common-law wife, a mistress, and four children), petitioner gave the reason that "it was on sale." *Id.*, at 341. The State, however, introduced testimony from the Schwegmann's advertising director that the pet food was *not* on sale that day. *Id.*, at 395. The dissenting judge below tried to rehabilitate petitioner's testimony

by interpreting the "on sale" claim as meaning "for sale," a reference to the pricing of the pet food (*e. g.*, "3 for 89 cents"), which petitioner claimed to have read on a shelf sign in the store. *Id.*, at 343. But unless petitioner was parodying George Leigh Mallory, "because it was *for* sale" would have been an irrational response to the question it was given in answer to: Why did you buy *so many* cans? In any event, the Schwegmann's employee also testified that store policy was not to put signs on the shelves at all. *Id.*, at 398–399. The sum of it is that petitioner, far from explaining the presence of the pet food, doubled the force of the State's evidence by perjuring himself before the jury, as the state trial judge observed. See *supra*, at 472–473.[7]

I will not address the list of cars in the Schwegmann's parking lot and the receipt, found in the victim's car, that bore petitioner's fingerprints. These were collateral matters that provided little evidence of either guilt or innocence. The list of cars, which did not contain petitioner's automobile, would only have served to rebut the State's introduction of a photograph purporting to show petitioner's car in the parking lot; but petitioner does not contest that the list was not comprehensive, and that the photograph was taken about six hours before the list was compiled. See 5 F. 3d, at 816.

[7] I have charitably assumed that petitioner had a pet or pets in the first place, although the evidence tended to show the contrary. Petitioner claimed that he owned a dog or puppy, that his son had a cat, and that there were "seven or eight more cats around there." Tr. 325 (Dec. 7, 1984). The dog, according to petitioner, had been kept "in the country" for a month and half, and was brought back just the week before petitioner was arrested. *Id.*, at 337–338. Although petitioner claimed to have kept the dog tied up in a yard behind his house before it was taken to the country, *id.*, at 336–337, two *defense* witnesses contradicted this story. Donald Powell stated that he had not seen a dog at petitioner's home since at least six months before the trial, *id.*, at 254, while Cathora Brown said that although Pinky, petitioner's wife, sometimes fed stray pets, she had no dog tied up in the back yard. *Id.*, at 304–305. The police found no evidence of any kind that any pets lived in petitioner's home at or near the time of the murder. *Id.*, at 75 (Dec. 6, 1984).

Thus its rebuttal value would have been marginal at best. The receipt—although it showed that petitioner must at some point have been both in Schwegmann's and in the murdered woman's car—was as consistent with petitioner's story as with the State's. See *ante*, at 452.

* * *

The State presented to the jury a massive core of evidence (including four eyewitnesses) showing that petitioner was guilty of murder, and that he lied about his guilt. The effect that the *Brady* materials would have had in chipping away at the edges of the State's case can only be called immaterial. For the same reasons I reject petitioner's claim that the *Brady* materials would have created a "residual doubt" sufficient to cause the sentencing jury to withhold capital punishment.

I respectfully dissent.

Syllabus

RUBIN, SECRETARY OF THE TREASURY *v.* COORS BREWING CO.

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

No. 93–1631. Argued November 30, 1994—Decided April 19, 1995

Because § 5(e)(2) of the Federal Alcohol Administration Act (FAAA or Act), 27 U. S. C. § 205(e)(2), prohibits beer labels from displaying alcohol content, the federal Bureau of Alcohol, Tobacco and Firearms (BATF) rejected respondent brewer's application for approval of proposed labels that disclosed such content. Respondent filed suit for relief on the ground that the relevant provisions of the Act violated the First Amendment's protection of commercial speech. The Government argued that the labeling ban was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer. The District Court invalidated the labeling ban, and the Court of Appeals affirmed. Although the latter court found that the Government's interest in suppressing "strength wars" was "substantial" under the test set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557, the court held that the ban violates the First Amendment because it fails to advance that interest in a direct and material way.

Held: Section 5(e)(2) violates the First Amendment's protection of commercial speech. Pp. 480–491.

(a) In scrutinizing a regulation of commercial speech that concerns lawful activity and is not misleading, a court must consider whether the governmental interest asserted to support the regulation is "substantial." If that is the case, the court must also determine whether the regulation directly advances the asserted interest and is no more extensive than is necessary to serve that interest. *Central Hudson*, *supra*, at 566. Here, respondent seeks to disclose only truthful, verifiable, and nonmisleading factual information concerning alcohol content. Pp. 480–482.

(b) The interest in curbing "strength wars" is sufficiently "substantial" to satisfy *Central Hudson.* The Government has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs. Cf. *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 341. There is no reason to think that strength wars, if they were

to occur, would not produce the type of social harm that the Government hopes to prevent. However, the additional asserted interest in "facilitat[ing]" state efforts to regulate alcohol under the Twenty-first Amendment is not sufficiently substantial to meet *Central Hudson*'s requirement. Even if the Government possessed the authority to facilitate state powers, the Government has offered nothing to suggest that States are in need of federal assistance in this regard. *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 431–435, distinguished. Pp. 483–486.

(c) Section 205(e)(2) fails *Central Hudson*'s requirement that the measure directly advance the asserted Government interest. The labeling ban cannot be said to advance the governmental interest in suppressing strength wars because other provisions of the FAAA and implementing regulations prevent § 205(e)(2) from furthering that interest in a direct and material fashion. Although beer advertising would seem to constitute a more influential weapon in any strength war than labels, the BATF regulations governing such advertising prohibit statements of alcohol content only in States that affirmatively ban such advertisements. Government regulations also permit the identification of certain beers with high alcohol content as "malt liquors," and they require disclosure of content on the labels of wines and spirits. There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects. Pp. 486–490.

(d) Section 205(e)(2) is more extensive than necessary, since available alternatives to the labeling ban—including directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, and limiting the ban to malt liquors, the segment of the beer market that allegedly is threatened with a strength war—would prove less intrusive to the First Amendment's protections for commercial speech. Pp. 490–491.

2 F. 3d 355, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 491.

Deputy Solicitor General Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Days, Assistant Attorney General Hunger, Richard H. Seamon, Michael Jay Singer*, and *John S. Koppel.*

Bruce J. Ennis, Jr., argued the cause for respondent. With him on the brief were *Donald B. Verrilli, Jr.*, *Paul M. Smith*, *Nory Miller*, *M. Caroline Turner*, and *Terrance D. Micek.**

JUSTICE THOMAS delivered the opinion of the Court.

Section 5(e)(2) of the Federal Alcohol Administration Act prohibits beer labels from displaying alcohol content. We granted certiorari in this case to review the Tenth Circuit's holding that the labeling ban violates the First Amendment because it fails to advance a governmental interest in a direct and material way. Because § 5(e)(2) is inconsistent with the protections granted to commercial speech by the First Amendment, we affirm.

I

Respondent brews beer. In 1987, respondent applied to the Bureau of Alcohol, Tobacco and Firearms (BATF), an agency of the Department of the Treasury, for approval of proposed labels and advertisements that disclosed the alcohol content of its beer. BATF rejected the application on the ground that the Federal Alcohol Administration Act (FAAA or Act), 49 Stat. 977, 27 U. S. C. § 201 *et seq.*, prohibited disclosure of the alcohol content of beer on labels or in advertising. Respondent then filed suit in the District

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*Briefs of *amici curiae* urging reversal were filed for the Center for Science in the Public Interest by *Bruce A. Silverglade;* and for the Council of State Governments et al. by *Richard Ruda.*

Briefs of *amici curiae* urging affirmance were filed for the Association of National Advertisers, Inc., et al. by *Burt Neuborne*, *Gilbert H. Weil*, *Valerie Schulte*, and *John F. Kamp;* for Public Citizen by *David C. Vladeck;* for the United States Telephone Association et al. by *Michael W. McConnell*, *Kenneth S. Geller*, *Charles A. Rothfeld*, *William Barfield*, and *Gerald E. Murray;* and for the Washington Legal Foundation by *Charles Fried*, *Donald B. Ayer*, *Daniel J. Popeo*, and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the Beer Institute by *P. Cameron DeVore*, *John J. Walsh*, and *Steven G. Brody;* and for the Wine Institute by *John C. Jeffries, Jr.*

Court for the District of Colorado seeking a declaratory judgment that the relevant provisions of the Act violated the First Amendment; respondent also sought injunctive relief barring enforcement of these provisions. The Government took the position that the ban was necessary to suppress the threat of "strength wars" among brewers, who, without the regulation, would seek to compete in the marketplace based on the potency of their beer.

The District Court granted the relief sought, but a panel of the Court of Appeals for the Tenth Circuit reversed and remanded. *Adolph Coors Co.* v. *Brady*, 944 F. 2d 1543 (1991). Applying the framework set out in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), the Court of Appeals found that the Government's interest in suppressing alcoholic "strength wars" was "substantial." *Brady*, *supra*, at 1547–1549. It further held, however, that the record provided insufficient evidence to determine whether the FAAA's ban on disclosure "directly advanced" that interest. *Id.*, at 1549–1551. The court remanded for further proceedings to ascertain whether a "'reasonable fit'" existed between the ban and the goal of avoiding strength wars. *Id.*, at 1554.

After further factfinding, the District Court upheld the ban on the disclosure of alcohol content in advertising but invalidated the ban as it applied to labels. Although the Government asked the Tenth Circuit to review the invalidation of the labeling ban, respondent did not appeal the court's decision sustaining the advertising ban. On the case's second appeal, the Court of Appeals affirmed the District Court. *Adolph Coors Co.* v. *Bentsen*, 2 F. 3d 355 (1993). Following our recent decision in *Edenfield* v. *Fane*, 507 U. S. 761 (1993), the Tenth Circuit asked whether the Government had shown that the "'challenged regulation advances [the Government's] interests in a direct and material way.'" 2 F. 3d, at 357 (quoting *Edenfield*, *supra*, at 767–768). After reviewing the record, the Court of Appeals concluded that the Government

had failed to demonstrate that the prohibition in any way prevented strength wars. The court found that there was no evidence of any relationship between the publication of factual information regarding alcohol content and competition on the basis of such content. 2 F. 3d, at 358–359.

We granted certiorari, 512 U. S. 1203 (1994), to review the Tenth Circuit's decision that § 205(e)(2) violates the First Amendment. We conclude that the ban infringes respondent's freedom of speech, and we therefore affirm.

II

A

Soon after the ratification of the Twenty-first Amendment, which repealed the Eighteenth Amendment and ended the Nation's experiment with Prohibition, Congress enacted the FAAA. The statute establishes national rules governing the distribution, production, and importation of alcohol and established a Federal Alcohol Administration to implement these rules. Section 5(e)(2) of the Act prohibits any producer, importer, wholesaler, or bottler of alcoholic beverages from selling, shipping, or delivering in interstate or foreign commerce any malt beverages, distilled spirits, or wines in bottles

> "unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law* and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of

> the package, and the manufacturer or bottler or importer of the product." 27 U. S. C. § 205(e)(2) (emphasis added).

The Act defines "'malt beverage[s]'" in such a way as to include all beers and ales. § 211(a)(7).

Implementing regulations promulgated by BATF (under delegation of authority from the Secretary of the Treasury) prohibit the disclosure of alcohol content on beer labels. 27 CFR § 7.26(a) (1994).[1] In addition to prohibiting numerical indications of alcohol content, the labeling regulations proscribe descriptive terms that suggest high content, such as "strong," "full strength," "extra strength," "high test," "high proof," "pre-war strength," and "full oldtime alcoholic strength." § 7.29(f). The prohibitions do not preclude labels from identifying a beer as "low alcohol," "reduced alcohol," "non-alcoholic," or "alcohol-free." *Ibid.;* see also §§ 7.26(b)–(d). By statute and by regulation, the labeling ban must give way if state law requires disclosure of alcohol content.

B

Both parties agree that the information on beer labels constitutes commercial speech. Though we once took the position that the First Amendment does not protect commercial speech, see *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), we repudiated that position in *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976). There we noted that the free flow of commercial information is "indispensable to the proper allocation of resources in a free enterprise system" because it informs the numerous private decisions that drive the system. *Id.*, at 765. Indeed, we observed that a "particular consumer's interest in the

[1] BATF has suspended § 7.26 to comply with the District Court's order enjoining the enforcement of that provision. 58 Fed. Reg. 21228 (1993). Pending the final disposition of this case, interim regulations permit the disclosure of alcohol content on beer labels. 27 CFR § 7.71 (1994).

free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.*, at 763.

Still, *Virginia Board of Pharmacy* suggested that certain types of restrictions might be tolerated in the commercial speech area because of the nature of such speech. See *id.*, at 771–772, n. 24. In later decisions we gradually articulated a test based on "'the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Central Hudson*, 447 U. S., at 562 (quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978)). *Central Hudson* identified several factors that courts should consider in determining whether a regulation of commercial speech survives First Amendment scrutiny:

> "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U. S., at 566.

We now apply *Central Hudson*'s test to § 205(e)(2).[2]

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[2] The Government argues that *Central Hudson* imposes too strict a standard for reviewing § 205(e)(2), and urges us to adopt instead a far more deferential approach to restrictions on commercial speech concerning alcohol. Relying on *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993), and *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328 (1986), the Government suggests that legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech. Although *Edge Broadcasting* and *Posadas* involved the advertising of gambling activities, the Government argues that we also have applied this principle to speech concerning alcohol. See *California* v. *LaRue*, 409

III

Both the lower courts and the parties agree that respondent seeks to disclose only truthful, verifiable, and nonmisleading factual information about alcohol content on its beer labels. Thus, our analysis focuses on the substantiality of the interest behind § 205(e)(2) and on whether the labeling ban bears an acceptable fit with the Government's goal. A careful consideration of these factors indicates that § 205(e)(2) violates the First Amendment's protection of commercial speech.

A

The Government identifies two interests it considers sufficiently "substantial" to justify § 205(e)(2)'s labeling ban. First, the Government contends that § 205(e)(2) advances Congress' goal of curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. According to the Government, the FAAA's restriction prevents a particular type of beer drinker—one

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U. S. 109, 138 (1972) (holding that States may ban nude dancing in bars and nightclubs that serve liquor).

Neither *Edge Broadcasting* nor *Posadas* compels us to craft an exception to the *Central Hudson* standard, for in both of those cases we applied the *Central Hudson* analysis. Indeed, *Edge Broadcasting* specifically avoided reaching the argument the Government makes here because the Court found that the regulation in question passed muster under *Central Hudson.* 509 U. S., at 425. To be sure, *Posadas* did state that the Puerto Rico Government could ban promotional advertising of casino gambling because it could have prohibited gambling altogether. 478 U. S., at 346. But the Court reached this argument only *after* it already had found that the state regulation survived the *Central Hudson* test. See 478 U. S., at 340–344. The Court raised the Government's point in response to an alternative claim that Puerto Rico's regulation was inconsistent with *Carey* v. *Population Services Int'l,* 431 U. S. 678 (1977), and *Bigelow* v. *Virginia,* 421 U. S. 809 (1975). *Posadas, supra,* at 345–346.

Nor does *LaRue* support the Government's position. *LaRue* did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing in places where alcohol was served. 409 U. S., at 114.

who selects a beverage because of its high potency—from choosing beers solely for their alcohol content. In the Government's view, restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic.

Respondent counters that Congress actually intended the FAAA to achieve the far different purpose of preventing brewers from making inaccurate claims concerning alcohol content. According to respondent, when Congress passed the FAAA in 1935, brewers did not have the technology to produce beer with alcohol levels within predictable tolerances—a skill that modern beer producers now possess. Further, respondent argues that the true policy guiding federal alcohol regulation is not aimed at suppressing strength wars. If such were the goal, the Government would not pursue the opposite policy with respect to wines and distilled spirits. Although § 205(e)(2) requires BATF to promulgate regulations barring the disclosure of alcohol content on beer labels, it also orders BATF to *require* the disclosure of alcohol content on the labels of wines and spirits. See 27 CFR § 4.36 (1994) (wines); § 5.37 (distilled spirits).

Rather than suppressing the free flow of factual information in the wine and spirits markets, the Government seeks to control competition on the basis of strength by monitoring distillers' promotions and marketing. Respondent quite correctly notes that the general thrust of federal alcohol policy appears to favor greater disclosure of information, rather than less. This also seems to be the trend in federal regulation of other consumer products as well. See, *e. g.,* Nutrition Labeling and Education Act of 1990, Pub. L. 101–535, 104 Stat. 2353, as amended (requiring labels of food products sold in the United States to display nutritional information).

Respondent offers a plausible reading of the purpose behind § 205(e)(2), but the prevention of misleading statements of alcohol content need not be the exclusive Government in-

terest served by § 205(e)(2). In *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 341 (1986), we found that the Puerto Rico Legislature's interest in promoting the health, safety, and welfare of its citizens by reducing their demand for gambling provided a sufficiently "substantial" governmental interest to justify the regulation of gambling advertising. So too the Government here has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs. Both panels of the Court of Appeals that heard this case concluded that the goal of suppressing strength wars constituted a substantial interest, and we cannot say that their conclusion is erroneous. We have no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the Government hopes to prevent.

The Government attempts to bolster its position by arguing that the labeling ban not only curbs strength wars, but also "facilitates" state efforts to regulate alcohol under the Twenty-first Amendment. The Solicitor General directs us to *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418 (1993), in which we upheld a federal law that prohibited lottery advertising by radio stations located in States that did not operate lotteries. That case involved a station located in North Carolina (a nonlottery State) that broadcast lottery advertisements primarily into Virginia (a State with a lottery). We upheld the statute against First Amendment challenge in part because it supported North Carolina's antigambling policy without unduly interfering with States that sponsored lotteries. *Id.*, at 431–435. In this case, the Government claims that the interest behind § 205(e)(2) mirrors that of the statute in *Edge Broadcasting* because it prohibits disclosure of alcohol content only in States that do not affirmatively require brewers to provide that information. In the Government's view, this saves States that might wish to

ban such labels the trouble of enacting their own legislation, and it discourages beer drinkers from crossing state lines to buy beer they believe is stronger.

We conclude that the Government's interest in preserving state authority is not sufficiently substantial to meet the requirements of *Central Hudson*. Even if the Federal Government possessed the broad authority to facilitate state powers, in this case the Government has offered nothing that suggests that States are in need of federal assistance. States clearly possess ample authority to ban the disclosure of alcohol content—subject, of course, to the same First Amendment restrictions that apply to the Federal Government. Unlike the situation in *Edge Broadcasting*, the policies of some States do not prevent neighboring States from pursuing their own alcohol-related policies within their respective borders. One State's decision to permit brewers to disclose alcohol content on beer labels will not preclude neighboring States from effectively banning such disclosure of that information within their borders.

B

The remaining *Central Hudson* factors require that a valid restriction on commercial speech directly advance the governmental interest and be no more extensive than necessary to serve that interest. We have said that "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Posadas*, *supra*, at 341. The Tenth Circuit found that § 205(e)(2) failed to advance the interest in suppressing strength wars sufficiently to justify the ban. We agree.

Just two Terms ago, in *Edenfield* v. *Fane*, 507 U. S. 761 (1993), we had occasion to explain the *Central Hudson* factor concerning whether the regulation of commercial speech "directly advances the governmental interest asserted." *Central Hudson*, 447 U. S., at 566. In *Edenfield*, we decided

that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." 507 U. S., at 767. That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at 770–771. We cautioned that this requirement was critical; otherwise, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.*, at 771.

The Government attempts to meet its burden by pointing to current developments in the consumer market. It claims that beer producers are already competing and advertising on the basis of alcohol strength in the "malt liquor" segment of the beer market.[3] The Government attempts to show that this competition threatens to spread to the rest of the market by directing our attention to respondent's motives in bringing this litigation. Respondent allegedly suffers from consumer misperceptions that its beers contain less alcohol than other brands. According to the Government, once respondent gains relief from § 205(e)(2), it will use its labels to overcome this handicap.

Under the Government's theory, § 205(e)(2) suppresses the threat of such competition by preventing consumers from choosing beers on the basis of alcohol content. It is assuredly a matter of "common sense," Brief for Petitioner 27, that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of that trait. In addition to common sense, the Government urges us to turn to history as a guide. Ac-

[3] "'Malt liquor' is the term used to designate those malt beverages with the highest alcohol content . . . . Malt liquors represent approximately three percent of the malt beverage market." *Adolph Coors Co.* v. *Bentsen*, 2 F. 3d 355, 358, n. 4 (CA10 1993).

cording to the Government, at the time Congress enacted the FAAA, the use of labels displaying alcohol content had helped produce a strength war. Section 205(e)(2) allegedly relieved competitive pressures to market beer on the basis of alcohol content, resulting over the long term in beers with lower alcohol levels.

We conclude that § 205(e)(2) cannot directly and materially advance its asserted interest because of the overall irrationality of the Government's regulatory scheme. While the laws governing labeling prohibit the disclosure of alcohol content unless required by state law, federal regulations apply a contrary policy to beer advertising. 27 U. S. C. § 205(f)(2); 27 CFR § 7.50 (1994). Like § 205(e)(2), these restrictions prohibit statements of alcohol content in advertising, but, unlike § 205(e)(2), they apply only in States that affirmatively prohibit such advertisements. As only 18 States at best prohibit disclosure of content in advertisements, App. to Brief for Respondent 1a–12a, brewers remain free to disclose alcohol content in advertisements, but not on labels, in much of the country. The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars.

Other provisions of the FAAA and its regulations similarly undermine § 205(e)(2)'s efforts to prevent strength wars. While § 205(e)(2) bans the disclosure of alcohol content on beer labels, it allows the exact opposite in the case of wines and spirits. Thus, distilled spirits may contain statements of alcohol content, 27 CFR § 5.37 (1994), and such disclosures are required for wines with more than 14 percent alcohol, 27 CFR § 4.36 (1994). If combating strength wars were the goal, we would assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones. Further, the Government permits brewers to signal high alcohol content through use

of the term "malt liquor." Although the Secretary has proscribed the use of various colorful terms suggesting high alcohol levels, 27 CFR § 7.29(f) (1994), manufacturers still can distinguish a class of stronger malt beverages by identifying them as malt liquors. One would think that if the Government sought to suppress strength wars by prohibiting numerical disclosures of alcohol content, it also would preclude brewers from indicating higher alcohol beverages by using descriptive terms.

While we are mindful that respondent only appealed the constitutionality of § 205(e)(2), these exemptions and inconsistencies bring into question the purpose of the labeling ban. To be sure, the Government's interest in combating strength wars remains a valid goal. But the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end. There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects.

This conclusion explains the findings of the courts below. Both the District Court and the Court of Appeals found that the Government had failed to present any credible evidence showing that the disclosure of alcohol content would promote strength wars. In the District Court's words, "none of the witnesses, none of the depositions that I have read, no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote . . . strength wars." App. to Pet. for Cert. A–38. See also *Bentsen*, 2 F. 3d, at 359. Indeed, the District Court concluded that "[p]rohibiting the alcoholic content disclosure of malt beverages on labels has little, if anything, to do with the type of advertising that promotes strength wars." App. to Pet. for Cert. A–36.[4] As the FAAA's exceptions and reg-

[4] Not only was there little evidence that American brewers intend to increase alcohol content, but the lower courts also found that "in the United States . . . the vast majority of consumers . . . value taste and

ulations would have counteracted any effect the labeling ban had exerted, it is not surprising that the lower courts did not find any evidence that § 205(e)(2) had suppressed strength wars.

The Government's brief submits anecdotal evidence and educated guesses to suggest that competition on the basis of alcohol content is occurring today and that § 205(e)(2)'s ban has constrained strength wars that otherwise would burst out of control. These various tidbits, however, cannot overcome the irrationality of the regulatory scheme and the weight of the record. The Government did not offer any convincing evidence that the labeling ban has inhibited strength wars. Indeed, it could not, in light of the effect of the FAAA's other provisions. The absence of strength wars over the past six decades may have resulted from any number of factors.

Nor do we think that respondent's litigating positions can be used against it as proof that the Government's regulation is necessary. That respondent wishes to disseminate factual information concerning alcohol content does not demonstrate that it intends to compete on the basis of alcohol content. Brewers may have many different reasons—only one of which might be a desire to wage a strength war—why they wish to disclose the potency of their beverages.

Even if § 205(e)(2) did meet the *Edenfield* standard, it would still not survive First Amendment scrutiny because the Government's regulation of speech is not sufficiently tailored to its goal. The Government argues that a sufficient "fit" exists here because the labeling ban applies to only one product characteristic and because the ban does not prohibit all disclosures of alcohol content—it applies only to those involving labeling and advertising. In response, respondent suggests several alternatives, such as directly limiting the alcohol content of beers, prohibiting marketing efforts em-

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lower calories—both of which are adversely affected by increased alcohol strength." *Bentsen*, 2 F. 3d, at 359; accord, App. to Pet. for Cert. A–37.

phasizing high alcohol strength (which is apparently the policy in some other western nations), or limiting the labeling ban only to malt liquors, which is the segment of the market that allegedly is threatened with a strength war. We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that § 205(e)(2) is more extensive than necessary.

IV

In sum, although the Government may have a substantial interest in suppressing strength wars in the beer market, the FAAA's countervailing provisions prevent § 205(e)(2) from furthering that purpose in a direct and material fashion. The FAAA's defects are further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech. Because we find that § 205(e)(2) fails the *Central Hudson* test, we affirm the decision of the court below.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Although I agree with the Court's persuasive demonstration that this statute does not serve the Government's purported interest in preventing "strength wars," I write separately because I am convinced that the constitutional infirmity in the statute is more patent than the Court's opinion indicates. Instead of relying on the formulaic approach announced in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), I believe the Court should ask whether the justification for allowing more regulation of commercial speech than other speech has any application to this unusual statute.

In my opinion the "commercial speech doctrine" is unsuited to this case, because the Federal Alcohol Administra-

tion Act (FAAA) neither prevents misleading speech nor protects consumers from the dangers of incomplete information. A truthful statement about the alcohol content of malt beverages would receive full First Amendment protection in any other context; without some justification tailored to the special character of commercial speech, the Government should not be able to suppress the same truthful speech merely because it happens to appear on the label of a product for sale.

I

The First Amendment generally protects the right not to speak as well as the right to speak. See *McIntyre* v. *Ohio Elections Comm'n*, *ante*, at 342; *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); cf. *Wallace* v. *Jaffree*, 472 U. S. 38, 51–52 (1985). In the commercial context, however, government is not only permitted to prohibit misleading speech that would be protected in other contexts, *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976), but it often requires affirmative disclosures that the speaker might not make voluntarily.[1] The regulation of statements about alcohol content in the statute before us today is a curious blend of prohibitions and requirements. It prohibits the disclosure of the strength of some malt beverages while requiring the disclosure of the strength of vintage wines. In my judgment the former prohibition is just as unacceptable in a commercial context as in any other because it is not supported by the rationales for treating commercial speech differently under

[1] See *In re R. M. J.*, 455 U. S. 191, 201 (1982) ("[A] warning or disclaimer might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception"), citing *Bates* v. *State Bar of Ariz.*, 433 U. S. 350, 375 (1977); see also 15 U. S. C. § 1333 (requiring "Surgeon General's Warning" labels on cigarettes); 21 U. S. C. § 343 (1988 ed. and Supp. V) (setting labeling requirements for food products); 21 U. S. C. § 352 (1988 ed. and Supp. V) (setting labeling requirements for drug products); 15 U. S. C. § 77e (requiring registration statement before selling securities).

the First Amendment: that is, the importance of avoiding deception and protecting the consumer from inaccurate or incomplete information in a realm in which the accuracy of speech is generally ascertainable by the speaker.

I am willing to assume that an interest in avoiding the harmful consequences of so-called "strength wars" would justify disclosure requirements explaining the risks and predictable harms associated with the consumption of alcoholic beverages. Such a measure could be justified as a means to ensure that consumers are not led, by incomplete or inaccurate information, to purchase products they would not purchase if they knew the truth about them. I see no basis, however, for upholding a prohibition against the dissemination of truthful, nonmisleading information about an alcoholic beverage merely because the message is propounded in a commercial context.

II

The Court's continued reliance on the misguided approach adopted in *Central Hudson* makes this case appear more difficult than it is. In *Central Hudson*, the Court held that commercial speech is categorically distinct from other speech protected by the First Amendment. 447 U. S., at 561–566, and n. 5. Defining "commercial speech," alternatively, as "expression related solely to the economic interests of the speaker and its audience," *id.*, at 561, and as "'speech proposing a commercial transaction,'" *id.*, at 562, quoting *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978), the Court adopted its much-quoted four-part test for determining when the government may abridge such expression. In my opinion the borders of the commercial speech category are not nearly as clear as the Court has assumed, and its four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech. See *Central Hudson*, 447 U. S., at 579–582 (STEVENS, J., concurring in judgment).

The case before us aptly demonstrates the artificiality of a rigid commercial/noncommercial distinction. The speech at issue here is an unadorned, accurate statement, on the label of a bottle of beer, of the alcohol content of the beverage contained therein. This, the majority finds, *ante*, at 481–482, is "commercial speech." The majority does not explain why the words "4.73% alcohol by volume"[2] are commercial. Presumably, if a nonprofit consumer protection group were to publish the identical statement, "Coors beer has 4.73% alcohol by volume," on the cover of a magazine, the Court would not label the speech "commercial." It thus appears, from the facts of this case, that whether or not speech is "commercial" has no necessary relationship to its content. If the Coors label is commercial speech, then, I suppose it must be because (as in *Central Hudson*) the motivation of the speaker is to sell a product, or because the speech tends to induce consumers to buy a product.[3] Yet, economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged. Neither can the value of speech be diminished solely because of its placement on the label of a product. Surely a piece of newsworthy information on the cover of a magazine, or a book review on the back of a book's dust jacket, is entitled to full constitutional protection.

As a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead. See *Virginia Bd. of*

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[2] The 4.73 percent figure comes from an "[i]ndependent [l]aboratory [a]nalysis" of Coors beer cited in a Coors advertisement. App. 65.

[3] The inducement rationale might also apply to a consumer protection publication, if it is sold on a newsrack, as some consumers will buy the publication because they wish to learn the varying alcohol contents of competing products.

Pharmacy, 425 U. S., at 771–772; *Bates*, 433 U. S., at 383–384; *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 81–83 (1983) (STEVENS, J., concurring in judgment); see also *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 426 (1993) (city's regulation of commercial speech bore no relationship to reasons why commercial speech is entitled to less protection). Although some false and misleading statements are entitled to First Amendment protection in the political realm, see, *e. g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974); *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the special character of commercial expression justifies restrictions on misleading speech that would not be tolerated elsewhere. As Justice Stewart explained:

> "In contrast to the press, which must often attempt to assemble the true facts from sketchy and sometimes conflicting sources under the pressure of publication deadlines, the commercial advertiser generally knows the product or service he seeks to sell and is in a position to verify the accuracy of his factual representations before he disseminates them. The advertiser's access to the truth about his product and its price substantially eliminates any danger that government regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression. There is, therefore, little need to sanction 'some falsehood in order to protect speech that matters.'" *Virginia Bd. of Pharmacy*, 425 U. S., at 777–778 (concurring opinion), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U. S., at 341.[4]

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[4] Justice Stewart's reasoning has been the subject of scholarly criticism, on the ground that some speech surrounding a commercial transaction is not readily verifiable, while some political speech is easily verifiable by the speaker. See Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372, 385–386 (1979). Although I agree that Justice Stewart's distinction will not extend to every instance of expression, I think his theory makes good sense as a general rule. Most of the time, if

See also *Bates*, 433 U. S., at 383.

Not only does regulation of inaccurate commercial speech exclude little truthful speech from the market, but false or misleading speech in the commercial realm also lacks the value that sometimes inheres in false or misleading political speech. Transaction-driven speech usually does not touch on a subject of public debate, and thus misleading statements in that context are unlikely to engender the beneficial public discourse that flows from political controversy. Moreover, the consequences of false commercial speech can be particularly severe: Investors may lose their savings, and consumers may purchase products that are more dangerous than they believe or that do not work as advertised. Finally, because commercial speech often occurs in the place of sale, consumers may respond to the falsehood before there is time for more speech and considered reflection to minimize the risks of being misled. See *Ohralik*, 436 U. S., at 447, 457–458 (distinguishing in-person attorney solicitation of clients from written solicitation). The evils of false commercial speech, which may have an immediate harmful impact on commercial transactions, together with the ability of purveyors of commercial speech to control falsehoods, explain why we tolerate more governmental regulation of this speech than of most other speech.

In this case, the Government has not identified a sufficient interest in suppressing the truthful, unadorned, informative speech at issue here. If Congress had sought to regulate all statements of alcohol content (say, to require that they be of a size visible to consumers or that they provide specific

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a seller is representing a fact or making a prediction about his product, the seller will know whether his statements are false or misleading and he will be able to correct them. On the other hand, the purveyor of political speech is more often (though concededly not always) an observer who is in a poor position to verify its truth. The paradigm example of this latter phenomenon is, of course, the journalist who must rely on confidential sources for his information.

information for comparative purposes) in order to prevent brewers from misleading consumers as to the true alcohol content of their beverages, then this would be a different case. But absent that concern, I think respondent has a constitutional right to give the public accurate information about the alcoholic content of the malt beverages that it produces. I see no reason why the fact that such information is disseminated on the labels of respondent's products should diminish that constitutional protection. On the contrary, the statute at issue here should be subjected to the same stringent review as any other content-based abridgment of protected speech.

III

Whatever standard is applied, I find no merit whatsoever in the Government's assertion that an interest in restraining competition among brewers to satisfy consumer demand for stronger beverages justifies a statutory abridgment of truthful speech. Any "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good. See *Virginia Bd. of Pharmacy*, 425 U. S., at 769–770; *Bates*, 433 U. S., at 374–375. One of the vagaries of the "commercial speech" doctrine in its current form is that the Court sometimes takes such paternalistic motives seriously. See *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 439–440 (1993) (STEVENS, J., dissenting); *Posadas de Puerto Rico Associates* v. *Tourism Co. of P. R.*, 478 U. S. 328, 358 (1986) (Brennan, J., dissenting).

In my opinion, the Government's asserted interest, that consumers should be misled or uninformed for their own protection, does not suffice to justify restrictions on protected speech in *any* context, whether under "exacting scrutiny" or

some other standard. If Congress is concerned about the potential for increases in the alcohol content of malt beverages, it may, of course, take other steps to combat the problem without running afoul of the First Amendment—for example, Congress may limit directly the alcoholic content of malt beverages. But Congress may not seek to accomplish the same purpose through a policy of consumer ignorance, at the expense of the free-speech rights of the sellers and purchasers. See *Virginia Bd. of Pharmacy*, 425 U. S., at 756–757. If varying alcohol strengths are lawful, I see no reason why brewers may not advise customers that their beverages are stronger—or weaker—than competing products.

In my opinion, this statute is unconstitutional because, regardless of the standard of review, the First Amendment mandates rejection of the Government's proffered justification for this restriction. Although some regulations of statements about alcohol content that *increase* consumer awareness would be entirely proper, this statutory provision is nothing more than an attempt to blindfold the public.

Accordingly, I concur in the Court's judgment.

Syllabus

CALIFORNIA DEPARTMENT OF CORRECTIONS ET AL. *v.* MORALES

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

No. 93–1462. Argued January 9, 1995—Decided April 25, 1995

Respondent was sentenced to 15 years to life for the 1980 murder of his wife and became eligible for parole in 1990. As required by California law, the Board of Prison Terms (Board) held a hearing in 1989, at which time it found respondent unsuitable for parole for numerous reasons, including the fact that he had committed his crime while on parole for an earlier murder. Respondent would have been entitled to subsequent suitability hearings annually under the law in place when he murdered his wife. The law was amended in 1981, however, to allow the Board to defer subsequent hearings for up to three years for a prisoner convicted of more than one offense involving the taking of a life, if the Board finds that it is not reasonable to expect that parole would be granted at a hearing during the intervening years and states the bases for the finding. Pursuant to this amendment, the Board scheduled respondent's next hearing for 1992. He then filed a federal habeas corpus petition, asserting that as applied to him, the 1981 amendment constituted an *ex post facto* law barred by the United States Constitution. The District Court denied the petition, but the Court of Appeals reversed, holding that the retrospective law made a parole hearing less accessible to respondent and thus effectively increased his sentence in violation of the *Ex Post Facto* Clause.

Held: The amendment's application to prisoners who committed their crimes before it was enacted does not violate the *Ex Post Facto* Clause. Pp. 504–514.

(a) The amendment did not increase the "punishment" attached to respondent's crime. It left untouched his indeterminate sentence and the substantive formula for securing any reductions to the sentencing range. By introducing the possibility that the Board would not have to hold another parole hearing in the year or two after the initial hearing, the amendment simply altered the method to be followed in fixing a parole release date under identical substantive standards. *Lindsey* v. *Washington*, 301 U. S. 397; *Miller* v. *Florida*, 482 U. S. 423; and *Weaver* v. *Graham*, 450 U. S. 24, distinguished. Pp. 504–508.

(b) Under respondent's expansive view, the Clause would forbid any legislative change that has any conceivable risk of affecting a prisoner's

punishment. In contrast, this Court has long held that the question of what legislative adjustments are of sufficient moment to transgress the constitutional prohibition must be a matter of degree, and has declined to articulate a single "formula" for making this determination. There is no need to do so here, either, since the amendment creates only the most speculative and attenuated possibility of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold that might be established under the Clause. The amendment applies only to those who have taken more than one life, a class of prisoners for whom the likelihood of release on parole is quite remote. In addition, it affects the timing only of subsequent hearings, and does so only when the Board makes specific findings in the first hearing. Moreover, the Board has the authority to tailor the frequency of subsequent hearings. Respondent offers no support for his speculation that prisoners might experience an unanticipated change that is sufficiently monumental to alter their suitability for parole, or that such prisoners might be precluded from receiving a subsequent expedited hearing. Nor is there a reason to think that postponing an expedited hearing would extend any prisoner's actual confinement period. Since a parole release date often comes at least several years after a suitability finding, the Board could consider when a prisoner became "suitable" for parole in setting the actual release date. Pp. 508–513.

16 F. 3d 1001, reversed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 514.

James Ching, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Daniel E. Lungren,* Attorney General, *George Williamson,* Chief Assistant Attorney General, *Kenneth C. Young,* Senior Assistant Attorney General, *Joan W. Cavanagh,* Supervising Deputy Attorney General, and *G. Lewis Chartrand, Jr.*

James R. Asperger argued the cause for respondent. With him on the brief were *Daniel H. Bookin*, *Brian D. Boyle*, and *Thomas J. Karr*.*

JUSTICE THOMAS delivered the opinion of the Court.

In 1981, the State of California amended its parole procedures to allow the Board of Prison Terms to decrease the frequency of parole suitability hearings under certain circumstances. This case presents the question whether the application of this amendment to prisoners who committed

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*Briefs of *amici curiae* urging reversal were filed for the State of Georgia by *Michael J. Bowers*, Attorney General, *Terry L. Long*, Assistant Attorney General, and *Daryl A. Robinson*, Senior Assistant Attorney General; for the State of Pennsylvania et al. by *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, and *Andrea F. McKenna*, Senior Deputy Attorney General, *Grant Woods*, Attorney General of Arizona, *Gale A. Norton*, Attorney General of Colorado, *John M. Bailey*, Chief State's Attorney of Connecticut, *Elizabeth Barrett-Anderson*, Attorney General of Guam, *Robert A. Marks*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Roland W. Burris*, Attorney General of Illinois, *Pamela Fanning Carter*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Joseph P. Mazurek*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Deborah T. Poritz*, Attorney General of New Jersey, *Heidi Heitkamp*, Attorney General of North Dakota, *Lee Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Jan Graham*, Attorney General of Utah, *Rosalie Simmonds Ballentine*, Attorney General of the Virgin Islands, *Joseph B. Meyer*, Attorney General of Wyoming, and *Eleni M. Constantine;* for the Criminal Justice Legal Foundation et al. by *Kent S. Scheidegger*, *Charles L. Hobson*, and *Kevin Washburn;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Anthony T. Caso*.

Ronald D. Maines, *Robert Burke*, and *Jonathan Smith* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

their crimes before it was enacted violates the *Ex Post Facto* Clause. We conclude that it does not.

I

California twice has convicted respondent Jose Ramon Morales of murder. In 1971, the body of respondent's girlfriend, Gina Wallace, was found in an abandoned medical building. She had been shot in the head, neck, and abdomen; her right thumb had been amputated and her face slashed repeatedly. A bloody fingerprint near the body matched respondent's. A jury found respondent guilty of first-degree murder, and he was sentenced to life in prison.

While serving his sentence at the State Training Facility in Soledad, California, respondent met Lois Washabaugh, a 75-year-old woman who had begun visiting inmates after gaining an interest in prison reform. Ms. Washabaugh visited respondent on numerous occasions, and respondent kept in contact with her through correspondence. Respondent's letters eventually expressed a romantic interest in Ms. Washabaugh, and the two were married some time after respondent's release to a halfway house in April 1980.

On July 4, 1980, Ms. Washabaugh left her home and told friends that she was moving to Los Angeles to live with her new husband. Three days later, police officers found a human hand on the Hollywood Freeway in Los Angeles. Ms. Washabaugh was reported missing at the end of July, and fingerprint identification revealed that the hand was hers. Her body was never recovered. Respondent was subsequently arrested and found in possession of Ms. Washabaugh's car, purse, credit cards, and diamond rings.

Respondent pleaded *nolo contendere* to the second-degree murder of Ms. Washabaugh. He was sentenced to a term of 15 years to life, but became eligible for parole beginning in 1990. As required by California law, see Cal. Penal Code Ann. § 3041 (West 1982), the Board of Prison Terms (Board) held a hearing on July 25, 1989, to determine respondent's

suitability for parole. California law required the Board to set a release date for respondent unless it found that "the public safety requires a more lengthy period of incarceration for this individual." § 3041(b). The Board found respondent unsuitable for parole for numerous reasons, including the heinous, atrocious, and cruel nature of his offense; the mutilation of Ms. Washabaugh during or after the murder; respondent's record of violence and assaultive behavior; and respondent's commission of his second murder while on parole for his first. Supplemental App. to Pet. for Cert. 45.

Under the law in place at the time respondent murdered Ms. Washabaugh, respondent would have been entitled to subsequent suitability hearings on an annual basis. 1977 Cal. Stats., ch. 165, § 46. In 1981, however, the California Legislature had authorized the Board to defer subsequent suitability hearings for up to three years if the prisoner has been convicted of "more than one offense which involves the taking of a life" and if the Board "finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982).[1] In light of the considerations that led it to find respondent unsuitable for parole, and based on its conclusion that a longer period of observation was required before a parole release date could be projected, the Board determined that it was not reasonable to expect that respondent would be found suitable for parole in 1990 or 1991. Pursuant to the 1981 amendment, the Board scheduled the next hearing for 1992.

[1] The statute was again amended in 1990 to allow the Board the alternative of deferring hearings for five years if the prisoner has been convicted of more than two murders, Cal. Penal Code Ann. § 3041.5(b)(2)(C) (West Supp. 1994), 1990 Cal. Stats., ch. 1053, and in 1994 to extend that alternative to prisoners convicted of even a single murder, 1994 Cal. Stats., ch. 560. The 5-year deferral applies, however, "only to offenses committed before July 1, 1977, or on or after January 1, 1991," 1990 Cal. Stats., ch. 1053, and thus appears to have no application to respondent, whose most recent crime was committed in 1980.

Respondent then filed a federal habeas corpus petition in the United States District Court for the Central District of California, asserting that he was being held in custody in violation of the Federal Constitution. See 28 U. S. C. § 2254. Respondent argued that as applied to him, the 1981 amendment constituted an *ex post facto* law barred by Article I, § 10, of the United States Constitution. The District Court denied respondent's habeas petition, but the United States Court of Appeals for the Ninth Circuit reversed. 16 F. 3d 1001 (1994).[2] Because "a prisoner cannot be paroled without first having a parole hearing," the Court of Appeals concluded that "any retrospective law making parole hearings less accessible would effectively increase the [prisoner's] sentence and violate the ex post facto clause." *Id.*, at 1004. The Court of Appeals accordingly held that the Board was constitutionally constrained to provide respondent with annual parole suitability hearings, as required by the law in effect when he committed his crime. *Id.*, at 1006.

We granted certiorari, 512 U. S. 1287 (1994), and we now reverse.

II

Article I, § 10, of the Constitution prohibits the States from passing any "ex post facto Law." In *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990), we reaffirmed that the *Ex Post Facto* Clause incorporated "a term of art with an established meaning at the time of the framing of the Constitution." In accordance with this original understanding, we have held that the Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Id.*, at 43 (citing *Calder* v. *Bull*, 3 Dall. 386, 391–392

[2] During the pendency of this action, respondent appeared before the Board for his 1992 suitability hearing. The Board again found respondent unsuitable and again determined that it was not reasonable to expect that he would be found suitable for parole at the following two annual hearings. Respondent's next suitability hearing was then set for 1995.

(1798) (opinion of Chase, J.); *Beazell* v. *Ohio*, 269 U. S. 167, 169–170 (1925)).

The legislation at issue here effects no change in the definition of respondent's crime. Instead, the question before us is whether the 1981 amendment to § 3041.5 increases the "punishment" attached to respondent's crime. In arguing that it does, respondent relies chiefly on a trilogy of cases holding that a legislature may not stiffen the "standard of punishment" applicable to crimes that have already been committed. See *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937); *Miller* v. *Florida*, 482 U. S. 423 (1987); *Weaver* v. *Graham*, 450 U. S. 24 (1981).

In *Lindsey*, we established the proposition that the Constitution "forbids the application of any new punitive measure to a crime already consummated." 301 U. S., at 401. The petitioners in *Lindsey* had been convicted of grand larceny, and the sentencing provision in effect at the time they committed their crimes provided for a maximum sentence of "not more than fifteen years." *Id.*, at 398. The applicable law called for sentencing judges to impose an indeterminate sentence up to whatever maximum they selected, so long as it did not exceed 15 years. *Id.*, at 398, 400. Before the petitioners were sentenced, however, a new statute was passed that *required* the judge to sentence the petitioners to the 15-year maximum; under the new statute, the petitioners could secure an earlier release only through the grace of the parole board. *Id.*, at 398–399. We held that the application of this statute to petitioners violated the *Ex Post Facto* Clause because "the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Id.*, at 401.

Weaver and *Miller* held that the *Ex Post Facto* Clause forbids the States to enhance the measure of punishment by altering the substantive "formula" used to calculate the applicable sentencing range. In *Weaver*, the petitioner had been sentenced to 15 years in prison for his crime of

second-degree murder. Both at the time of his crime and at the time his sentence was imposed, state statutes provided a formula for mandatory reductions to the terms of all prisoners who complied with certain prison regulations and state laws. The statute that the petitioner challenged and that we invalidated retroactively reduced the amount of "gain time" credits available to prisoners under this formula. Though the statute preserved the possibility that some prisoners might win back these credits if they convinced prison officials to exercise their discretion to find that they were especially deserving, see 450 U. S., at 34, n. 18, we found that it effectively eliminated the lower end of the possible range of prison terms. *Id.*, at 26–27, 31–33. The statute at issue in *Miller* contained a similar defect. The Florida sentencing scheme had established "presumptive sentencing ranges" for various offenses, which sentencing judges were required to follow in the absence of "clear and convincing reasons" for a departure. At the time that the petitioner in *Miller* committed his crime, his presumptive sentencing range would have been 3½ to 4½ years. Before his sentencing, however, the state legislature altered the formula for establishing the presumptive sentencing range for certain sexual offenses by increasing the "primary offense points" assigned to those crimes. As a result, petitioner's presumptive range jumped to 5½ to 7 years. We held that the resulting increase in the "quantum of punishment" violated the *Ex Post Facto* Clause. 482 U. S., at 433–434.[3]

[3] Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. See *Lindsey*, 301 U. S., at 401; *Weaver*, 450 U. S., at 29; *Miller*, 482 U. S., at 433. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "*opportunity* to take advan-

Respondent insists that the California amendment before us is indistinguishable from the legislation at issue in *Lindsey*, *Weaver*, and *Miller*, and he contends that those cases control this one. We disagree. Both before and after the 1981 amendment, California punished the offense of second-degree murder with an indeterminate sentence of "confinement in the state prison for a term of 15 years to life." Cal. Penal Code Ann. § 190 (West 1982). The amendment also left unchanged the substantive formula for securing any reductions to this sentencing range. Thus, although 15 years was the formal "minimum" term of confinement, see *ibid.*, respondent was able to secure a one-third "credit" or reduction in this minimum by complying with prison rules and regulations, see § 2931. The amendment had no effect on the standards for fixing a prisoner's initial date of "eligibility" for parole, see *In re Jackson*, 39 Cal. 3d 464, 476, 703 P. 2d 100, 108 (1985), or for determining his "suitability" for parole and setting his release date, see Cal. Penal Code Ann. §§ 3041, 3041.5 (West 1982).

The 1981 amendment made only one change: It introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period. § 3041.5(b)(2). In contrast to the laws at issue in *Lindsey*, *Weaver*, and *Miller* (which had the purpose and effect of enhancing the range of available prison terms, see *Miller*, *supra*, at 433–434), the evident focus of the California amendment was merely "'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings'" for prisoners who have no reasonable chance of being released. *In re Jackson*, *supra*, at 473, 703 P. 2d, at 106 (quoting legislative history). Rather than

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tage of provisions for early release," see *post*, at 518, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

changing the sentencing range applicable to covered crimes, the 1981 amendment simply "alters the method to be followed" in fixing a parole release date under identical substantive standards. See *Miller*, *supra*, at 433 (contrasting adjustment to presumptive sentencing range with change in "the method to be followed in determining the appropriate sentence"); see also *Dobbert* v. *Florida*, 432 U. S. 282, 293–294 (1977) (contrasting change in the "quantum of punishment" with statute that merely "altered the methods employed in determining whether the death penalty was to be imposed").

III

Respondent nonetheless urges us to hold that the *Ex Post Facto* Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment. In his view, there is "no principled way to determine how significant a risk of enhanced confinement is to be tolerated." Brief for Respondent 39. Our cases have never accepted this expansive view of the *Ex Post Facto* Clause, and we will not endorse it here.

Respondent's approach would require that we invalidate any of a number of minor (and perhaps inevitable) mechanical changes that might produce some remote risk of impact on a prisoner's expected term of confinement. Under respondent's approach, the judiciary would be charged under the *Ex Post Facto* Clause with the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures, including such innocuous adjustments as changes to the membership of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocution before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor. These and countless other changes might create some speculative,

attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release, but that fact alone cannot end the matter for *ex post facto* purposes.[4]

Indeed, contrary to the approach advocated by respondent, we have long held that the question of what legislative adjustments "will be held to be of sufficient moment to transgress the constitutional prohibition" *must* be a matter of "degree." *Beazell*, 269 U. S., at 171. In evaluating the constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.[5] We have previously declined to articulate a single "formula" for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition, see *ibid.*, and we have no occasion to do so here. The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause. See *Dobbert*, *supra*, at 294 (refusing to accept "speculation" that the effective punishment under a new

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[4] The dissent proposes a line between those measures that deprive prisoners of a parole hearing and those that "make it more difficult for prisoners to obtain release." *Post*, at 524. But this arbitrary line has absolutely no basis in the Constitution. If a delay in parole hearings raises *ex post facto* concerns, it is because that delay effectively increases a prisoner's term of confinement, and not because the hearing itself has independent constitutional significance. Other adjustments to mechanisms surrounding the sentencing process should be evaluated under the same standard.

[5] Contrary to the dissent's suggestion, see *post*, at 519, we express no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those present here.

statutory scheme would be "more onerous" than under the old one).[6]

First, the amendment applies only to a class of prisoners for whom the likelihood of release on parole is quite remote. The amendment enabled the Board to extend the time between suitability hearings only for those prisoners who have been convicted of "more than one offense which involves the taking of a life." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982).[7] The California Supreme Court has noted that about

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[6] The dissent suggests that any "speculation" as to the effect of the amendment on prison terms should "ru[n] in the other direction," *post,* at 525, but this approach effectively shifts to the State the burden of persuasion as to respondent's *ex post facto* claim. Not surprisingly, the dissent identifies no support for its attempt to undo the settled rule that a claimant must bear the risk of nonpersuasion as to the existence of an alleged constitutional violation. Although we have held that a party asserting an *ex post facto* claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme, see *Lindsey* v. *Washington,* 301 U. S., at 401, we have never suggested that the challenging party may escape the ultimate burden of establishing that the measure of punishment itself has changed. Indeed, elimination of that burden would eviscerate the view of the *Ex Post Facto* Clause that we reaffirmed in *Collins.* Just as "[t]he inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed," *Gibson* v. *Mississippi,* 162 U. S. 565, 590 (1896), neither does it require that the sentence be carried out under the identical legal regime that previously prevailed.

[7] The dissent mischaracterizes our analysis in suggesting that we somehow have concocted a "reduced" standard of judicial scrutiny for application to "a narrow group as unpopular . . . as multiple murderers." *Post,* at 522. The *ex post facto* standard we apply today is constant: It looks to whether a given legislative change has the prohibited effect of altering the definition of crimes or increasing punishments. Our application of that standard necessarily considers a number of factors—including, in this case, that the 1981 amendment targets a group of prisoners whom the California Legislature deemed less likely than others to secure early release on parole—but the constitutional standard is neither "enhanced" nor

90% of *all* prisoners are found unsuitable for parole at the initial hearing, while 85% are found unsuitable at the second and subsequent hearings. *In re Jackson*, 39 Cal. 3d, at 473, 703 P. 2d, at 105. In light of these numbers, the amendment "was seen as a means 'to relieve the [Board] from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no chance of being released.'" *Ibid.* (quoting legislative history).

Second, the Board's authority under the amendment is carefully tailored to that end. The amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of *subsequent* hearings. Accordingly, the amendment has no effect on any prisoner unless the Board has first concluded, after a hearing, not only that the prisoner is unsuitable for parole, but also that "it is not reasonable to expect that parole would be granted at a hearing during the following years." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982). "This is no arbitrary decision," *Morris* v. *Castro*, 166 Cal. App. 3d 33, 38, 212 Cal. Rptr. 299, 302 (1985); the Board must conduct "a full hearing and review" of all relevant facts, *ibid.*, and state the bases for its finding. Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982). Though California law is not entirely clear on this point, the reliability of the Board's determination may also be enhanced by the possibility of an administrative appeal. See 15 Cal. Admin. Code § 2050 (1994).

Moreover, the Board retains the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner. The default requirement is an annual hearing, but the Board may defer the next hearing up to two years more depending on the circumstances. Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982). Thus, a mass murderer who has participated in re-

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"reduced" on the basis of societal animosity toward multiple murderers. Cf. *ibid.*

peated violent crimes both in prison and while on parole could perhaps expect a 3-year delay between suitability hearings, while a prisoner who poses a lesser threat to the "public safety," see § 3041(b), might receive only a 2-year delay. In light of the particularized findings required under the amendment and the broad discretion given to the Board, the narrow class of prisoners covered by the amendment cannot reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings. For these prisoners, the amendment simply allows the Board to avoid the futility of going through the motions of reannouncing its denial of parole suitability on a yearly basis.

Respondent suggests that there is some chance that the amendment might nevertheless produce an increased term of confinement for some prisoners who might experience a change of circumstances that could render them suitable for parole during the period between their hearings. Brief for Respondent 39. Respondent fails, however, to provide any support for his speculation that the multiple murderers and other prisoners subject to the amendment might experience an unanticipated change that is sufficiently monumental to alter their suitability for release on parole. Even if we assume the possibility of such a change, moreover, there is no reason to conclude that the amendment will have any effect on any prisoner's actual term of confinement, for the current record provides no basis for concluding that a prisoner who experiences a drastic change of circumstances would be precluded from seeking an expedited hearing from the Board. Indeed, the California Supreme Court has suggested that under the circumstances hypothesized by respondent "the Board could advance the suitability hearing," *In re Jackson*, *supra*, at 475, 703 P. 2d, at 107, and the California Department of Corrections indicates in its brief that the Board's "practice" is to "review for merit any communication from an inmate asking for an earlier suitability hearing," Reply

Brief for Petitioner 3, n. 1. If the Board's decision to postpone the hearing is subject to administrative appeal, the controlling regulations also seem to preserve the possibility of a belated appeal. See 15 Cal. Admin. Code § 2050 (1994) (time limits for administrative appeals "are directory only and may be extended"). An expedited hearing by the Board—either on its own volition or pursuant to an order entered on an administrative appeal—would remove any possibility of harm even under the hypothetical circumstances suggested by respondent.

Even if a prisoner were denied an expedited hearing, there is no reason to think that such postponement would extend any prisoner's actual period of confinement. According to the California Supreme Court, the possibility of immediate release after a finding of suitability for parole is largely "theoretica[l]," *In re Jackson*, 39 Cal. 3d, at 474, 703 P. 2d, at 106; in many cases, the prisoner's parole release date comes at least several years after a finding of suitability. To the extent that these cases are representative, it follows that "the 'practical effect' of a hearing postponement is not significant." *Id.*, at 474, 703 P. 2d, at 106–107. This is because the Board is bound by statute to consider "any sentencing information relevant to the setting of parole release dates" with an eye toward establishing "uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public." Cal. Penal Code Ann. § 3041(a) (West 1982). Under these standards, the fact that a prisoner had been "suitable" for parole prior to the date of the hearing certainly would be "relevant" to the Board's decision in setting an actual release date, and the Board retains the discretion to expedite the release date of such a prisoner. Thus, a prisoner who could show that he was "suitable" for parole two years prior to such a finding by the Board might well be entitled to secure a release date that reflects that fact. Such a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings.

IV

Given these circumstances, we conclude that the California legislation at issue creates only the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes. The Ninth Circuit's judgment that the amendment violates the *Ex Post Facto* Clause is accordingly reversed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, dissenting.

In 1980, respondent was charged with the murder of his wife. Despite respondent's previous conviction for first-degree murder, and despite the serious character of the 1980 offense, California accepted his plea of *nolo contendere* to the offense of second-degree murder. The trial judge imposed a sentence of imprisonment for 15 years to life, under which respondent became eligible for parole in 1990.

The law in effect at the time of respondent's offense entitled him to a hearing before the Board of Prison Terms (Board) in 1989 and in each year thereafter. In 1981, however, California amended its parole statute. The amended statute permitted the Board to delay parole hearings for multiple murderers for up to three years, provided the Board found that "it is not reasonable to expect that parole would be granted at a hearing during the following years." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982). In 1989, the Board determined that respondent was not yet "suitable" for parole, and, after making the requisite findings, the Board deferred respondent's next hearing for three years. The question before the Court is whether the California Legislature's 1981 elimination of the statutory right to an annual parole hearing increased the punishment for respondent's 1980 offense and thereby violated the *Ex Post Facto* Clause.

In answering that question, I begin with certain propositions of law that I do not understand the Court to dispute.

Those propositions compel the conclusion that, as applied to the general prison population, replacing a statutory right to an annual parole hearing with a right to such a hearing every three years would violate the *Ex Post Facto* Clause of the Federal Constitution. Though nowhere disputing this conclusion, the majority holds that the 1981 amendment to the California parole statute is not *ex post facto* legislation because it applies only to a small subset of the prison population, namely multiple murderers, see *ante*, at 510, and because the Board must make a special finding before depriving a prisoner of an annual hearing, see *ante*, at 511. In my view, neither of these features is sufficient to save what is otherwise a plainly invalid statute.

I

The Constitution provides that "[n]o State shall . . . pass any . . . ex post facto Law." Art. I, § 10. The Framers viewed the prohibition on *ex post facto* legislation as one of the fundamental protections against arbitrary and oppressive government.[1] Thus, for example, Madison noted that "*ex post facto* laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961). Similarly, Hamilton counted the prohibition on *ex post facto* laws among the three protections that he described as "greater securities to liberty and republicanism than any [the Constitution] contains." *Id.*, No. 84, at 511.

Although the text of the *Ex Post Facto* Clause is not self-explanatory, its basic coverage has been well understood at least since 1798, when the Court in *Calder* v. *Bull*, 3 Dall.

[1] That the Framers included two separate clauses in the Constitution prohibiting *ex post facto* legislation, see Art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed"); Art. I, § 10 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"), highlights the Framers' appraisal of the importance of that prohibition.

386, 390, identified four categories of *ex post facto* laws.[2] The case before us today implicates the third *Calder* category, which consists of "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Ibid.* (emphasis in original). This Court has consistently condemned laws falling in that category. Thus, in *Beazell* v. *Ohio*, 269 U. S. 167 (1925), Justice Stone noted that it "is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute . . . which makes more burdensome the punishment for a crime, after its commission, . . . is prohibited as *ex post facto*." *Id.*, at 169–170. We reaffirmed Justice Stone's observation only a few years ago: "The *Beazell* formulation is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause: Legislatures may not retroactively . . . increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U. S. 37, 43 (1990).

In light of the importance that the Framers placed on the *Ex Post Facto* Clause, we have always enforced the prohibition against the retroactive enhancement scrupulously. Any statute that authorizes an increased term of imprisonment for a past offense is invalid. Thus, although the Court has carefully examined laws changing the conditions of confinement to determine whether they are favorable or unfavorable to the prisoner, see, *e. g.*, *Rooney* v. *North Dakota*, 196 U. S. 319, 325 (1905); *In re Medley*, 134 U. S. 160, 171 (1890), no Member of the Court has ever voted to uphold a statute

[2] "1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (emphasis in original).

that retroactively increased the length of time that a prisoner must remain imprisoned for past offenses, see, *e. g.*, *Miller* v. *Florida*, 482 U. S. 423 (1987) (unanimous opinion); *Weaver* v. *Graham*, 450 U. S. 24 (1981) (without dissent).

Our *ex post facto* jurisprudence concerning increased punishment has established three important propositions. First, the Court has squarely held that an individual prisoner need not prove that the retroactive application of a law authorizing an increased punishment for a past offense has actually affected the sentence that that prisoner must serve. In *Lindsey* v. *Washington*, 301 U. S. 397 (1937), for example, petitioners were sentenced under a law that required a sentence of 15 years; the law in effect at the time of the offense gave the judge discretion to impose a lesser sentence. The State contended that petitioners had failed to show that there was an *ex post facto* violation because petitioners might have received a 15-year sentence even under the old law. We unanimously rejected the State's contention:

> "[T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. . . .
>
> "Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old." *Id.*, at 401.

Only a few years ago, in *Miller* v. *Florida*, 482 U. S. 423 (1987), we unanimously reaffirmed the holding in *Lindsey*, noting that "*Lindsey* establishes 'that one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old.'" 482 U. S., at 432 (citation

omitted). As we stated succinctly in *Weaver* v. *Graham*, 450 U. S., at 33, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual."

Second, we have noted that an impermissible increase in the punishment for a crime may result not only from statutes that govern initial sentencing but also from statutes that govern parole or early release. Thus, in *Weaver* v. *Graham*, we addressed a Florida statute that altered the availability of good-time credits. We rejected any notion that the removal of good-time credits did not constitute an increase in punishment, explaining that "a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Id.*, at 32, citing *Wolff* v. *McDonnell*, 418 U. S. 539, 557 (1974); *Warden* v. *Marrero*, 417 U. S. 653, 658 (1974). See also *Greenfield* v. *Scafati*, 277 F. Supp. 644, 645 (Mass. 1967) (three-judge court) ("The availability of good conduct deductions is considered an essential element of the sentence"), summarily aff'd, 390 U. S. 713 (1968).

Finally, we have held that an increase in punishment occurs when the State deprives a person of the *opportunity* to take advantage of provisions for early release. Thus, in *Weaver* we emphasized that "petitioner is . . . disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." 450 U. S., at 33–34. Our statement in *Weaver* was consistent with our holding in *Lindsey* that "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." 301 U. S., at 401–402. See also *Greenfield* v. *Scafati*, 277 F. Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U. S. 713 (1968) (affirming judgment of a three-judge court that

found an *ex post facto* violation in a statute that eliminated the opportunity to accumulate gain time for the first six months following parole revocation as applied to an inmate whose crime occurred before the statute's enactment).

These settled propositions make perfectly clear that the retroactive application of a simple statute that changed the frequency of a statutorily mandated annual parole suitability hearing would constrict an inmate's opportunity to earn early release and would thus constitute increased punishment in violation of the *Ex Post Facto* Clause. It is thus no surprise that nearly every Federal Court of Appeals and State Supreme Court to consider the issue has so held. See, *e. g.*, 16 F. 3d 1001 (CA9 1994) (case below); *Roller* v. *Cavanaugh*, 984 F. 2d 120 (CA4), cert. dism'd, 510 U. S. 42 (1993); *Akins* v. *Snow*, 922 F. 2d 1558 (CA11), cert. denied, 501 U. S. 1260 (1991); *Rodriguez* v. *United States Parole Commission*, 594 F. 2d 170 (CA7 1979); *State* v. *Reynolds*, 642 A. 2d 1368 (N. H. 1994); *Griffin* v. *State*, 315 S. C. 285, 433 S. E. 2d 862 (1993), cert. denied, 510 U. S. 1093 (1994); *Tiller* v. *Klincar*, 138 Ill. 2d 1, 561 N. E. 2d 576 (1990), cert. denied, 498 U. S. 1031 (1991).[3]

The 1981 amendment at issue in this case, of course, is not such a simple statute. It is therefore necessary to consider whether the particular features of that amendment eliminate the *ex post facto* problems.

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[3] The two contrary decisions cited by the parties, see *Bailey* v. *Gardebring*, 940 F. 2d 1150 (CA8 1991); *In re Jackson*, 39 Cal. 3d 464, 703 P. 2d 100 (1985), do not undermine my thesis. In *Bailey* v. *Gardebring*, a 2-to-1 decision, the Court of Appeals found no *ex post facto* violation when Minnesota failed to provide a prisoner with an annual parole hearing. However, one member of the majority premised his conclusion on the view that the Minnesota parole regulations were not "laws"; the other member of the majority concurred only in the result, but authored no opinion. In *In re Jackson*, the California Supreme Court upheld the very amendment at issue in this case and thus did not speak to the more general situation I have described in the text.

II

The first special feature that the majority identifies in the 1981 amendment, see *ante,* at 510, is that it applies only to the narrow class of prisoners who have "been convicted, in the same or different proceedings, of more than one offense which involves the taking of a life." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982). In my view, the 1981 amendment's narrow focus on that discrete class of prisoners implicates one of the principal concerns that underlies the constitutional prohibition against retrospective legislation—the danger that the legislature will usurp the judicial power and will legislate so as to administer justice unfairly against particular individuals. This concern has been at the forefront of our *ex post facto* jurisprudence. As Justice Harlan noted: "[T]he policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, . . . may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons." *James* v. *United States,* 366 U. S. 213, 247, n. 3 (1961) (Harlan, J., concurring in part and dissenting in part). Our cases have thus consistently noted that the *Ex Post Facto* Clauses protect against the danger of such "vindictive legislation." *Miller* v. *Florida,* 482 U. S., at 429; *Weaver* v. *Graham,* 450 U. S., at 29; see also *Malloy* v. *South Carolina,* 237 U. S. 180, 183 (1915). The narrower the class burdened by retroactive legislation, the greater the danger that the legislation has the characteristics of a bill of attainder.[4] Cf. *Plaut* v. *Spendthrift Farm, Inc., ante,* at 241

[4] "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. . . . [L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." *United States* v. *Lovett,* 328 U. S. 303, 315–316 (1946) (internal quotation marks omitted). The prohibitions on *ex post facto* laws and on bills of attainder

(BREYER, J., concurring in judgment) (finding a separation-of-powers violation in part because of the statute's "application to a limited number of individuals"); see generally *ante*, at 241–242 (discussing the dangers of statutes focused at particular groups of individuals).

I believe that the 1981 amendment implicates this core *ex post facto* concern. The narrow class of affected individuals belies the majority's acceptance of the proposition that "the evident focus," *ante*, at 507, of the 1981 amendment was to save costs. Surely, even today, multiple murderers make up but a small fraction of total parole hearings; eliminating those hearings would seem unlikely to create substantial savings. Indeed, though the majority gives credence to the budget-cutting rationale, petitioners are much more frank about their motivations, as they urge the Court to "reexamine" its *ex post facto* jurisprudence "[i]n view of the national trend towards the implementation of harsher penalties and conditions of confinement for offenders and inmates." Brief for Petitioners 11 (footnote omitted).

I agree with petitioners' implication that the 1981 amendment is better viewed as part of that national trend toward "get-tough-on-crime" legislation. The California statute challenged in this case is one of many currently popular statutes designed to cut back on the availability of parole. The California Legislature has adopted several similar provisions in recent years,[5] and a number of other States have passed comparable legislation.[6] Such measures are, of course, entirely legitimate when they operate prospectively, but their

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are obviously closely related. See, *e. g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 138–139 (1810).

[5] The California Legislature appears to have altered the frequency of parole hearings for some prisoners on at least three occasions since the 1981 amendment. See 1986 Cal. Stats., ch. 248, § 166; 1990 Cal. Stats., ch. 1053, § 1; 1994 Cal. Stats., ch. 560, § 1.

[6] See, *e. g.*, 1992 N. H. Laws, ch. 254:13; Mich. Comp. Laws Ann. § 791.234 (West 1992); Ill. Rev. Stat., ch. 38, ¶ 1003–3–5(f) (1987); S. C. Code Ann. § 24–21–645 (Supp. 1987).

importance and prevalence surely justify careful review when those measures change the consequences of past conduct.

The danger of legislative overreaching against which the *Ex Post Facto* Clause protects is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers. There is obviously little legislative hay to be made in cultivating the multiple murderer vote. For a statute such as the 1981 amendment, therefore, the concerns that animate the *Ex Post Facto* Clause demand enhanced, and not (as the majority seems to believe) reduced, judicial scrutiny.[7]

III

The second feature of the 1981 amendment on which the majority relies is the provision requiring that the Board make certain findings before it may defer the annual hearings. At the time of respondent's crime, the Board was instructed either to set a parole date at an inmate's initial parole hearing or, if it set no date, to provide the inmate with a written statement explaining the reasons for the denial and suggesting "activities in which he might participate that will benefit him while he is incarcerated." The statute provided that the Board "shall hear each case annually thereafter." Cal. Penal Code Ann. § 3041.5(b)(2) (West 1982).

The 1981 amendment allows the Board to defer the annual hearings for multiple murderers for up to three years if "the [B]oard finds that it is not reasonable to expect that parole

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[7] Though the Court suggests that "multiple murderers" have a particularly low likelihood of parole, *ante*, at 510–511, n. 7, the statute in effect at the time of respondent's offense determined that even multiple murderers were sufficiently likely candidates for early release to be entitled to an annual parole hearing. The grant of that statutory right reflected the California Legislature's judgment that such a hearing provided an important avenue to reduced punishment. The *Ex Post Facto* Clause, properly construed, should prevent the legislature from revising that judgment retroactively.

would be granted at a hearing during the following years and states the bases for the finding." *Ibid.* The statute does not contain any provision authorizing any sort of review of a Board order dispensing with annual hearings. Nor does it provide any procedure for dealing with exceptional changed circumstances warranting the setting of a release date that might arise before the next scheduled hearing. In short, the amended statute vests unreviewable discretion in the Board to dispense with annual hearings for up to three years by making the required finding.

In my view, the requirement that the Board make this finding is insufficient to render the 1981 amendment constitutional. We have previously expressed doubts that an early release regime that substitutes administrative discretion for statutory requirements complies with the *Ex Post Facto* Clause. In *Weaver* v. *Graham*, we noted that the state statute at issue reduced the amount of gain time to which an inmate was "automatically entitled . . . simply for avoiding disciplinary infractions and performing his assigned tasks." 450 U. S., at 35. The State argued, however, that the statute as a whole caused inmates no increase in punishment because the statute provided inmates with new ways to earn gain time. We rejected the State's argument, noting that "the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate." *Ibid.*

The reasoning behind our skepticism in *Weaver* is applicable to this case. As is true under almost any factfinding regime, the Board will occasionally make mistakes and will defer parole hearings for inmates who would have been found suitable at those hearings.[8] Because the parole hear-

[8] There may be reasons to be particularly skeptical of the reliability of the Board's findings with respect to deferrals under the 1981 amendment. The Board's determination that the inmate is not currently suitable for parole and the determination that the inmate will not be suitable for parole in the next three years are expected to be separate determina-

ing is a prerequisite for early release, the inmates affected by the Board's errors will have had their punishment increased. In my view, the Court's speculation about possible methods of correcting the Board's erroneous findings or of persuading the Board to reinstate a canceled hearing on the basis of new evidence is plainly insufficient to bridge the significant gap between the protection afforded by an unqualified right to annual hearings and the unreviewable discretion of an administrative agency to dispense with such hearings.[9]

IV

Two final elements of the majority's opinion require comment. First, the majority suggests that a holding in respondent's favor would require that we "invalidate" an "endless array of legislative adjustments," thus plunging the judiciary into micromanagement of state parole procedures. *Ante*, at 508. The majority's fear is completely unfounded. The provision of a parole hearing in California differs from all of the matters set forth by the majority in one critical way: It is an absolute prerequisite to release. For the three years in which respondent is denied his hearing, he is absolutely deprived of any parole opportunity. Though the changes to which the majority refers might well make it more difficult for prisoners to obtain release, none of them deprives prisoners of the opportunity for release. Our cases

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tions. In the state-court litigation over the constitutionality of this statute, the State argued that compliance with the requirement of separate determinations was "'virtually impossible'" because "'[b]oth the decision to deny parole and to delay a subsequent hearing for two years must be the same.'" *In re Jackson*, 39 Cal. 3d, at 478, 703 P. 2d, at 109. Indeed, in respondent's case, the findings on parole suitability and on the possibility of future parole are remarkably similar. The Board's findings on which the majority relies so heavily thus seem of particularly questionable utility.

[9] I find it somewhat ironic that the majority posits the existence of nonstatutory, extraordinary remedies as a cure for legislation ostensibly motivated entirely by an interest in administrative efficiency.

are absolutely clear that the retroactive deprivation of the opportunity for early release constitutes *ex post facto* legislation. The majority's parade of hypothetical horribles is easily distinguishable from the case before us, and it thus provides no justification for diverging from our settled approach.

Second, the majority attempts to circumvent our *ex post facto* cases by characterizing the risk that the statute will actually increase any inmate's punishment as "speculative." In my view, the speculation runs in the other direction. Under the present California parole procedures, there is no possibility that an inmate will benefit from the 1981 amendment: Instead of an unqualified statutory right to an annual hearing, the amendment leaves the inmate with no protection against either the risk of a mistaken prediction or the risk that the Board may be influenced by its interest in curtailing its own workload. Moreover, the statute gives an inmate no right to advance favorable changed circumstances as a basis for a different result. Unlike the *ex post facto* law condemned in *Weaver*, and also unlike the statutes approved in *Dobbert* v. *Florida*, 432 U. S. 282 (1977), and *Rooney* v. *North Dakota*, 196 U. S. 319 (1905), the 1981 amendment contains no off-setting benefits for the inmate. By postponing and reducing the number of parole hearings, ostensibly for the sole purpose of cutting administrative costs, the amendment will at best leave an inmate in the same position he was in, and will almost inevitably delay the grant of parole in some cases.

The Court concludes, nevertheless, that it is "speculative" to say that the statute will increase inmates' punishment. To draw such a conclusion, the Court "speculates" about the accuracy of the Board's predictions, it "speculates" about the parole suitability of a class of prisoners, it "speculates" about the length of time that elapses between an eventual parole hearing and the ultimate release date, and it "speculates" as to the availability of procedures to deal with unexpected

changes in circumstances. To engage in such pure speculation while condemning respondent's assertion of increased punishment as "speculative" seems to me not only unpersuasive, but actually perverse.

I respectfully dissent.

Syllabus

UNITED STATES *v.* WILLIAMS

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

No. 94–395. Argued February 22, 1995—Decided April 25, 1995

The Government assessed a tax against Jerrold Rabin and placed a lien on all of his property, including his interest in the home he jointly owned with respondent Lori Williams, his then-wife. Before the Government recorded its lien, Rabin transferred his interest in the home to Williams, as part of a division of assets in contemplation of divorce. Although Williams was not personally liable for the tax, she paid it under protest to remove the lien and sued for a refund under 28 U. S. C. § 1346(a)(1), which waives the Government's sovereign immunity from suit in "[a]ny civil action . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." The Government responded that it was irrelevant whether the Government had a right to Williams' money because she lacked standing to seek a refund under § 1346(a)(1). According to the Government, that provision authorizes refund actions only by the assessed party, *i. e.*, Rabin. The District Court accepted this jurisdictional argument, but the Court of Appeals reversed.

Held: Section 1346(a)(1) authorizes a refund suit by a party who, though not assessed a tax, paid the tax under protest to remove a federal tax lien from her property. Pp. 531–541.

(a) Williams' plea falls squarely within § 1346(a)(1)'s broad and unequivocal language authorizing suit for "any . . . tax . . . erroneously . . . collected." Pp. 531–532.

(b) The Government's strained reliance on the interaction of three other provisions to narrow § 1346(a)(1)'s waiver of sovereign immunity is rejected. The Government argues: Under 26 U. S. C. § 7422, a party may not bring a refund action without first exhausting administrative remedies; under 26 U. S. C. § 6511, only a "taxpayer" may exhaust; under 26 U. S. C. § 7701(a)(14), Williams is not a taxpayer. The Government's argument fails at two statutory junctures. First, the word "taxpayer" in § 6511(a)—the provision governing administrative claims—cannot bear the weight the Government puts on it. This provision's plain terms provide only a deadline for filing for administrative relief, not a limit on who may file. Further, the Government's claim that Williams is not at this point a "taxpayer" is unpersuasive. In placing a lien on her home and then accepting the tax payment she made under protest,

the Government surely subjected Williams to a tax, even though she was not the assessed party. *Colorado Nat. Bank of Denver* v. *Bedford*, 310 U. S. 41, 52, distinguished. Pp. 532–536.

(c) The Government's strained reading of § 1346(a)(1) would leave people in Williams' position without a remedy. This consequence reinforces the conclusion that Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Williams is. Though the Government points to the levy, quiet title, and separate-fund remedies authorized by 26 U. S. C. § 7426, 28 U. S. C. § 2410(a)(12), and 26 U. S. C. § 6325(b)(3), respectively, none of those realistically would be available to Williams or others in her situation. Moreover, because those remedies offer predeprivation relief, they do not become superfluous if some third-party suits are authorized by § 1346(a)(1), a postdeprivation remedy available only if the taxpayer has paid the Government in full. Pp. 536–538.

(d) The principle on which the Government relies, that parties generally may not challenge the tax liabilities of others, is not unyielding. See, *e. g.*, *Stahmann* v. *Vidal*, 305 U. S. 61. The burden on that principle is mitigated here because Williams' main challenge is to the existence of a lien against *her* property, rather than to the underlying assessment on her husband. Moreover, the Government's forecast that allowing her to sue will lead to rampant abuse by parties volunteering to pay others' taxes seems implausible. In any event, the disposition herein does not address the circumstances, if any, under which a party who volunteers to pay a tax assessed against someone else may seek a refund under § 1346(a). Pp. 538–540.

24 F. 3d 1143, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, SOUTER, and BREYER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 541. REHNQUIST, C. J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 541.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Days*, *Assistant Attorney General Argrett*, *Deputy Solicitor General Wallace*, *William S. Estabrook*, and *Kevin M. Brown*.

Philip Garrett Panitz argued the cause for respondent. With him on the brief was *Gregory Ross Gose*.

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents the question whether respondent Lori Williams, who paid a tax under protest to remove a lien on her property, has standing to bring a refund action under 28 U. S. C. § 1346(a)(1), even though the tax she paid was assessed against a third party. We hold that respondent has standing to sue for a refund. Respondent's suit falls within the broad language of § 1346(a)(1), which gives federal courts jurisdiction to hear "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," and only a strained reading of other relevant provisions would bar her suit. She had no realistic alternative to payment of a tax she did not owe,[1] and we do not believe Congress intended to leave parties in respondent's position without a remedy.

I

Before this litigation commenced, respondent Lori Williams and her then-husband Jerrold Rabin jointly owned their home. As part owner of a restaurant, Rabin personally incurred certain tax liabilities, which he failed to satisfy. In June 1987 and March 1988, the Government assessed Rabin close to $15,000 for these liabilities, and thereby placed a lien in the assessed amount on all his property, including his interest in the house. See 26 U. S. C. § 6321 ("If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."). The Government has not alleged that Williams is personally liable for these or any subsequent assessments.

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[1] Seeking summary disposition in the District Court, the Government did not contend otherwise or question the District Court's understanding that "the plaintiff here is left without a remedy." App. 22.

Meanwhile, Rabin and Williams divided their marital property in contemplation of divorce. Williams did not have notice of the lien when Rabin deeded his interest in the house to her on October 25, 1988, for the Government did not file its tax lien until November 10, 1988. As consideration for the house, Williams assumed three liabilities for Rabin (none of them tax liabilities) totaling almost $650,000. App. 7–8 (Statement of Uncontroverted Facts presented by attorneys for United States). In the ensuing months, the Government made further assessments on Rabin in excess of $26,000, but did not file notice of them until June 22, 1989.

Williams entered a contract on May 9, 1989, to sell the house, and agreed to a closing date of July 3. *Id.*, at 8. One week before the closing, the Government gave actual notice to Williams and the purchaser of over $41,000 in tax liens which, it claimed, were valid against the property or proceeds of the sale. The purchaser threatened to sue Williams if the sale did not go through on schedule. Believing she had no realistic alternative—none having been suggested by the Government—Williams, under protest, authorized disbursement of $41,937 from the sale proceeds directly to the Internal Revenue Service so that she could convey clear title.

After the Government denied Williams' claim for an administrative refund, she filed suit in the United States District Court for the Central District of California, claiming she had taken the property free of the Government's lien under 26 U. S. C. § 6323(a) (absent proper notice, tax lien not valid against purchaser). To enforce her rights, she invoked 28 U. S. C. § 1346(a)(1), which waives the Government's sovereign immunity from suit by authorizing federal courts to adjudicate "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." In a trial on stipulated facts, the Government maintained that it was irrelevant whether the Government had a right to Williams' money; her plea could not be entertained, the Govern-

ment insisted, because she lacked standing to seek a refund under § 1346(a)(1).[2] According to the Government, that provision authorizes actions only by the assessed party, *i. e.*, Rabin. The District Court accepted this jurisdictional argument, relying on precedent set in the Fifth and Seventh Circuits.[3]

The United States Court of Appeals for the Ninth Circuit reversed, 24 F. 3d 1143, 1145 (1994), guided by Fourth Circuit precedent.[4] To resolve this conflict among the Courts of Appeals, we granted certiorari, 513 U. S. 959 (1994), and now affirm.

II

The question before us is whether the waiver of sovereign immunity in § 1346(a)(1) authorizes a refund suit by a party who, though not assessed a tax, paid the tax under protest to remove a federal tax lien from her property. In resolving this question, we may not enlarge the waiver beyond the purview of the statutory language. *Department of Energy* v. *Ohio*, 503 U. S. 607, 614–616 (1992). Our task is to discern the "unequivocally expressed" intent of Congress, construing ambiguities in favor of immunity. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992) (internal quotation marks omitted).

To fathom the congressional instruction, we turn first to the language of § 1346(a). This provision does not say that only the person assessed may sue. Instead, the statute uses broad language:

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[2] The dissent, perhaps finding unappealing the Government's defense of unjustified taking, tenders factual inferences, *post*, at 545–546, both unfavorable to Williams and beyond the parties' stipulation of uncontroverted facts. The sole issue in this case, however, is whether one in Williams' situation has standing to sue for a refund, and to that issue the strength of Williams' case on the merits is not relevant.

[3] See *Snodgrass* v. *United States*, 834 F. 2d 537, 540 (CA5 1987); *Busse* v. *United States*, 542 F. 2d 421, 425 (CA7 1976).

[4] See *Martin* v. *United States*, 895 F. 2d 992 (1990).

> "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> "(1) *Any* civil action against the United States for the recovery of *any* internal-revenue tax alleged to have been *erroneously* or illegally assessed or *collected*, or any penalty claimed to have been *collected* without authority or any sum alleged to have been excessive or in any manner wrongfully *collected* under the internal-revenue laws." 28 U. S. C. § 1346(a) (1988 ed. and Supp. V) (emphasis added).

Williams' plea to recover a tax "erroneously . . . collected" falls squarely within this language.

The broad language of § 1346(a)(1) mirrors the broad common-law remedy the statute displaced: actions of assumpsit for money had and received, once brought against the tax collector personally rather than against the United States. See Ferguson, Jurisdictional Problems in Federal Tax Controversies, 48 Iowa L. Rev. 312, 327 (1963). Assumpsit afforded a remedy to those who, like Williams, had paid money they did not owe—typically as a result of fraud, duress, or mistake. See H. Ballantine, Shipman on Common-Law Pleading 163–164 (3d ed. 1923). Assumpsit refund actions were unavailable to volunteers, a limit that would not have barred Williams because she paid under protest. See *Philadelphia* v. *Collector*, 5 Wall. 720, 731–732 (1867) ("Where the party voluntarily pays the money, he is without remedy; but if he pays it by compulsion of law, or under protest, or with notice that he intends to bring suit to test the validity of the claim, he may recover it back . . . .").

III

Acknowledging the evident breadth of § 1346(a)(1), the Government relies on the interaction of three other provisions to narrow the waiver of sovereign immunity. The Government argues: Under 26 U. S. C. § 7422, a party may

not bring a refund action without first exhausting administrative remedies; under 26 U. S. C. § 6511, only a "taxpayer" may exhaust; under 26 U. S. C. § 7701(a)(14), Williams is not a taxpayer.

It is undisputed that § 7422 requires administrative exhaustion.[5] If Williams is eligible to exhaust, she did so by filing an administrative claim. But to show that Williams is not eligible to exhaust, the Government relies first on 26 U. S. C. § 6511(a), which provides in part:

> "(a) Period of limitation on filing claim
>
> "Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return *shall be filed by the taxpayer* within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid." (Emphasis added.)

From the statute's use of the term "taxpayer," rather than "person who paid the tax," the Government concludes that only a "taxpayer" may file for administrative relief under § 7422, and thereafter pursue a refund action under 28 U. S. C. § 1346(a)(1).[6] Then, to show that Williams is not

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[5] Section 7422(a) provides in relevant part:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

[6] Title 26 U. S. C. § 6532(a)(1), governing the time to file a refund suit in court, reads in part:

"No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expira-

a "taxpayer," the Government relies on 26 U. S. C. § 7701 (a)(14), which defines "taxpayer" as "any person subject to any internal revenue tax." According to the Government, a party who pays a tax is not "subject to" it unless she is the one assessed.

The Government's argument fails at both statutory junctures. First, the word "taxpayer" in § 6511(a)—the provision governing administrative claims—cannot bear the weight the Government puts on it. This provision's plain terms provide only a deadline for filing for administrative relief,[7] not a limit on who may file. To read the term "taxpayer" as implicitly limiting administrative relief to the party assessed is inconsistent with other provisions of the refund scheme, which expressly contemplate refunds to parties other than the one assessed. Thus, in authorizing the Secretary to award a credit or refund "[i]n the case of any overpayment," 26 U. S. C. § 6402(a) describes the recipient not as the "taxpayer," but as "the person who made the overpayment." Similarly, in providing for credits and refunds for sales taxes and taxes on tobacco and alcohol, 26 U. S. C. § 6416(a) and 26 U. S. C. § 6419(a) describe the recipient as "the person who paid the tax."

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tion of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates."

[7] As a statute of limitations, § 6511(a) does narrow the waiver of sovereign immunity in § 1346(a)(1) by barring the tardy. See *United States* v. *Dalm*, 494 U. S. 596, 602 (1990) ("Read together, the import of these sections [§§ 1346(a)(1), 7422(a), 6511(a)] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' §§ 1346(a)(1), 7422(a), may not be maintained in any court.").

Further, even if, as the Government contends, only "taxpayers" could seek administrative relief under § 6511, the Government's claim that Williams is not at this point a "taxpayer" is unpersuasive. Section 7701(a)(14), defining "taxpayer," informs us that "[w]hen used in [the Internal Revenue Code], where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, . . . [t]he term 'taxpayer' means any person subject to any internal revenue tax."[8] That definition does not exclude Williams. The Government reads the definition as if it said "any person who is assessed any internal revenue tax," but these are not Congress' words. The general phrase "subject to" is broader than the specific phrase "assessed" and, in the tax collection context before us, we think it is broad enough to include Williams. In placing a lien on her home and then accepting her tax payment under protest, the Government surely subjected Williams to a tax, even though she was not the assessed party.

In support of its reading of "taxpayer," the Government cites our observation in *Colorado Nat. Bank of Denver* v. *Bedford*, 310 U. S. 41, 52 (1940), that "[t]he taxpayer is the person ultimately liable for the tax itself." The Government takes this language out of context. We were not interpreting the term "taxpayer" in the Internal Revenue Code, but deciding whether a state tax scheme was consistent with federal law. In particular, we were determining whether Colorado had imposed its service tax on a bank's customers (which was consistent with federal law) or on the bank itself (which was not). Though the bank collected and paid the tax, its incidence fell on the customers. Favoring substance over form, we said: "The person liable for the tax [the bank], primarily, cannot always be said to be the real taxpayer.

[8] The Treasury's regulation, 26 CFR § 301.7701–16 (1994), adds nothing to the statute; in particular, the regulation does not ascribe any special or limiting meaning to the statute's "subject to" terminology.

The taxpayer is the person ultimately liable for the tax itself." *Ibid.* As a result, we determined that the tax had been imposed on the customers rather than the bank. If *Colorado Nat. Bank* is relevant at all, it shows our preference for commonsense inquiries over formalism—a preference that works against the Government's technical argument in this case.

IV

As we have just developed, 28 U. S. C. § 1346(a)(1) clearly allows one from whom taxes are erroneously or illegally collected to sue for a refund of those taxes. And 26 U. S. C. § 6402(a), with similar clarity, authorizes the Secretary to pay out a refund to "the person who made the overpayment." The Government's strained reading of § 1346(a)(1), we note, would leave people in Williams' position without a remedy. See *supra*, at 529, n. 1. This consequence reinforces our conclusion that Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is. Though the Government points to three other remedies, none was realistically open to Williams. Nor would any of the vaunted remedies be available to others in her situation. See, *e. g.*, *Martin* v. *United States*, 895 F. 2d 992 (CA4 1990); *Barris* v. *United States*, 851 F. Supp. 696 (WD Pa. 1994); *Brodey* v. *United States*, 788 F. Supp. 44 (Mass. 1991) (all ordering refunds of amounts erroneously collected to the people who paid those amounts).

If the Government has not levied on property—as it has not levied on Williams' home—the owner cannot challenge such a levy under 26 U. S. C. § 7426. Nor would an action under 28 U. S. C. § 2410(a)(1) to quiet title afford meaningful relief to someone in Williams' position. The first lien on her property, for nearly $15,000, was filed just six months before the closing; and liens in larger sum—over $26,000, out of $41,937—were filed only 11 days before the closing. (Williams did not receive actual notice of *any* of the liens until barely a week before the closing.) She simply did not have

time to bring a quiet title action. She urgently sought to sell the property, but a sale would have been difficult before a final judgment in such litigation, which could have been protracted. In contrast, a refund suit would allow her to sell the property and simultaneously pay off the lien, leaving her free to litigate with the Government without tying up her real property, whose worth far exceeded the value of the Government's liens.

Nor may Williams and persons similarly situated rely on § 6325(b)(3) for such an arrangement. This provision permits the Government to discharge a lien on property if the owner sets aside a fund that becomes subject to a new lien; the parties then can litigate the propriety of the new lien after the property is sold. However, § 6325(b)(3) and its implementing regulation render this remedy doubtful indeed, for it is available only at the Government's discretion. See § 6325(b)(3) ("[T]he Secretary *may* issue a certificate of discharge [of a federal tax lien] of any part of the property subject to the lien if such part of the property is sold and, *pursuant to an agreement with the Secretary*, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property.") (emphasis added); 26 CFR § 301.6325–1(b)(3) (1994) ("A district director [of the Internal Revenue Service] may, *in his discretion*, issue a certificate of discharge of any part of the property subject to a [tax lien] if such part of the property is sold and, *pursuant to a written agreement with the district director*, the proceeds of the sale are held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as the lien or claim had with respect to the discharged property.") (emphasis added).

So far as the record shows, the Government did not afford Williams an opportunity to substitute a fund pursuant to

§ 6325(b)(3).[9] This omission is not surprising, for on the Government's theory of who may sue under § 1346(a)(1), the Government had scant incentive to agree to such an arrangement with people caught in Williams' bind. Under § 6325(b)(3), the Government does not receive cash, but another lien (albeit one on a fund). In contrast, if the Government resists a § 6325(b)(3) agreement, it is likely to get cash immediately: property owners eager to remove a tax lien will have to pay, as did Williams. If they may not sue under § 1346(a)(1), their payment is nonrefundable. An agreement pursuant to § 6325(b)(3) thus dependent on the district director's grace cannot sensibly be described as available to Williams.

We do not agree with the Government that, if § 1346(a)(1) authorizes some third-party suits, the levy, quiet title, and separate-fund remedies become superfluous. Section 1346(a)(1) is a postdeprivation remedy, available only if the taxpayer has paid the Government in full. *Flora* v. *United States*, 362 U. S. 145 (1960). The other remedies offer predeprivation relief. The levy provision in 26 U. S. C. § 7426(a)(1) is available "without regard to whether such property has been surrendered to or sold by the Secretary." Likewise, 28 U. S. C. § 2410 allows a property owner to have a lien discharged without ever paying the tax. Under 26 U. S. C. § 6325(b)(3), the lien on the property is removed in exchange for a new lien, rather than a cash payment.

V

Finally, the Government urges that allowing Williams to sue will violate the principle that parties may not challenge

[9] The dissent asserts, regarding § 6325(b)(3), that Williams cannot complain in court without exhausting her administrative remedy. *Post*, at 547–548. But § 6325(b)(3) presents no question of administrative exhaustion as a prelude to judicial review, for that "remedy" lies entirely within the Government's discretion.

the tax liabilities of others. According to the Government, undermining this principle will lead to widespread abuse: In particular, parties will volunteer to pay the tax liabilities of others, only to seek a refund once the Government has ceased collecting from the real taxpayer.

Although parties generally may not challenge the tax liabilities of others, this rule is not unyielding. A taxpayer's fiduciary may litigate the taxpayer's liability, even though the fiduciary is not herself liable. See 26 CFR § 301.6903–1(a) (1994) (the fiduciary must "assume the powers, rights, duties, and privileges of the taxpayer with respect to the taxes imposed by the Code"); *ibid.* ("The amount of the tax or liability is ordinarily not collectible from the personal estate of the fiduciary but is collectible from the estate of the taxpayer . . . ."); 15 J. Mertens, Law of Federal Income Taxation § 58.08 (1994) (refund claims for decedents filed by executor, administrator, or other fiduciary of estate). Similarly, certain transferees may litigate the tax liabilities of the transferor; if the transfer qualifies as a fraudulent conveyance under state law, the Code treats the transferee as the taxpayer, see 26 U. S. C. § 6901(a)(1)(A); 5 J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation § 73.10, pp. 73–82 to 73–87 (1992), so the transferee may contest the transferor's liability either in tax court, see 14 Mertens, *supra*, § 53.50, or in a refund suit under § 1346(a)(1). See *id.*, § 53.55. Furthermore, the Court has allowed a refund action by parties who were not assessed, albeit under a different statute. See *Stahmann* v. *Vidal*, 305 U. S. 61 (1938) (cotton producers could bring a refund action for a federal cotton ginning tax if they had paid the tax, even though the tax was assessed against ginners rather than producers).

The burden on the principle that a party may not challenge the tax liability of another is mitigated, moreover, because Williams' main challenge is to the existence of a lien against *her* property, rather than to the underlying assessment on

her husband. That is, her primary claim is not that *her husband* never owed the tax [10]—a matter that, had she not paid these taxes herself under the duress of a lien, would not normally be her concern. Rather, she asserts that the Government has attached a lien on the wrong property, because the house belongs to her rather than to him—a scenario which leaves her "subject to" the tax in a meaningful and immediate way.

We do not find disarming the Government's forecast that allowing Williams to sue will lead to rampant abuse. The Government's posited scenario seems implausible; it is not clear what incentive a volunteer has to pay someone else's taxes as a way to help that person evade them. Nor does the Government report that such schemes are commonplace among the millions of taxpayers in the Fourth and Ninth Circuits, Circuits that permit persons in Williams' position to bring refund suits. Furthermore, our holding does not authorize the host of third-party challenges the Government fears. Williams paid under protest, solely to gain release of the Government's lien on her property—a lien she attacked as erroneously maintained. We do not decide the circumstances, if any, under which a party who volunteers to pay a tax assessed against someone else may seek a refund under § 1346(a).

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[10] On motion for summary judgment in District Court, Williams did challenge her husband's liability as well. See Plaintiff's Notice of Motion and Cross-Motion for Summary Judgment 13. However, counsel retreated from this claim at oral argument. Tr. of Oral Arg. 36 ("We're not arguing that she's going to go into court and litigate the liability of her ex-husband."); *id.*, at 37 ("[W]e're not saying that she wa[nts] [to] go into court and litigate his tax liability. That's his problem, not hers."). Moreover, to affirm the Ninth Circuit's judgment, we can rely solely on Williams' standing to challenge the lien, regardless of whether she has standing to challenge the underlying assessment on her husband. Accordingly, we need not resolve whether Williams is still asserting her challenge to the underlying assessment, let alone whether she has standing to do so.

* * *

The judgment of the United States Court of Appeals for the Ninth Circuit is

Affirmed.

JUSTICE SCALIA, concurring.

I join the opinion of the Court, except insofar as it holds that Williams is a "taxpayer" within the meaning of 26 U. S. C. §§ 6511(a) and 7701(a)(14), see *ante*, at 534–536. That seems to me unnecessary to the decision, since § 6511(a), an administrative exhaustion provision, has too remote a bearing upon § 1346(a)(1), the jurisdictional provision at issue, to create by implication the significant limitation upon jurisdiction that the Government asserts.

I acknowledge the rule requiring clear statement of waivers of sovereign immunity, see *post*, at 544 (dissenting opinion), and I agree that the rule applies even to determination of the scope of explicit waivers. See, *e. g.*, *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 34 (1992). The rule does not, however, require explicit waivers to be given a meaning that is implausible—which would in my view be the result of restricting the unequivocal language of § 1346(a)(1) by reference to § 6511(a). "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *United States* v. *Aetna Casualty & Surety Co.*, 338 U. S. 366, 383 (1949) (quoting *Anderson* v. *Hayes Constr. Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926) (Cardozo, J.)).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court, in an unusual departure from the bedrock principle that waivers of sovereign immunity must be "unequivocally expressed," holds that respondent may sue for a refund of a tax which was not assessed against her. In so doing, it

outlines in some detail what it conceives to be the equities of respondent's situation—a factor not usually of great significance in construing the Internal Revenue Code. I believe that the Court's picture of the equities is misleadingly inaccurate, and that its effort to stretch the law to avoid these perceived inequities is quite contrary to established doctrine.

The legal question at hand is whether the Government has waived its sovereign immunity in 28 U. S. C. § 1346(a)(1) to authorize respondent, who conceded that she "is not the taxpayer," App. 16, to file a refund suit. In answering that question, it must be remembered that § 1346(a)(1) is "a jurisdictional provision which is a keystone in a carefully articulated and quite complicated structure of tax laws." *Flora* v. *United States*, 362 U. S. 145, 157 (1960). Section "1346(a)(1) must be read in conformity with other statutory provisions [26 U. S. C. §§ 7422(a) and 6511(a)] which qualify a taxpayer's right to bring a refund suit." *United States* v. *Dalm*, 494 U. S. 596, 601–602 (1990).

Section 1346(a)(1) provides:

> "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> "(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." 28 U. S. C. § 1346(a)(1) (1988 ed. and Supp V).

The jurisdiction conferred by § 1346(a)(1) is limited by 26 U. S. C. § 7422(a). Like § 1346(a)(1), § 7422(a) contains no language limiting a refund suit to the "taxpayer," but its "express language . . . conditions a district court's authority

to hear a refund suit." *Dalm*, *supra*, at 609, n. 6. It requires that "a claim for refund or credit [first be] filed with the Secretary, according to the provisions of law in that regard." 26 U. S. C. § 7422(a). There are two "provisions of law" dealing with such claims. Title 26 U. S. C. § 6511(a) provides in part that a

> "[c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the *taxpayer* is required to file a return shall be filed by the *taxpayer* within 3 years from the time the return was filed or 2 years from the time the tax was paid." (Emphasis added.)

Title 26 U. S. C. § 6532(a), which imposes a period of limitations on suits for refunds in court and is entitled "Suits by *taxpayers* for refund," states that

> "[n]o suit or proceeding under section 7422(a) . . . shall be begun before the expiration of 6 months from the date of filing the claim required under such section . . . , nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the *taxpayer* of a notice of the disallowance" (emphasis added).

Both §§ 6511(a) and 6532(a) clearly are limited to the "taxpayer," and the term "taxpayer" is in turn defined in § 7701(a)(14) to mean "any person subject to any internal revenue tax." Reading these provisions as a whole, the conclusion is inescapable that only a "taxpayer" (§ 7701(a)(14)) who has filed a timely claim for refund (under § 6511(a)) and a timely suit for refund (under § 6532(a)) is authorized to maintain a suit for refund in any court (§ 7422(a)) for an "erroneously or illegally assessed or collected" tax (28 U. S. C. § 1346(a)(1)).

The Court describes 26 U. S. C. § 6511(a) as providing "only a deadline for filing for administrative relief, not a limit on who may file." *Ante*, at 534. But the "plain terms" of

§ 6511(a), *ibid.*, *do* impose such a limit—a refund claim may be filed only "by the taxpayer." The Court discounts the notion that the term "taxpayer" limits administrative relief to the party assessed by concluding that such a construction "is inconsistent with other provisions of the refund scheme." *Ibid.* The "other provisions" cited by the Court, however, are in no way inconsistent with the above construction of § 6511(a): the fact that the Secretary is authorized to refund any overpayment to "the person who made the overpayment," § 6402(a), or to "the person who paid the tax," §§ 6416(a), 6419(a), does not mean that such a person may bring suit if she disagrees with the Secretary's calculation of the amount of the overpayment. And even if such an inconsistency did exist, an "inconsistency" is not enough to carry the day when dealing with a waiver of sovereign immunity; "inconsistency" simply means ambiguity, and because a waiver of sovereign immunity must be "'unequivocally expressed,'" any ambiguity is construed in favor of immunity. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992).

The Court proceeds to argue that, even if only "taxpayers" could seek administrative relief under § 6511, respondent qualifies as a "taxpayer." *Ante*, at 535. That term is defined in the Code as "any person subject to any internal revenue tax." § 7701(a)(14). The Court says this phrase is "broad enough to include [respondent]" because the Government "place[d] a lien on her home and then accept[ed] her tax payment." *Ante*, at 535. This is remarkably imprecise reasoning.

Respondent was subjected to a tax *lien*, but this does not mean she was "subject to any internal revenue tax" in the normal sense of that phrase as used in the Code. The tax was assessed against Rabin, not respondent, and respondent has equivocated as to whether she is simply challenging the lien or also challenging Rabin's underlying tax assessment. The underlying tax, and the lien to enforce liability for that tax, are obviously two different things. One may have a tax

assessed against him, and if he pays it in a timely manner he will never be subject to a lien. Conversely, one against whom the tax was not assessed may nonetheless be subject to a lien to enforce collection of that tax. The Court says it will decide here only the challenge to the lien, thereby leaving the tax totally unchallenged in this proceeding. *Ante*, at 539–540, and n. 10. This is quite contrary to the language quoted above, which allows only the person "subject to any internal revenue *tax*" to file the claim for refund which is the necessary prerequisite for bringing a refund suit under § 1346(a)(1).

The Court believes its position is reinforced by its conclusion that respondent is left without a remedy if she cannot bring a refund suit under § 1346(a)(1). Equities ordinarily do not assume such a dominant role when dealing with questions of sovereign immunity, but if they are to play that role, the equities ought to be those which can be confirmed on the record before us.

The undisputed facts of record which evoke the Court's sympathy are these. Rabin and respondent owned the property in question as joint tenants. In June 1987, and in March 1988, the Government made federal employment tax assessments totaling nearly $15,000 against Rabin. A federal tax lien securing the taxes and interest owed by Rabin arose "at the time the assessment [was] made," 26 U. S. C. § 6322, and reached "all property and rights to property, whether real or personal, belonging to" Rabin at that time. § 6321. In October 1988, Rabin and respondent entered into a "transfer agreement," whereby Rabin agreed to convey his interest in the property to respondent and to indemnify her for the payment of any liens on the property. Rabin transferred his interest in the property to respondent by executing a quitclaim deed. The deed, recorded nearly three months before any divorce proceedings had commenced, described respondent as "'an unmarried woman.'" App. 14. This misrepresentation—stating that respondent was "'an

unmarried woman' " at the time of the transfer—raises the question whether the property was conveyed to respondent "in contemplation of divorce," as the Court says, *ante*, at 530, or whether it was done in an attempt to shield Rabin's assets from the tax lien. In November 1988, the Government recorded notice of the federal tax lien. Respondent commenced divorce proceedings against Rabin in January 1989, and in May 1989, while the divorce petition was pending, respondent entered into an agreement to sell the property. In June 1989, the Government filed notice of additional tax liens, including a lien in respondent's name as nominee, agent, alter ego, and holder of a beneficial interest in the property for Rabin. The closing date for the sale of the property was July 3, 1989.

Respondent thus faced a situation not uncommon to those who seek to transfer a clear title to real property: Her property was subject to federal tax liens. But despite the Court's suggestion to the contrary, respondent clearly had available to her at least two remedies. She could have brought an action to "quiet title" under 28 U. S. C. § 2410(a)(1), or she could have sought from the Secretary a "certificate of discharge" of the property under 26 U. S. C. § 6325(b)(3).

The Court, relying on respondent's bald assertion that she had no notice of the liens until the week before the closing, concludes that a quiet title action under § 2410(a) would not have afforded respondent meaningful relief because only "a refund suit would allow her to sell the property and simultaneously pay off the lien, leaving her free to litigate with the Government without tying up her real property." *Ante*, at 537. This simply begs the question. Obviously, a quiet title action brought at the time respondent agreed to sell the property could not have proceeded to judgment before the closing date, but that is true of lawsuits to quiet title against all sorts of other liens that may prevent the conveyance of clear title. The existence of outstanding liens on property

is a fact of life, and heretofore lienors—least of all the United States—have not been required to afford the legal equivalent of "same day service" to finally adjudicate title before the closing date.

Respondent was not left only with the remedy of a quiet title action; she could have sought from the Secretary a "certificate of discharge" of the property under 26 U. S. C. § 6325(b)(3) by agreeing to hold the proceeds of the sale of the property "as a fund subject to the liens and claims of the United States," with the propriety of the liens to be litigated in a subsequent action under § 7426(a)(3). The Court finds this remedy inadequate because it was a "doubtful" remedy upon which respondent could not "rely," since the certificate of discharge could issue only in the exercise of the Secretary's discretion. *Ante*, at 537. That the Secretary must exercise discretion does not make § 6325(b)(3) a "doubtful" remedy. Congress appropriately granted the Secretary discretion to determine, on a case-by-case basis, whether the proceeds from the sale of property will be sufficient to protect the Government's tax lien. And because the worth of respondent's property "far exceeded the value of the Government's liens," *ibid.*, the Secretary most likely would have issued a certificate of discharge in this case. But respondent never sought to invoke this remedy, and the cases are legion holding that a person may not claim an administrative remedy was inadequate if she never sought to invoke it. See, *e. g.*, *McGee* v. *United States*, 402 U. S. 479, 483 (1971) (a Selective Service registrant may not complain in court if the registrant "has failed to pursue normal administrative remedies and thus has sidestepped a corrective process which might have cured or rendered moot the very defect later complained of"); *Geo. F. Alger Co.* v. *Peck*, 74 S. Ct. 605, 606–607, 98 L. Ed. 1148, 1150 (1954) (Reed, J., in chambers) (a company may not complain in court when it failed to take advantage of an available administrative remedy, even though that remedy may "cause inconvenience and ex-

pense"); cf. *McCarthy* v. *Madigan*, 503 U. S. 140, 145 (1992) (exhaustion of administrative remedies "appl[ies] with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise") (citing *McKart* v. *United States*, 395 U. S. 185, 194 (1969)).

To make a bad matter worse, the Court faults the Government for not "afford[ing respondent] an opportunity" to pursue this remedy. *Ante*, at 537. This makes one wonder whether we are entering an era where internal revenue agents must give warnings to delinquent taxpayers and lienees analogous to the warnings required in criminal cases by our decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Certainly the Court has never so held before, and one may hope that it would not so hold in the future. Indeed, since respondent concedes in her brief that the Government was not required to tell her about the discretionary relief available, Brief for Respondent 20, it is surprising to see the Court suggest to the contrary.

If this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, today's decision would be more understandable, since such a statute would be "entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783 (1949) (construing the Jones Act); see also *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 562 (1987) (stating that the Federal Employers' Liability Act is a "broad remedial statute" which must be given a "'liberal construction'"). But it would surely come as news to the millions of taxpayers in this country that the Internal Revenue Code has a "beneficent purpose" as far as they are concerned. It does not, and the Court is mistaken to decide this case in a way that can only be justified if it does.

Syllabus

UNITED STATES *v.* LOPEZ

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

No. 93–1260. Argued November 8, 1994—Decided April 26, 1995

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," 18 U. S. C. § 922(q)(1)(A). The District Court denied his motion to dismiss the indictment, concluding that § 922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, § 922(q) is invalid as beyond Congress' power under the Commerce Clause.

Held: The Act exceeds Congress' Commerce Clause authority. First, although this Court has upheld a wide variety of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce. Second, § 922(q) contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contention that § 922(q) is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional Commerce Clause

Syllabus

authority to a general police power of the sort held only by the States. Pp. 552–568.

2 F. 3d 1342, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 568. THOMAS, J., filed a concurring opinion, *post*, p. 584. STEVENS, J., *post*, p. 602, and SOUTER, J., *post*, p. 603, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 615.

Solicitor General Days argued the cause for the United States. With him on the briefs were *Assistant Attorney General Harris*, *Deputy Solicitor General Wallace*, *Malcolm L. Stewart*, and *John F. De Pue*.

John R. Carter argued the cause for respondent. With him on the brief were *Lucien B. Campbell*, *Henry J. Bemporad*, *Carter G. Phillips*, and *Adam D. Hirsh*.*

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*Briefs of *amici curiae* urging reversal were filed for 16 Members of the United States Senate et al. by *Debra A. Valentine*, *Brady C. Williamson*, and *Jeffrey J. Kassel;* for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *John P. Ware*, Assistant Attorney General, *Richard A. Cordray*, State Solicitor, *Simon B. Karas*, *G. Oliver Koppell*, Attorney General of New York, and *Vanessa Ruiz;* for the Center to Prevent Handgun Violence et al. by *Erwin N. Griswold*, *Dennis A. Henigan*, and *Gail A. Robinson;* for Children NOW et al. by *William F. Abrams;* for the Clarendon Foundation by *Ronald D. Maines;* for the Coalition to Stop Gun Violence et al. by *Brian J. Benner;* and for the National School Safety Center et al. by *James A. Rapp*.

Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Richard Ruda* and *Barry Friedman;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso*.

Briefs of *amici curiae* were filed for Academics for the Second Amendment et al. by *Patrick J. Basial*, *Don B. Kates*, *Robert Carter*, *Henry Mark Holzer*, *Nicholas J. Johnson*, *Joseph E. Olson*, *Daniel Polsby*, *Charles E. Rice*, *Wallace Rudolph*, *Justin Smith*, *Robert B. Smith*, *George Strickler*, *Richard Warner*, and *Robert Weisberg;* and for the Texas Justice Foundation by *Clayton Trotter*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U. S. C. § 922(q)(1)(A) (1988 ed., Supp. V). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . . ." U. S. Const., Art. I, § 8, cl. 3.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. See Tex. Penal Code Ann. § 46.03(a)(1) (Supp. 1994). The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. 18 U. S. C. § 922(q)(1)(A) (1988 ed., Supp. V).[1]

A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of § 922(q). Respondent moved to dismiss his federal indictment on the ground that § 922(q) "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools." The District Court denied the motion, concluding that § 922(q) "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting

[1] The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921(a)(25).

commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." App. to Pet. for Cert. 55a. Respondent waived his right to a jury trial. The District Court conducted a bench trial, found him guilty of violating § 922(q), and sentenced him to six months' imprisonment and two years' supervised release.

On appeal, respondent challenged his conviction based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." 2 F. 3d 1342, 1367–1368 (1993). Because of the importance of the issue, we granted certiorari, 511 U. S. 1029 (1994), and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory* v. *Ashcroft*, 501 U. S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.*

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8,

cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189–190 (1824):

> "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

> "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id.*, at 194–195.

For nearly a century thereafter, the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. See, *e. g.*, *Veazie* v. *Moor*, 14 How. 568, 573–575 (1853) (upholding a state-created steamboat monop-

oly because it involved regulation of wholly internal commerce); *Kidd* v. *Pearson*, 128 U. S. 1, 17, 20–22 (1888) (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, American Constitutional Law 306 (2d ed. 1988). Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause. See *Wickard* v. *Filburn*, 317 U. S. 111, 121 (1942) (describing development of Commerce Clause jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 *et seq.* These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e. g.*, *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12 (1895) ("Commerce succeeds to manufacture, and is not part of it"); *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 304 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, *e. g.*, *Shreveport Rate Cases*, 234 U. S. 342 (1914).

In *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 550 (1935), the Court struck down regulations that

fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." *Id.*, at 548. Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. *Id.*, at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." *Id.*, at 548.

Two years later, in the watershed case of *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. *Id.*, at 36–38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. *Id.*, at 37.

In *United States* v. *Darby*, 312 U. S. 100 (1941), the Court upheld the Fair Labor Standards Act, stating:

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.*, at 118.

See also *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U. S., at 128–129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Id.*, at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.*, at 127–128.

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause

confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." 301 U. S., at 37; see also *Darby*, *supra*, at 119–120 (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard*, *supra*, at 125 (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276–280 (1981); *Perez* v. *United States*, 402 U. S. 146, 155–156 (1971); *Katzenbach* v. *McClung*, 379 U. S. 294, 299–301 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 252–253 (1964).[2]

Similarly, in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. *Id.*, at 196, overruled on other grounds, *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit*

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[2] See also *Hodel*, 452 U. S., at 311 ("[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (REHNQUIST, J., concurring in judgment); *Heart of Atlanta Motel*, 379 U. S., at 273 ("[W]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (Black, J., concurring).

Authority, 469 U. S. 528 (1985). In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "[a]ll activities affecting commerce, even in the minutest degree, *[Wickard]*, may be regulated and controlled by Congress," 392 U. S., at 204 (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "[n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *id.*, at 197, n. 27. Rather, "[t]he Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez*, *supra*, at 150; see also *Hodel*, *supra*, at 276–277. First, Congress may regulate the use of the channels of interstate commerce. See, *e. g.*, *Darby*, 312 U. S., at 114; *Heart of Atlanta Motel*, *supra*, at 256 ("'[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *Caminetti* v. *United States*, 242 U. S. 470, 491 (1917))). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e. g.*, *Shreveport Rate Cases*, 234 U. S. 342 (1914); *Southern R. Co.* v. *United States*, 222 U. S. 20 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez*, *supra*, at 150 ("[F]or example, the destruction of an aircraft (18 U. S. C. § 32), or . . . thefts from interstate shipments (18 U. S. C. § 659)"). Finally, Congress' commerce authority includes the power to regulate those ac-

tivities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, *i. e.*, those activities that substantially affect interstate commerce, *Wirtz*, *supra*, at 196, n. 27.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault* v. *ICC*, 494 U. S. 1, 17 (1990), with *Wirtz*, *supra*, at 196, n. 27 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact § 922(q). The first two categories of authority may be quickly disposed of: § 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if § 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining; *Hodel*, *supra*, intrastate extortionate credit transactions, *Perez*, *supra*, restaurants utilizing substantial interstate supplies, *McClung*, *supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, *supra*, and pro-

duction and consumption of homegrown wheat, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

> "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.

> Home-grown wheat in this sense competes with wheat in commerce." 317 U. S., at 128.

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.[3] Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, § 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States* v. *Bass*, 404 U. S. 336 (1971), the Court interpreted former 18 U. S. C. § 1202(a), which made it

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[3] Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht* v. *Abrahamson*, 507 U. S. 619, 635 (1993) (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)); see also *Screws* v. *United States*, 325 U. S. 91, 109 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States* v. *Enmons*, 410 U. S. 396, 411–412 (1973) (quoting *United States* v. *Bass*, 404 U. S. 336, 349 (1971)). The Government acknowledges that § 922(q) "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." Brief for United States 29, n. 18; see also Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ("Most egregiously, section [922(q)] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress").

a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." 404 U. S., at 337. The Court interpreted the possession component of § 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.*, at 349. The *Bass* Court set aside the conviction because, although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *Id.*, at 347. The Court thus interpreted the statute to reserve the constitutional question whether Congress could regulate, without more, the "mere possession" of firearms. See *id.*, at 339, n. 4; see also *United States* v. *Five Gambling Devices*, 346 U. S. 441, 448 (1953) (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative"). Unlike the statute in *Bass*, § 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, *e. g.*, *Preseault* v. *ICC*, 494 U. S., at 17, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." Brief for United States 5–6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. See *McClung*, 379 U. S., at 304;

see also *Perez*, 402 U. S., at 156 ("Congress need [not] make particularized findings in order to legislate"). But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.[4]

The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. Cf. *Fullilove* v. *Klutznick*, 448 U. S. 448, 503 (1980) (Powell, J., concurring). We agree, however, with the Fifth Circuit that importation of previous findings to justify § 922(q) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." 2 F. 3d, at 1366.

The Government's essential contention, *in fine*, is that we may determine here that § 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent

[4] We note that on September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796. Section 320904 of that Act, *id.*, at 2125, amends § 922(q) to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce. The Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance. Tr. of Oral Arg. 25 ("[W]e're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be identified for why Congress wanted to regulate this particular activity").

crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See *United States* v. *Evans*, 928 F. 2d 858, 862 (CA9 1991). Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel*, 379 U. S., at 253. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8–9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Con-

gress' commerce power, such as family law or certain aspects of education. *Post*, at 624. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

JUSTICE BREYER focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. *Post*, at 619–624. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. *Post*, at 623. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," cf. *ibid.*, and that, in turn, has a substantial effect on interstate commerce.

JUSTICE BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 629. Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service—namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress

has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." *Post*, at 630. As Chief Justice Marshall stated in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819):

> "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id.*, at 405.

See also *Gibbons* v. *Ogden*, 9 Wheat., at 195 ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803) (Marshall, C. J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

In *Jones & Laughlin Steel*, 301 U. S., at 37, we held that the question of congressional power under the Commerce Clause "is necessarily one of degree." To the same effect

is the concurring opinion of Justice Cardozo in *Schechter Poultry:*

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" 295 U. S., at 554 (quoting *United States* v. *A. L. A. Schechter Poultry Corp.*, 76 F. 2d 617, 624 (CA2 1935) (L. Hand, J., concurring)).

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra*, at 556–558. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons* v. *Ogden*, *supra*, at 195, and that there never will be a distinction between what is

truly national and what is truly local, cf. *Jones & Laughlin Steel*, *supra*, at 30. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

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

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Chief Justice Marshall announced that the national authority reaches "that commerce which concerns more States than one" and that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 194, 196 (1824). His statements can be understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise. The progression of our Commerce Clause cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.

Furthermore, for almost a century after the adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate. Rather,

the Court faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power had Congress chosen to act. The simple fact was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question. The Court's initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so. Not the least part of the problem was the unresolved question whether the congressional power was exclusive, a question reserved by Chief Justice Marshall in *Gibbons* v. *Ogden*, *supra*, at 209–210.

At the midpoint of the 19th century, the Court embraced the principle that the States and the National Government both have authority to regulate certain matters absent the congressional determination to displace local law or the necessity for the Court to invalidate local law because of the dormant national power. *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–321 (1852). But the utility of that solution was not at once apparent, see generally F. Frankfurter, The Commerce Clause under Marshall, Taney and Waite (1937) (hereinafter Frankfurter), and difficulties of application persisted, see *Leisy* v. *Hardin*, 135 U. S. 100, 122–125 (1890).

One approach the Court used to inquire into the lawfulness of state authority was to draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not. For instance, in deciding that a State could prohibit the in-state manufacture of liquor intended for out-of-state shipment, it distinguished between manufacture and commerce. "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactur[e] and commerce. Manufacture is transformation—the fashioning of raw mate-

rials into a change of form for use. The functions of commerce are different." *Kidd* v. *Pearson*, 128 U. S. 1, 20 (1888). Though that approach likely would not have survived even if confined to the question of a State's authority to enact legislation, it was not at all propitious when applied to the quite different question of what subjects were within the reach of the national power when Congress chose to exercise it.

This became evident when the Court began to confront federal economic regulation enacted in response to the rapid industrial development in the late 19th century. Thus, it relied upon the manufacture-commerce dichotomy in *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), where a manufacturers' combination controlling some 98% of the Nation's domestic sugar refining capacity was held to be outside the reach of the Sherman Act. Conspiracies to control manufacture, agriculture, mining, production, wages, or prices, the Court explained, had too "indirect" an effect on interstate commerce. *Id.*, at 16. And in *Adair* v. *United States*, 208 U. S. 161 (1908), the Court rejected the view that the commerce power might extend to activities that, although local in the sense of having originated within a single State, nevertheless had a practical effect on interstate commercial activity. The Court concluded that there was not a "legal or logical connection . . . between an employé's membership in a labor organization and the carrying on of interstate commerce," *id.*, at 178, and struck down a federal statute forbidding the discharge of an employee because of his membership in a labor organization. See also *The Employers' Liability Cases*, 207 U. S. 463, 497 (1908) (invalidating statute creating negligence action against common carriers for personal injuries of employees sustained in the course of employment, because the statute "regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce").

Even before the Court committed itself to sustaining federal legislation on broad principles of economic practicality, it found it necessary to depart from these decisions. The Court disavowed *E. C. Knight*'s reliance on the manufacturing-commerce distinction in *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 68–69 (1911), declaring that approach "unsound." The Court likewise rejected the rationale of *Adair* when it decided, in *Texas & New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548, 570–571 (1930), that Congress had the power to regulate matters pertaining to the organization of railroad workers.

In another line of cases, the Court addressed Congress' efforts to impede local activities it considered undesirable by prohibiting the interstate movement of some essential element. In the *Lottery Case*, 188 U. S. 321 (1903), the Court rejected the argument that Congress lacked power to prohibit the interstate movement of lottery tickets because it had power only to regulate, not to prohibit. See also *Hipolite Egg Co.* v. *United States*, 220 U. S. 45 (1911); *Hoke* v. *United States*, 227 U. S. 308 (1913). In *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), however, the Court insisted that the power to regulate commerce "is directly the contrary of the assumed right to forbid commerce from moving," *id.*, at 269–270, and struck down a prohibition on the interstate transportation of goods manufactured in violation of child labor laws.

Even while it was experiencing difficulties in finding satisfactory principles in these cases, the Court was pursuing a more sustainable and practical approach in other lines of decisions, particularly those involving the regulation of railroad rates. In the *Minnesota Rate Cases*, 230 U. S. 352 (1913), the Court upheld a state rate order, but observed that Congress might be empowered to regulate in this area if "by reason of the interblending of the interstate and intrastate operations of interstate carriers" the regulation of interstate rates could not be maintained without restrictions on "intra-

state rates which substantially affect the former." *Id.*, at 432–433. And in the *Shreveport Rate Cases*, 234 U. S. 342 (1914), the Court upheld an Interstate Commerce Commission order fixing railroad rates with the explanation that congressional authority, "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id.*, at 351.

Even the most confined interpretation of "commerce" would embrace transportation between the States, so the rate cases posed much less difficulty for the Court than cases involving manufacture or production. Nevertheless, the Court's recognition of the importance of a practical conception of the commerce power was not altogether confined to the rate cases. In *Swift & Co.* v. *United States*, 196 U. S. 375 (1905), the Court upheld the application of federal antitrust law to a combination of meat dealers that occurred in one State but that restrained trade in cattle "sent for sale from a place in one State, with the expectation that they will end their transit . . . in another." *Id.*, at 398. The Court explained that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Ibid.* Chief Justice Taft followed the same approach in upholding federal regulation of stockyards in *Stafford* v. *Wallace*, 258 U. S. 495 (1922). Speaking for the Court, he rejected a "nice and technical inquiry," *id.*, at 519, when the local transactions at issue could not "be separated from the movement to which they contribute," *id.*, at 516.

Reluctance of the Court to adopt that approach in all of its cases caused inconsistencies in doctrine to persist, however. In addressing New Deal legislation the Court resuscitated

the abandoned abstract distinction between direct and indirect effects on interstate commerce. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 309 (1936) (Act regulating price of coal and wages and hours for miners held to have only "secondary and indirect" effect on interstate commerce); *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 368 (1935) (compulsory retirement and pension plan for railroad carrier employees too "remote from any regulation of commerce as such"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 548 (1935) (wage and hour law provision of National Industrial Recovery Act had "no direct relation to interstate commerce").

The case that seems to mark the Court's definitive commitment to the practical conception of the commerce power is *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), where the Court sustained labor laws that applied to manufacturing facilities, making no real attempt to distinguish *Carter*, *supra*, and *Schechter*, *supra*. 301 U. S., at 40–41. The deference given to Congress has since been confirmed. *United States* v. *Darby*, 312 U. S. 100, 116–117 (1941), overruled *Hammer* v. *Dagenhart*, *supra*. And in *Wickard* v. *Filburn*, 317 U. S. 111 (1942), the Court disapproved *E. C. Knight* and the entire line of direct-indirect and manufacture-production cases, explaining that "broader interpretations of the Commerce Clause [were] destined to supersede the earlier ones," 317 U. S., at 122, and "[w]hatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution," *id.*, at 123, n. 24. Later examples of the exercise of federal power where commercial transactions were the subject of regulation include *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964), *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), and *Perez* v. *United States*, 402 U. S. 146 (1971). These and like authorities are within the fair ambit

of the Court's practical conception of commercial regulation and are not called in question by our decision today.

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

In referring to the whole subject of the federal and state balance, we said this just three Terms ago:

> "This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such

> responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York* v. *United States*, 505 U. S. 144, 157 (1992) (emphasis deleted).

It does not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. See, *e. g.*, *Prize Cases*, 2 Black 635 (1863); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952); *United States* v. *Nixon*, 418 U. S. 683 (1974); *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *INS* v. *Chadha*, 462 U. S. 919 (1983); *Bowsher* v. *Synar*, 478 U. S. 714 (1986); *Plaut* v. *Spendthrift Farm, Inc.*, *ante*, p. 211. These standards are by now well accepted. Judicial review is also established beyond question, *Marbury* v. *Madison*, 1 Cranch 137 (1803), and though we may differ when applying its principles, see, *e. g.*, *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833 (1992), its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Foreword, 86

Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776–1787, pp. 524–532, 564 (1969). Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also *Gregory* v. *Ashcroft*, 501 U. S. 452, 458–459 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *New York* v. *United States*, *supra*, at 181 ("[T]he Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power' ") (quoting *Coleman* v. *Thompson*, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of

the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *FTC* v. *Ticor Title Ins. Co.*, 504 U. S. 621, 636 (1992). Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. Cf. *New York* v. *United States*, *supra*, at 155–169; *FERC* v. *Mississippi*, 456 U. S. 742, 787 (1982) (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered," *ibid.* Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, see The Great Speeches and

Orations of Daniel Webster 227–272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1–3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 466 (1989); *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981), the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, see, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971); *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943), the rules for determining the primacy of state law, see, *e. g.*, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the doctrine of adequate and independent state grounds, see, *e. g.*, *Murdock* v. *Memphis*, 20 Wall. 590 (1875); *Michigan* v. *Long*, 463 U. S. 1032 (1983), the whole jurisprudence of pre-emption, see, *e. g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504 (1992), and many of the rules governing our habeas jurisprudence, see, *e. g.*, *Coleman* v. *Thompson*, 501 U. S. 722 (1991); *McCleskey*

v. *Zant*, 499 U. S. 467 (1991); *Teague* v. *Lane*, 489 U. S. 288 (1989); *Rose* v. *Lundy*, 455 U. S. 509 (1982); *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

Our ability to preserve this principle under the Commerce Clause has presented a much greater challenge. See *supra*, at 568–574. "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of judicial qualities." Frankfurter 66–67. But as the branch whose distinctive duty it is to declare "what the law is," *Marbury* v. *Madison*, 1 Cranch, at 177, we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines. The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. See *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 630 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights). But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Our position in enforcing the dormant Commerce Clause is instructive. The Court's doctrinal approach in that area has likewise "taken some turns." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, *ante*, at 180. Yet in contrast to the prevailing skepticism that surrounds our ability to give meaning to the explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States. One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not

impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 579 (1986) (citing *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970)). Distinguishing between regulations that do place an undue burden on interstate commerce and regulations that do not depends upon delicate judgments. True, if we invalidate a state law, Congress can in effect overturn our judgment, whereas in a case announcing that Congress has transgressed its authority, the decision is more consequential, for it stands unless Congress can revise its law to demonstrate its commercial character. This difference no doubt informs the circumspection with which we invalidate an Act of Congress, but it does not mitigate our duty to recognize meaningful limits on the commerce power of Congress.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus. See *ante*, at 559–561. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. *Milliken* v. *Bradley*, 418 U. S. 717, 741–742 (1974);

Epperson v. *Arkansas*, 393 U. S. 97, 104 (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed. Cf. *Rice*, *supra*, at 230 ("[W]e start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress"); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 146 (1963).

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 49–50 (1973); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. See, *e. g.*, Alaska Stat. Ann. §§ 11.61.195(a)(2)(A), 11.61.220(a)(4)(A) (Supp. 1994); Cal. Penal Code Ann. § 626.9 (West Supp. 1994); Mass. Gen. Laws § 269:10(j) (1992); N. J. Stat. Ann. § 2C:39–5(e) (West Supp. 1994); Va. Code Ann. § 18.2–308.1 (1988); Wis. Stat. § 948.605 (1991–1992).

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are

charged with maintaining. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 26–30 (injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments). These might include inducements to inform on violators where the information leads to arrests or confiscation of the guns, see Lima, Schools May Launch Weapons Hot Line, Los Angeles Times, Ventura Cty. East ed., Jan. 13, 1995, p. B1, col. 5; Reward for Tips on Guns in Tucson Schools, The Arizona Republic, Jan. 7, 1995, p. B2; programs to encourage the voluntary surrender of guns with some provision for amnesty, see Zaidan, Akron Rallies to Save Youths, The Plain Dealer, Mar. 2, 1995, p. 1B; Swift, Legislators Consider Plan to Get Guns Off Streets, Hartford Courant, Apr. 29, 1992, p. A4; penalties imposed on parents or guardians for failure to supervise the child, see, *e. g.*, Okla. Stat., Tit. 21, § 858 (Supp. 1995) (fining parents who allow students to possess firearm at school); Tenn. Code Ann. § 39–17–1312 (Supp. 1992) (misdemeanor for parents to allow student to possess firearm at school); Straight Shooter: Gov. Casey's Reasonable Plan to Control Assault Weapons, Pittsburgh Post-Gazette, Mar. 14, 1994, p. B2 (proposed bill); Bailey, Anti-Crime Measures Top Legislators' Agenda, Los Angeles Times, Orange Cty. ed., Mar. 7, 1994, p. B1, col. 2 (same); Krupa, New Gun-Control Plans Could Tighten Local Law, The Boston Globe, June 20, 1993, p. 29; laws providing for suspension or expulsion of gun-toting students, see, *e. g.*, Ala. Code § 16–1–24.1 (Supp. 1994); Ind. Code § 20–8.1–5–4(b)(1)(D) (1993); Ky. Rev. Stat. Ann. § 158.150(1)(a) (Michie 1992); Wash. Rev. Code § 9.41.280 (1994), or programs for expulsion with assignment to special facilities, see Martin, Legislators Poised to Take Harsher Stand on Guns in Schools, The Seattle Times, Feb. 1, 1995, p. B1 (automatic year-long expulsion for students with guns and intense semester-long reentry program).

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. See U. S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics 73, 104 (NCES 94–115, 1994) (Tables 63, 94). Each of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York* v. *United States*, 505 U. S. 144 (1992), or to organize its governmental functions in a certain way, cf. *FERC* v. *Mississippi*, 456 U. S., at 781 (O'CONNOR, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101–647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several States," U. S. Const., Art. I, § 8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. See *New York* v. *United States*, 505 U. S. 144, 155 (1992) ("[N]o one disputes the proposition that '[t]he Constitution created a Federal Government of limited powers' ") (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *Maryland* v. *Wirtz*, 392 U. S. 183, 196 (1968); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). Cf. *Chisholm* v. *Georgia*, 2 Dall. 419, 435 (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal

Government has nothing approaching a police power. Compare *ante*, at 556–558, with *post*, at 624.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see *post*, at 602 (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel Corp.*, *supra,* at 37.

I

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dic-

tionary of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com—"with"; merci—"merchandise"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government);[1] *id.*, No. 7, at 39–40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); *id.*, No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in *id.*, at 107.

As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, *e. g.*, The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.*, No. 21, at 133 (distinguishing commerce, arts, and industry); *id.*, No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions

[1] All references to The Federalist are to the Jacob E. Cooke 1961 edition.

were made in the state ratification conventions. See, *e. g.*, 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); *id.*, at 336 (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U. S. Const., Art. I, § 9, cl. 6. Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause[2] does not state that Congress may

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[2] Even to speak of "the Commerce Clause" perhaps obscures the actual scope of that Clause. As an original matter, Congress did not have authority to regulate all commerce; Congress could only "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. Although the precise line between

"regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power to regulate commerce among the several States. U. S. Const., Art. I, § 8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to spec-

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interstate/foreign commerce and purely intrastate commerce was hard to draw, the Court attempted to adhere to such a line for the first 150 years of our Nation. See *infra*, at 593–599.

ify that Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, § 8 (including portions of the Commerce Clause itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, § 8.[3]

Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

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[3] There are other powers granted to Congress outside of Art. I, § 8, that may become wholly superfluous as well due to our distortion of the Commerce Clause. For instance, Congress has plenary power over the District of Columbia and the territories. See U. S. Const., Art. I, § 8, cl. 17, and Art. IV, § 3, cl. 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.

II

The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other—that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("[D]iscerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend"); *id.*, at 221 ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as

a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, *id.*, at 152 (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

> "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

In the unlikely event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Ibid.*[4]

[4] Cf. 3 Debates 40 (E. Pendleton at the Virginia convention) (The proposed Federal Government "does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can [it] make a law altering the form of transferring property, or the rule of descents, in Virginia?"); *id.*, at 553 (J. Marshall at the Virginia convention) (denying that Congress could make "laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state"); The Federalist No. 33, at 206 (A. Hamilton) (denying that Congress could change laws of descent or could pre-empt a land tax); A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 Documentary History 692 (States have sole authority over "rules of property").

The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, *e. g.*, 2 Debates 267–268 (A. Hamilton at New York Convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate . . . [a State's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45, at 313 (J. Madison); 3 Debates 259 (J. Madison) (Virginia Convention); R. Sherman & O. Ellsworth, Letter to Governor Huntington, Sept. 26, 1787, in 3 Documentary History 352; J. Wilson, Speech in the State House Yard, Oct. 6, 1787, in 2 *id.*, at 167–168. Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. See The Federalist No. 34, at 212–213 (A. Hamilton) (observing that the "internal encouragement of agriculture and manufactures" was an object of *state* expenditure). Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers "herein granted" by the rest of the Constitution. Art. I, § 1.

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." The Federalist No. 42, at 287. Likewise, Hamilton urged that "[i]f we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavour as soon as possible to have a navy." *Id.*, No. 24, at 157.

In short, the Founding Fathers were well aware of what the principal dissent calls "'economic . . . realities.'" See

post, at 625 (BREYER, J.) (quoting *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946)). Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

III

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), established that Congress may control all local activities that "significantly affect interstate commerce," *post,* at 615. And, "with the exception of one wrong turn subsequently corrected," this has been the "traditiona[l]" method of interpreting the Commerce Clause. *Post,* at 631 (citing *Gibbons* and *United States* v. *Darby,* 312 U. S. 100, 116–117 (1941)).

In my view, the dissent is wrong about the holding and reasoning of *Gibbons.* Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

A

In *Gibbons,* the Court examined whether a federal law that licensed ships to engage in the "coasting trade" preempted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In concluding that it did, the Court noted that Congress could regulate "navigation" because "[a]ll America . . . has uniformly understood, the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." 9 Wheat., at 190. The Court also ob-

served that federal power over commerce "among the several States" meant that Congress could regulate commerce conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States. *Id.*, at 194–196.

At the same time, the Court took great pains to make clear that Congress could *not* regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id.*, at 194. Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." *Id.*, at 203. From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce. That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard* v. *Filburn*, 317 U. S. 111, 120 (1942). See also *Perez* v. *United States*, 402 U. S. 146, 151 (1971) (claiming that with *Darby* and *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "*commerce*" that "does

not extend to or affect other States." 9 Wheat., at 194 (emphasis added). From this statement, the principal dissent infers that whenever an activity affects interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affect[s]" language: Because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could *never* be said to be commerce "among the several States."

But even if one were to adopt the dissent's reading, the "affect[s]" language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce. See *ibid.*

The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*, at 195.

In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters to the States. The Court was *not* saying that whatever Congress believes is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8. *Gibbons*' emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally."[5] *Gibbons* simply cannot be construed as the principal dissent would have it.

B

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), noted that Congress had "no general right to punish murder committed within any of the States," *id.*, at 426, and that it was "clear that congress cannot punish felonies generally," *id.*, at 428. The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers—for instance, over the District of Columbia. *Id.*, at 426. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any

[5] None of the other Commerce Clause opinions during Chief Justice Marshall's tenure, which concerned the "dormant" Commerce Clause, even suggested that Congress had authority over all matters substantially affecting commerce. See *Brown* v. *Maryland*, 12 Wheat. 419 (1827); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829).

other subject of federal concern) was irrelevant to the question of congressional power.[6]

United States v. *Dewitt*, 9 Wall. 41 (1870), marked the first time the Court struck down a federal law as exceeding the power conveyed by the Commerce Clause. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.*, at 44. The law in question was "plainly a regulation of police," which could have constitutional application only where Congress had exclusive authority, such as the territories. *Id.*, at 44–45. See also *License Tax Cases*, 5 Wall. 462, 470–471 (1867) (Congress cannot interfere with the internal commerce and business of a State); *Trade-Mark Cases*, 100 U. S. 82 (1879) (Congress

[6] It is worth noting that Congress, in the first federal criminal Act, did not establish nationwide prohibitions against murder and the like. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States territory not part of a State or on the high seas. *Ibid.* See U. S. Const., Art. I, § 8, cl. 10 (authorizing Congress to outlaw piracy and felonies on high seas); Art. IV, § 3, cl. 2 (plenary authority over United States territory and property). When Congress did enact nationwide criminal laws, it acted pursuant to direct grants of authority found in the Constitution. Compare Act of Apr. 30, 1790, *supra*, §§ 1 and 14 (prohibitions against treason and the counterfeiting of U. S. securities), with U. S. Const., Art. I, § 8, cl. 6 (counterfeiting); Art. III, § 3, cl. 2 (treason). Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood that it could not establish nationwide prohibitions.

Likewise, there were no laws in the early Congresses that regulated manufacturing and agriculture. Nor was there *any* statute that purported to regulate activities with "substantial effects" on interstate commerce.

cannot regulate internal commerce and thus may not establish national trademark registration).

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause. Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.*, at 12. The Court also approvingly quoted from *Kidd* v. *Pearson*, 128 U. S. 1, 20 (1888):

> "'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce . . . . If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.'" *E. C. Knight*, *supra*, at 14.

If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *Id.*, at 16. See also *Newberry* v. *United States*, 256 U. S. 232, 257 (1921) ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress"). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308 (1936) (Congress may not regulate mine labor because "[t]he relation of employer and employee is a local relation"); see also *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 543–550 (1935) (holding that Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce.

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause.[7] Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

IV

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further

[7] To be sure, congressional power pursuant to the Commerce Clause was alternatively described less narrowly or more narrowly during this 150-year period. Compare *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate [interstate and international] commerce" such as stealing goods from a beached ship), with *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13 (1895) ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or commerce"). During this period, however, this Court never held that Congress could regulate everything that substantially affects commerce.

flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. *Post,* at 624. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threaten[ing] legal uncertainty in an area of law that . . . seemed reasonably well settled." *Post,* at 630. The one advantage of the dissent's standard is certainty: It is certain that under its analysis everything may be regulated under the guise of the Commerce Clause.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation. See *Maryland* v. *Wirtz,* 392 U. S., at 192–193 (if class of activities is " 'within the reach of federal power,' " courts may not excise individual applications as trivial) (quoting *Darby,* 312 U. S., at 120–121).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional.

Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

V

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.[8] It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future.[9] The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

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[8] Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

[9] Nor can the majority's opinion fairly be compared to *Lochner* v. *New York*, 198 U. S. 45 (1905). See *post*, at 604–609 (SOUTER, J., dissenting). Unlike *Lochner* and our more recent "substantive due process" cases, today's decision enforces only the Constitution and not "judicial policy judgments." See *post*, at 607. Notwithstanding JUSTICE SOUTER's discussion, "'commercial' character" is not only a natural but an inevitable "ground of *Commerce* Clause distinction." See *post*, at 608 (emphasis added). Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself. As John Marshall put it: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void." 3 Debates 553 (before the Virginia ratifying convention); see also The Federalist No. 44, at 305 (J. Madison) (asserting that if Congress exercises powers "not warranted by [the Constitution's] true meaning" the judiciary will defend the Constitution); *id.*, No. 78, at 526 (A. Hamilton) (asserting that the "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"). Where, as here, there is a case or controversy, there can be no "misstep," *post*, at 614, in enforcing the Constitution.

Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "'commensurate with the national needs'" or self-consciously intended to let the Federal Government "'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" See *post*, at 625 (BREYER, J., dissenting) (quoting *North American Co.* v. *SEC*, 327 U. S., at 705). Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

JUSTICE STEVENS, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States," U. S. Const., Art. I, § 8, cl. 3, is vitally dependent on the character of the education of our children. I therefore agree entirely with JUSTICE BREYER's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools—just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with JUSTICE SOUTER's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. Cf. *Dolan* v. *City of Tigard*, 512 U. S. 374, 405–411 (1994) (STEVENS, J., dissenting). I believe, however, that the Court's extraordinary decision merits this additional comment.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the con-

sequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial.* Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

JUSTICE SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981); *Preseault* v. *ICC*, 494 U. S. 1, 17 (1990); see *Maryland* v. *Wirtz*, 392 U. S. 183, 190 (1968), quoting *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304 (1964). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276, quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 262 (1964); see also *Preseault* v. *ICC*, *supra*, at 17.[1]

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*Indeed, there is evidence that firearm manufacturers—aided by a federal grant—are specifically targeting schoolchildren as consumers by distributing, at schools, hunting-related videos styled "educational materials for grades four through 12," Herbert, Reading, Writing, Reloading, N. Y. Times, Dec. 14, 1994, p. A23, col. 1.

[1] In this case, no question has been raised about means and ends; the only issue is about the effect of school zone guns on commerce.

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 314 (1993). In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices. See *id.*, at 313–316; *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147, 151–154 (1938); cf. *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

I

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196–197 (1824) (Marshall, C. J.), Congress saw few occasions to exercise that power prior to Reconstruction, see generally 2 C. Warren, The Supreme Court in United States History 729–739 (rev. ed. 1935), and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level, see *id.*, at

729–730. Although the Court upheld a fair amount of the ensuing legislation as being within the commerce power, see, *e. g.*, *Stafford* v. *Wallace*, 258 U. S. 495 (1922) (upholding an Act regulating trade practices in the meat packing industry); *Shreveport Rate Cases*, 234 U. S. 342 (1914) (upholding Interstate Commerce Commission order to equalize interstate and intrastate rail rates); see generally Warren, *supra*, at 729–739, the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, *e. g.*, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 303–304 (1936) (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 545–548 (1935) (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918) (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair* v. *United States*, 208 U. S. 161 (1908) (striking protection of labor union membership as outside "commerce").

These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. See, *e. g.*, *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928) (striking state law requiring pharmacy owners to be licensed as pharmacists); *Coppage* v. *Kansas*, 236 U. S. 1 (1915) (striking state law prohibiting employers from requiring their employees to agree not to join labor organizations); *Lochner* v. *New York*, 198 U. S. 45 (1905) (striking state law establishing maximum working hours for bakers). See generally L. Tribe, American Consti-

tutional Law 568–574 (2d ed. 1988). The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. See Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645, 674–682 (1946). In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses, see *United States* v. *Carolene Products Co.*, 304 U. S., at 147–148, 152; *United States* v. *Darby*, 312 U. S. 100, 119–121 (1941); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–119 (1942), and in due course that deference became articulate in the standard of rationality review. In due process litigation, the Court's statement of a rational

basis test came quickly. See *United States* v. *Carolene Products Co.*, *supra*, at 152; see also *Williamson* v. *Lee Optical Co.*, *supra*, at 489–490. The parallel formulation of the Commerce Clause test came later, only because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine, *Wickard* v. *Filburn*, 317 U. S. 111, 125, 127–129 (1942); *United States* v. *Wrightwood Dairy Co.*, *supra*, at 124–126, so far settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments. The moment came, however, with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach* v. *McClung*, 379 U. S., at 303–304, discussing *United States* v. *Darby*, *supra;* see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S., at 258–259. Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half century the Court has no more turned back in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy). See, *e. g.*, *Maryland* v. *Wirtz*, 392 U. S., at 190, 198; *Perez* v. *United States*, 402 U. S. 146, 151–157 (1971); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 276, 277.

II

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. See *ante*, at 558–561. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began. Taking the Court's opinion on its own terms, JUSTICE BREYER has explained both the hopeless porosity of "commercial" character as a ground of Commerce Clause distinction in America's highly connected economy, and the inconsistency of this categorization with our rational basis precedents from the last 50 years.

Further glosses on rationality review, moreover, may be in the offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis

scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

A

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have often observed, is plenary. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276; *United States* v. *Darby*, 312 U. S., at 114; see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549–550 (1985); *Gibbons* v. *Ogden*, 9 Wheat., at 196–197. Justice Harlan put it this way in speaking for the Court in *Maryland* v. *Wirtz:*

> "There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. . . . [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . . As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U. S., at 195–196 (citations and internal quotation marks omitted).

See also *United States* v. *Darby*, *supra*, at 114; *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991); *United States* v. *Carolene Products Co.*, 304 U. S., at 147.

Nor is there any contrary authority in the reasoning of our cases imposing clear statement rules in some instances of legislation that would significantly alter the state-national balance. In the absence of a clear statement of congressional design, for example, we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives, *Gregory* v. *Ashcroft*, *supra*, at 460–464, our understanding being that such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere," 501 U. S., at 460, 461. Likewise, when faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States. See *United States* v. *Enmons*, 410 U. S. 396, 411–412 (1973); *United States* v. *Bass*, 404 U. S. 336, 349–350 (1971); *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

These clear statement rules, however, are merely rules of statutory interpretation, to be relied upon only when the

terms of a statute allow, *United States* v. *Culbert*, 435 U. S. 371, 379–380 (1978); see *Gregory* v. *Ashcroft*, *supra*, at 470; *United States* v. *Bass*, *supra*, at 346–347, and in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States, *Gregory* v. *Ashcroft*, *supra*, at 461; *United States* v. *Bass*, *supra*, at 349; see *Rewis* v. *United States*, *supra*, at 811–812. They are rules for determining intent when legislation leaves intent subject to question. But our hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification. And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress (as distinct from state legislation subject to review under the theory of dormant commerce power) nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

B

There remain questions about legislative findings. The Court of Appeals expressed the view, 2 F. 3d 1342, 1363–1368 (CA5 1993), that the result in this case might well have been different if Congress had made explicit findings that guns in schools have a substantial effect on interstate commerce, and the Court today does not repudiate that position, see *ante*, at 562–563. Might a court aided by such findings have subjected this legislation to less exacting scrutiny (or, put another way, should a court have deferred to such findings if Congress had made them)?[2] The answer to either question must be no, although as a general matter findings are important and to be hoped for in the difficult cases.

It is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others. A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional regulation of gun possession in school yards is more difficult, both because the link to interstate commerce is less obvious and because of our initial ignorance of the relevant facts. In a

[2] Unlike the Court, (perhaps), I would see no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation. See the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, § 320904, 108 Stat. 2125 ("[T]he occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an adverse impact on interstate commerce and the foreign commerce of the United States; . . . Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection"). The findings, however, go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record. The Solicitor General certainly exercised sound judgment in placing no significant reliance on these particular afterthoughts. Tr. of Oral Arg. 24–25.

case comparable to this one, we may have to dig hard to make a responsible judgment about what Congress could reasonably find, because the case may be close, and because judges tend not to be familiar with the facts that may or may not make it close. But while the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress acted ultra vires intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 276–277; *Katzenbach* v. *McClung*, 379 U. S., at 303–304; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 391–392 (1935) (Hughes, C. J., dissenting); cf. *FCC* v. *Beach Communications, Inc.*, 508 U. S., at 315 (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it[;] . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (citations and internal quotation marks omitted); *Ferguson* v. *Skrupa*, 372 U. S. 726, 731–733 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S., at 487. Congressional findings do not, however, directly address the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply

either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

On the other hand, to say that courts applying the rationality standard may not defer to findings is not, of course, to say that findings are pointless. They may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority. The research underlying JUSTICE BREYER'S dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than this record illustrates would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone, and I would not allow for the possibility, as the Court's opinion may, *ante*, at 563, that the addition of congressional findings could in principle have affected the fate of the statute here.

III

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its sugges-

tions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. 301 U. S., at 41–43. But we know what happened.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. 18 U. S. C. § 922(q)(1)(A) (1988 ed., Supp. V). In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

I

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," U. S. Const., Art. I, § 8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. See, *e. g.*, *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195 (1824) (Marshall, C. J.); *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942). As the majority points out, *ante*, at 559, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not. Compare, *e. g.*, *Wickard*, *supra*, at 125 ("substantial economic effect"), with *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981) ("affects interstate commerce"); see also *Maryland* v. *Wirtz*, 392 U. S. 183, 196, n. 27 (1968) (cumulative effect must not be "trivial"); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937)

(speaking of "close and substantial *relation*" between activity and commerce, not of "substantial effect") (emphasis added); *Gibbons*, *supra*, at 194 (words of Commerce Clause do not "comprehend . . . commerce, which is completely internal . . . and which does not . . . affect other States"). And, as the majority also recognizes in quoting Justice Cardozo, the question of degree (how *much* effect) requires an estimate of the "size" of the effect that no verbal formulation can capture with precision. See *ante*, at 567. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. See, *e. g.*, *Perez* v. *United States*, 402 U. S. 146, 154 (1971); *Daniel* v. *Paul*, 395 U. S. 298, 308 (1969). But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools). See, *e. g.*, *Wickard*, *supra*, at 127–128. As this Court put the matter almost 50 years ago:

> "[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) (citations omitted).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the

determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. See *Hodel, supra,* at 276–277. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding. *Ante,* at 557 (emphasis added).

I recognize that we must judge this matter independently. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra,* at 311 (REHNQUIST, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i. e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. See, *e. g., Katzenbach* v. *McClung,* 379 U. S. 294, 299 (1964) (noting that "no formal findings were made, which of course are not necessary"); *Perez, supra,* at 156–157; cf. *Turner Broadcasting System, Inc.* v. *FCC,* 512 U. S. 622, 666 (1994) (opinion of KENNEDY, J.) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review"); *Fullilove* v. *Klutznick,* 448 U. S. 448, 503 (1980) (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate . . ."). It would seem particularly unfortunate to make the validity of

the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance. See Pub. L. 103–322, §§ 320904 (2)(F), (G), 108 Stat. 2125, 18 U. S. C. §§ 922(q)(1)(F), (G).

In addition, despite the Court of Appeals' suggestion to the contrary, see 2 F. 3d 1342, 1365 (CA5 1993), there is no special need here for a clear indication of Congress' rationale. The statute does not interfere with the exercise of state or local authority. Cf., *e. g.*, *Dellmuth* v. *Muth*, 491 U. S. 223, 227–228 (1989) (requiring clear statement for abrogation of Eleventh Amendment immunity). Moreover, any clear statement rule would apply only to determine Congress' intended result, *not* to clarify the source of its authority or measure the level of consideration that went into its decision, and here there is no doubt as to which activities Congress intended to regulate. See *ibid.; id.*, at 233 (SCALIA, J., concurring) (to subject States to suits for money damages, Congress need only make that intent clear, and need not refer explicitly to the Eleventh Amendment); *EEOC* v. *Wyoming*, 460 U. S. 226, 243, n. 18 (1983) (Congress need not recite the constitutional provision that authorizes its action).

II

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? 18 U. S. C. §§ 922(q)(1)(F), (G). As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co.* v. *United States*, 196

U. S. 375, 398 (1905) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies—generated both inside and outside government—make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, *infra,* at 631, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, *ibid.;* that 20 percent of those students have been threatened with guns, *ibid.;* and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U. S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, *e. g.,* House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U. S. Dept. of Health 118–119 (1978) (school-violence victims suffer academically); compare U. S. Dept. of Justice 1 (1991) (gun violence worst in inner-city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U. S. Dept. of Health 118, 123–124 (1978). Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. See generally Seybolt; Rorabaugh; U. S. Dept. of Labor (1950). As late as the 1920's, many workers still received general education directly from their employers—from large corporations, such as General Electric, Ford, and Goodyear, which created schools within their firms to help both the worker and the firm. See Bolino 15–25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See *id.*, at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling, see Denison 243; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this investment in education exceeded the returns to conventional capital investment, see, *e. g.*, Davis & Morrall 48–49.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. See, *e. g.*, MIT 32

(only about one-third of handtool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better trained workers increasing); U. S. Dept. of Labor 41 (1981) (job openings for dropouts declining over time). There is evidence that "service, manufacturing or construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas," Gordon, Ponticell, & Morgan 26; that "workers with truly few skills by the year 2000 will find that only one job out of ten will remain," *ibid.;* and that

> "[o]ver the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . [B]etter-trained workers become more productive workers, enabling a company to become more competitive and expand." Henkoff 60.

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Marshall 205; Marshall & Tucker 33. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. See National Center 57; Handbook of Labor Statistics 561, 576 (1989); Neef & Kask 28, 31. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, see, *e. g.,* MIT 28, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities), see, *e. g.,* National Center 47; Chubb & Hanushek 215. Indeed, Congress has said, when writing other statutes, that

"functionally or technologically illiterate" Americans in the work force "erod[e]" our economic "standing in the international marketplace," Pub. L. 100–418, § 6002(a)(3), 102 Stat. 1469, and that "[o]ur Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling," H. R. Rep. No. 98–6, pt. 1, p. 19 (1983).

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education. See MacCormack, Newman, & Rosenfield 73; Coffee 296. Scholars on the subject report, for example, that today, "[h]igh speed communication and transportation make it possible to produce most products and services anywhere in the world," National Center 38; that "[m]odern machinery and production methods can therefore be combined with low wage workers to drive costs down," *ibid.;* that managers can perform "'back office functions anywhere in the world now,'" and say that if they "'can't get enough skilled workers here'" they will "'move the skilled jobs out of the country,'" *id.*, at 41; with the consequence that "rich countries need better education and retraining, to reduce the supply of unskilled workers and to equip them with the skills they require for tomorrow's jobs," Survey of Global Economy 37. In light of this increased importance of education to individual firms, it is no surprise that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools, Maturi 65–68, that 88 percent think this kind of involvement is important, *id.*, at 68, that more than 20 States have recently passed educational reforms to attract new business, Overman 61–62, and that business magazines have begun to rank cities according to the quality of their schools, see Boyle 24.

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical

threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." The evidence of (1) the *extent* of the gun-related violence problem, see *supra*, at 619, (2) the *extent* of the resulting negative effect on classroom learning, see *ibid.*, and (3) the *extent* of the consequent negative commercial effects, see *supra*, at 620–622, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, *e. g.*, National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, *e. g.*, Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *Perez* v. *United States*, 402 U. S., at 157, and that unfair labor practices pose to instrumentalities of commerce, see *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 221–222 (1938). As I have pointed out, *supra*, at 618, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." 18 U. S. C. §§ 922(q)(1)(F), (G). The violence-related facts, the educa-

tional facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see *supra*, at 615–617; *infra*, at 627–628, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," *ante*, at 567 (citation omitted; internal quotation marks omitted); nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. *Ante*, at 564. First, this statute is aimed at curbing a particularly acute threat to the educational process—the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. See *supra*, at 619. This Court has previously recognized the singularly disruptive potential on interstate commerce that acts of violence may have. See *Perez*, *supra*, at 156–157. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. See *Heart of Atlanta*

Motel, Inc. v. *United States*, 379 U. S. 241, 251 (1964). It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress "to act in terms of economic . . . realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy." *North American Co.* v. *SEC*, 327 U. S. 686, 705 (1946) (citing *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.)).

III

The majority's holding—that § 922 falls outside the scope of the Commerce Clause—creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez* v. *United States*, *supra*, the Court held that the Commerce Clause authorized a federal statute that makes it a crime to engage in loan sharking ("[e]xtortionate credit transactions") at a local level. The Court said that Congress may judge that such transactions, "though purely *intra*state, . . . affect *inter*state commerce." 402 U. S., at 154 (emphasis added). Presumably, Congress reasoned that threatening or using force, say with a gun on a street corner, to collect a debt occurs sufficiently often so that the activity (by helping organized crime) affects commerce among the States. But, why then cannot Congress also reason that the threat or use of force—the frequent consequence of possessing a gun—in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects

commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach* v. *McClung*, 379 U. S. 294 (1964), this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States. See *id.*, at 300; *Heart of Atlanta Motel*, *supra*, at 274 (Black, J., concurring in *McClung* and in *Heart of Atlanta*). In *Daniel* v. *Paul*, 395 U. S. 298 (1969), this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama—because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state. See *id.*, at 304–305, 308. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well. See *McClung*, *supra*, at 301; *Daniel*, *supra*, at 307, n. 10. It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. Families will hesitate to move to neighborhoods where students carry guns instead of books. (Congress expressly found in 1994 that "parents may decline to send their children to school" in certain areas "due to concern about violent crime and gun violence." 18 U. S. C. §922(q)(1)(E).) And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly, like the local racial discrimination at issue in *McClung* and *Daniel*, the local instances here, taken

together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

In *Wickard* v. *Filburn*, 317 U. S. 111 (1942), this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and consumed on his own local farm because, considered in its totality, (1) homegrown wheat may be "induced by rising prices" to "flow into the market and check price increases," and (2) even if it never actually enters the market, homegrown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and, in that sense, "competes with wheat in commerce." *Id.*, at 128. To find both of these effects on commerce significant in amount, the Court had to give Congress the benefit of the doubt. Why would the Court, to find a significant (or "substantial") effect here, have to give Congress any greater leeway? See also *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 236 ("[I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventive regulation").

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." *Ante*, at 561. That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give

> "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Wickard*, *supra*, at 120.

See also *United States* v. *Darby*, 312 U. S. 100, 116–117 (1941) (overturning the Court's distinction between "production" and "commerce" in the child labor case, *Hammer* v. *Dagenhart*, 247 U. S. 251, 271–272 (1918)); *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.) ("[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez*, *McClung*, and *Wickard* as involving intrastate "economic activity," *ante*, at 559, the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "*though it may not be regarded as commerce*," could nevertheless be regulated—"*whatever its nature*"—so long as "it exerts a substantial economic effect on interstate commerce." *Wickard*, *supra*, at 125 (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez*—in each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a

practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See *supra*, at 620, 622. When, and to what extent, does its involvement make education commercial? Does the number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264 (1981).

Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $230 billion—that is, nearly a quarter of a trillion dollars—which accounts for a significant portion of our $5.5 trillion gross domestic product for that year. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' salaries. See U. S. Dept. of Education 4, 7 (1993). These expenditures enable schools to provide a valuable service—namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources

they spend, and whether they can be restructured to achieve greater returns. See, *e. g.*, S. Rep. No. 100–222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185–229 (school choice); Hanushek 85–122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, *e. g.*, 18 U. S. C. § 844(i) (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, *e. g.*, 18 U. S. C. § 922(*o*)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *United States* v. *Staszcuk*, 517 F. 2d 53, 57–58 (CA7 1975) (en banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard*, 317 U. S., at 127–128, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather

than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

IV

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." *North American Co.* v. *SEC*, 327 U. S., at 705 (citing *Swift & Co.* v. *United States*, 196 U. S., at 398 (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See *Gibbons* v. *Ogden*, 9 Wheat., at 195 (holding that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally"); *United States* v. *Darby*, 312 U. S., at 116–117 ("The conclusion is inescapable that *Hammer* v. *Dagenhart* [the child labor case] was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision . . . . It should be and now is overruled"). Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

APPENDIX TO OPINION OF BREYER, J.

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Syllabus

NEW YORK STATE CONFERENCE OF BLUE CROSS & BLUE SHIELD PLANS ET AL. *v.* TRAVELERS INSURANCE CO. ET AL.

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

No. 93–1408. Argued January 18, 1995—Decided April 26, 1995*

A New York statute requires hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan, and also subjects certain health maintenance organizations (HMO's) to surcharges. Several commercial insurers and their trade associations filed actions against state officials, claiming that § 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA)—under which state laws that "relate to" any covered employee benefit plan are superseded—pre-empts the imposition of surcharges on bills of patients whose commercial insurance coverage is purchased by an ERISA plan, and on HMO's insofar as their membership fees are paid by an ERISA plan. Blue Cross/Blue Shield plans (collectively the Blues) and a hospital association intervened as defendants, and several HMO's and an HMO conference intervened as plaintiffs. The District Court consolidated the actions and granted the plaintiffs summary judgment. The Court of Appeals affirmed, relying on this Court's decisions in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, and *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U. S. 125, holding that ERISA's pre-emption clause must be read broadly to reach any state law having a connection with, or reference to, covered benefit plans. The court decided that the surcharges were meant to increase the costs of certain insurance and HMO health care and held that this purposeful interference with the choices that ERISA plans make for health care coverage constitutes a "connection with" ERISA plans triggering pre-emption.

Held: New York's surcharge provisions do not "relate to" employee benefit plans within the meaning of § 514(a) and, thus, are not pre-empted. Pp. 654–668.

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*Together with No. 93–1414, *Pataki, Governor of New York, et al.* v. *Travelers Insurance Co. et al.*, and No. 93–1415, *Hospital Association of New York State* v. *Travelers Insurance Co. et al.*, also on certiorari to the same court.

(a) Under *Shaw*, *supra*, the provisions "relate to" ERISA plans if they have a "connection with," or make "reference to," the plans. They clearly make no reference to ERISA plans, and ERISA's text is unhelpful in determining whether they have a "connection with" them. Thus, the Court must look to ERISA's objectives as a guide to the scope of the state law that Congress understood would survive. Pp. 654–656.

(b) The basic thrust of the pre-emption clause was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans. Thus, ERISA pre-empts state laws that mandate employee benefit structures or their administration as well as those that provide alternative enforcement mechanisms. The purpose and effects of New York's statute are quite different, however. The principal reason for charge differentials is that the Blues provide coverage to many subscribers whom the commercial insurers would reject. Since the differentials make the Blues more attractive, they have an indirect economic effect on choices made by insurance buyers, including ERISA plans. However, an indirect economic influence does not bind plan administrators to any particular choice or preclude uniform administrative practice or the provision of a uniform interstate benefit package. It simply bears on the costs of benefits and the relative costs of competing insurance to provide them. Cost uniformity almost certainly is not an object of pre-emption. Rate differentials are common even in the absence of state action, and therefore it is unlikely that ERISA meant to bar such indirect influences under state law. The existence of other common state actions with indirect economic effects on a plan's cost—such as quality control standards and workplace regulation—leaves the intent to pre-empt even less likely, since such laws would have to be superseded as well. New York's surcharges leave plan administrators where they would be in any case, with the responsibility to choose the best overall coverage for the money, and thus they do not bear the requisite "connection with" ERISA plans to trigger pre-emption. Pp. 656–662.

(c) This conclusion is confirmed by the decision in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, that ERISA pre-emption falls short of barring application of general state garnishment statutes to participants' benefits in the hands of an ERISA plan. And New York's surcharges do not impose the kind of substantive coverage requirement binding plan administrators that was at issue in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, since they do not require plans to deal with only one insurer or to insure against an entire category of illnesses the plans might otherwise choose not to cover. Pp. 662–664.

Syllabus

(d) Any conclusion other than the one drawn here would have the unsettling result of barring any state regulation of hospital costs on the theory that all laws with indirect economic effects on ERISA plans are pre-empted. However, there is no hint in ERISA's legislative history or elsewhere that Congress intended to squelch the efforts of several States that were regulating hospital charges to some degree at the time ERISA was passed. Moreover, such a broad interpretation of § 514 would have rendered nugatory an entire federal statute—enacted after ERISA by the same Congress—that gave comprehensive aid to state health care rate regulation. Pp. 664–667.

(e) In reaching this decision, the Court does not hold that ERISA pre-empts only direct regulation of ERISA plans. It is possible that a state law might produce such acute, albeit indirect, economic effects as to force an ERISA plan to adopt a certain scheme of coverage or effectively restrict its choice of insurers, but such is not the case here. P. 668.

14 F. 3d 708, reversed and remanded.

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

M. Patricia Smith, Assistant Attorney General of New York, argued the cause for petitioners in all cases. With her on the briefs for petitioners in No. 93–1414 were *G. Oliver Koppell*, Attorney General, *Jerry Boone*, Solicitor General, *Peter H. Schiff* and *Andrea Green*, Deputy Solicitors General, and *Jane Lauer Barker*, Assistant Attorney General. *Robert A. Bicks*, *Patricia Anne Kuhn*, *Alan C. Drewsen*, *Jeffrey D. Chansler*, *Bartley J. Costello III*, *Eileen M. Considine*, and *Beverly Cohen* filed briefs for petitioners in No. 93–1408. *Jeffrey J. Sherrin*, *Philip Rosenberg*, and *H. Bartow Farr III* filed briefs for petitioner in No. 93–1415.

Deputy Solicitor General Kneedler argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days*, *James A. Feldman*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Judith D. Heimlich*.

Craig P. Murphy argued the cause for respondents Travelers Insurance Co. et al. in all cases. With him on the brief were *Darrell M. Joseph*, *Stephen M. Shapiro*, *Kenneth S.*

Geller, *Andrew J. Pincus*, *Charles Rothfeld*, *Donald M. Falk*, *Zoë Baird*, *Theresa L. Sorota*, *Philip E. Stano*, and *Raymond A. d'Amico*. *Harold N. Iselin* argued the cause for respondents New York State Health Maintenance Organization Conference et al. in all cases. With him on the brief were *Wendy L. Ravitz* and *Glen D. Nager*.†

† Briefs of *amici curiae* urging reversal were filed for the State of Minnesota et al. by *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Richard S. Slowes*, Assistant Attorney General, *Richard Blumenthal*, Attorney General of Connecticut, and *Phyllis E. Hyman*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, and *Stanley Lustman* and *Elizabeth M. Kameen*, Assistant Attorneys General, *Roland W. Burris*, Attorney General of Illinois, *Pamela Carter*, Attorney General of Indiana, *Scott Harshbarger*, Attorney General of Massachusetts, *Jeremiah W. (Jay) Nixon*, Attorney General of Missouri, *Joseph P. Mazurek*, Attorney General of Montana, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Dan Morales*, Attorney General of Texas, *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, and *Joseph B. Meyer*, Attorney General of Wyoming; for the American Federation of State County and Municipal Employees, AFL–CIO, by *Larry P. Weinberg*, *John C. Dempsey*, *Robert M. Weinberg*, *Ian D. Lanoff*, and *Andrew D. Roth;* for the American Hospital Association et al. by *Peter F. Nadel*, *Margaret J. Hardy*, *William T. McGrail*, and *Dorothy Grandolfi Wagg;* and for the National Governors' Association et al. by *Richard Ruda* and *Lee Fennell*.

Briefs of *amici curiae* urging affirmance were filed for the Association of Private Pension and Welfare Plans et al. by *Edward R. Mackiewicz;* for Group Health Association of America, Inc., by *Alan J. Davis* and *Brian D. Pedrow;* for the Federation of American Health Systems by *Carl Weissburg* and *Robert E. Goldstein;* for the National Carriers' Conference Committee by *Benjamin W. Boley*, *David P. Lee*, and *William H. Dempsey;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder* and *Diana L. S. Peters;* for the NYSA–ILA Welfare Fund et al. by *C. Peter Lambos*, *Donato Caruso*, *Thomas W. Gleason*, *Ernest L. Mathews, Jr.*, and *Kevin Marrinan;* and for the Trustees of and the Pension Hospitalization Benefit Plan of the Electrical Industry et al. by *Edward J. Groarke*.

Briefs of *amici curiae* were filed for the International Foundation of Employee Benefit Plans by *Paul J. Ondrasik, Jr.*, and *Sara E. Hauptfuehrer;* and for the Self-Insurance Institute of America, Inc., by *George J. Pantos*.

JUSTICE SOUTER delivered the opinion of the Court.

A New York statute requires hospitals to collect surcharges from patients covered by a commercial insurer but not from patients insured by a Blue Cross/Blue Shield plan, and it subjects certain health maintenance organizations (HMO's) to surcharges that vary with the number of Medicaid recipients each enrolls. N. Y. Pub. Health Law § 2807–c (McKinney 1993). These cases call for us to decide whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.* (1988 ed. and Supp. V), pre-empts the state provisions for surcharges on bills of patients whose commercial insurance coverage is purchased by employee health-care plans governed by ERISA, and for surcharges on HMO's insofar as their membership fees are paid by an ERISA plan. We hold that the provisions for surcharges do not "relate to" employee benefit plans within the meaning of ERISA's pre-emption provision, § 514(a), 29 U. S. C. § 1144(a), and accordingly suffer no pre-emption.

I

A

New York's Prospective Hospital Reimbursement Methodology (NYPHRM) regulates hospital rates for all in-patient care, except for services provided to Medicare beneficiaries.[1] N. Y. Pub. Health Law § 2807–c (McKinney 1993).[2] The scheme calls for patients to be charged not for the cost of their individual treatment, but for the average cost of treating the patient's medical problem, as classified under one or another of 794 Diagnostic Related Groups (DRG's). The

[1] Medicare rates are set by the Federal Government unless States obtain an express authorization from the United States Department of Health and Human Services. See 42 U. S. C. § 1395 *et seq.;* see also Part II–D, *infra.*

[2] References are made to the laws of New York as they stood at the times relevant to this litigation.

charges allowable in accordance with DRG classifications are adjusted for a specific hospital to reflect its particular operating costs, capital investments, bad debts, costs of charity care, and the like.

Patients with Blue Cross/Blue Shield coverage, Medicaid patients, and HMO participants are billed at a hospital's DRG rate. N. Y. Pub. Health Law § 2807–c(1)(a); see also Brief for Petitioners Pataki et al. 4.[3] Others, however, are not. Patients served by commercial insurers providing in-patient hospital coverage on an expense-incurred basis, by self-insured funds directly reimbursing hospitals, and by certain workers' compensation, volunteer firefighters' benefit, ambulance workers' benefit, and no-fault motor vehicle insurance funds, must be billed at the DRG rate plus a 13% surcharge to be retained by the hospital. N. Y. Pub. Health Law § 2807–c(1)(b). For the year ending March 31, 1993, moreover, hospitals were required to bill commercially insured patients for a further 11% surcharge to be turned over to the State, with the result that these patients were charged 24% more than the DRG rate. § 2807–c(11)(i).

New York law also imposes a surcharge on HMO's, which varies depending on the number of eligible Medicaid recipients an HMO has enrolled, but which may run as high as 9% of the aggregate monthly charges paid by an HMO for its members' in-patient hospital care. §§ 2807–c(2–a)(a) to (2–a)(e). This assessment is not an increase in the rates to be paid by an HMO to hospitals, but a direct payment by the HMO to the State's general fund.

B

ERISA's comprehensive regulation of employee welfare and pension benefit plans extends to those that provide "medical, surgical, or hospital care or benefits" for plan par-

[3] Under certain circumstances, New York law permits HMO's to negotiate their own hospital payment schedules subject to state approval. § 2807–c(2)(b)(i).

ticipants or their beneficiaries "through the purchase of insurance or otherwise." § 3(1), 29 U. S. C. § 1002(1). The federal statute does not go about protecting plan participants and their beneficiaries by requiring employers to provide any given set of minimum benefits, but instead controls the administration of benefit plans, see § 2, 29 U. S. C. § 1001(b), as by imposing reporting and disclosure mandates, §§ 101–111, 29 U. S. C. §§ 1021–1031, participation and vesting requirements, §§ 201–211, 29 U. S. C. §§ 1051–1061, funding standards, §§ 301–308, 29 U. S. C. §§ 1081–1086, and fiduciary responsibilities for plan administrators, §§ 401–414, 29 U. S. C. §§ 1101–1114. It envisions administrative oversight, imposes criminal sanctions, and establishes a comprehensive civil enforcement scheme. §§ 501–515, 29 U. S. C. §§ 1131–1145. It also pre-empts some state law. § 514, 29 U. S. C. § 1144.

Section 514(a) provides that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" covered by the statute, 29 U. S. C. § 1144(a), although pre-emption stops short of "any law of any State which regulates insurance." § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A). (This exception for insurance regulation is itself limited, however, by the provision that an employee welfare benefit plan may not "be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . ." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B).) Finally, ERISA saves from pre-emption "any generally applicable criminal law of a State." § 514(b)(4), 29 U. S. C. § 1144(b)(4).

C

On the claimed authority of ERISA's general pre-emption provision, several commercial insurers, acting as fiduciaries of ERISA plans they administer, joined with their trade associations to bring actions against state officials in United States District Court seeking to invalidate the 13%, 11%, and

9% surcharge statutes. The New York State Conference of Blue Cross and Blue Shield plans, Empire Blue Cross and Blue Shield (collectively the Blues), and the Hospital Association of New York State intervened as defendants, and the New York State Health Maintenance Organization Conference and several HMO's intervened as plaintiffs. The District Court consolidated the actions and granted summary judgment to the plaintiffs. *Travelers Ins. Co.* v. *Cuomo*, 813 F. Supp. 996 (SDNY 1993). The court found that although the surcharges "do not directly increase a plan's costs or [a]ffect the level of benefits to be offered" there could be "little doubt that the [s]urcharges at issue will have a significant effect on the commercial insurers and HMOs which do or could provide coverage for ERISA plans and thus lead, at least indirectly, to an increase in plan costs." *Id.*, at 1003 (footnote omitted). It found that the "entire justification for the [s]urcharges is premised on that exact result—that the [s]urcharges will increase the cost of obtaining medical insurance through any source other than the Blues to a sufficient extent that customers will switch their coverage to and ensure the economic viability of the Blues." *Ibid.* (footnote omitted). The District Court concluded that this effect on choices by ERISA plans was enough to trigger pre-emption under § 514(a) and that the surcharges were not saved by § 514(b) as regulating insurance. *Id.*, at 1003–1008. The District Court accordingly enjoined enforcement of "those surcharges against any commercial insurers or HMOs in connection with their coverage of . . . ERISA plans." *Id.*, at 1012.[4]

[4] The District Court and the Court of Appeals both held that the injunctive remedy was not prohibited by the Tax Injunction Act, 28 U. S. C. § 1341, which provides that federal district courts "shall not enjoin, suspend or restrain the assessment . . . of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Although these courts considered the surcharges to be taxes, they found no "plain, speedy and efficient remedy" to exist in state court, since ERISA § 502(e), 29 U. S. C. § 1132(e)(1) (1988 ed., Supp. V), divests state courts of jurisdiction over such claims. See 813 F. Supp., at 1000–1001;

The Court of Appeals for the Second Circuit affirmed, relying on our decisions in *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85 (1983), and *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U. S. 125 (1992), holding that ERISA's pre-emption clause must be read broadly to reach any state law having a connection with, or reference to, covered employee benefit plans. *Travelers Ins. Co.* v. *Cuomo*, 14 F. 3d 708, 718 (1994). In the light of our decision in *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 141 (1990), the Court of Appeals abandoned its own prior decision in *Rebaldo* v. *Cuomo*, 749 F. 2d 133, 137 (1984), cert. denied, 472 U. S. 1008 (1985), which had drawn upon the definition of the term "State" in ERISA § 514(c)(2), 29 U. S. C. § 1144(c)(2), to conclude that "a state law must 'purpor[t] to regulate . . . the terms and conditions of employee benefit plans' to fall within the preemption provision" of ERISA. 14 F. 3d, at 719 (internal quotation marks omitted). Rejecting that narrower approach to ERISA pre-emption, it relied on our statement in *Ingersoll-Rand* that under the applicable "'broad common-sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." 498 U. S., at 139; see 14 F. 3d, at 718.

Travelers Ins. Co. v. *Cuomo*, 14 F. 3d 708, 713–714 (CA2 1994). Neither party challenges this conclusion and we have no occasion to examine it.

Nor do we address the surcharge statute insofar as it applies to self-insured funds. The trial court's ERISA analysis originally led it to enjoin defendants "from enforcing those surcharges against any commercial insurers or HMOs in connection with their coverage of . . . ERISA plans," without any further mention of self-insured funds. 813 F. Supp., at 1012. After staying its decision as to the 13% surcharge pending appeal, see *id.*, at 1012–1015, it ordered all named parties, including the Travelers Insurance Company (which served as fiduciary to a self-insured plan), to pay that surcharge whenever required by state law, see *Travelers Ins. Co.* v. *New York State Health Maintenance Conference*, No. 92 Civ. 3999 (SDNY Apr. 27, 1993), reprinted in Brief for National Carriers' Conference Committee as *Amicus Curiae* 29a–31a. The Court of Appeals, in turn, did not expressly address this application of the surcharge and, accordingly, we leave it for consideration on remand.

The Court of Appeals agreed with the trial court that the surcharges were meant to increase the costs of certain insurance and health care by HMO's, and held that this "purpose-[ful] interfer[ence] with the choices that ERISA plans make for health care coverage . . . is sufficient to constitute [a] 'connection with' ERISA plans" triggering pre-emption. *Id.*, at 719. The court's conclusion, in sum, was that "the three surcharges 'relate to' ERISA because they impose a significant economic burden on commercial insurers and HMOs" and therefore "have an impermissible impact on ERISA plan structure and administration." *Id.*, at 721. In the light of its conclusion that the surcharge statutes were not otherwise saved by any applicable exception, the court held them pre-empted. *Id.*, at 723. It recognized the apparent conflict between its conclusion and the decision of the Third Circuit in *United Wire, Metal and Machine Health and Welfare Fund* v. *Morristown Memorial Hosp.*, 995 F. 2d 1179, 1191, cert. denied, 510 U. S. 944 (1993), which held that New Jersey's similar ratesetting statute "does not relate to the plans in a way that triggers ERISA's preemption clause." See 14 F. 3d, at 721, n. 3. We granted certiorari to resolve this conflict, 513 U. S. 920 (1994), and now reverse and remand.

II

Our past cases have recognized that the Supremacy Clause, U. S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. See *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 203–204 (1983); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. See *Maryland* v.

Louisiana, 451 U. S. 725, 746 (1981). Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985), we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice*, *supra*, at 230. See, *e. g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 516 (1992); *id.*, at 532–533 (Blackmun, J., concurring in part, concurring in judgment in part, and dissenting in part); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 740 (1985); *Jones* v. *Rath Packing Co.*, 430 U. S. 519 (1977); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611 (1926).

Since pre-emption claims turn on Congress's intent, *Cipollone*, *supra*, at 516; *Shaw*, *supra*, at 95, we begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs. See, *e. g.*, *Ingersoll-Rand*, *supra*, at 138. The governing text of ERISA is clearly expansive. Section 514(a) marks for pre-emption "all state laws insofar as they . . . relate to any employee benefit plan" covered by ERISA, and one might be excused for wondering, at first blush, whether the words of limitation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere," H. James, Roderick Hudson xli (New York ed., World's Classics 1980). But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. That said, we have to recognize that our prior attempt to construe the phrase "relate to" does not give us much help drawing the line here.

In *Shaw,* we explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U. S., at 96–97. The latter alternative, at least, can be ruled out. The surcharges are imposed upon patients and HMO's, regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise, with the consequence that the surcharge statutes cannot be said to make "reference to" ERISA plans in any manner. Cf. *Greater Washington Bd. of Trade,* 506 U. S., at 130 (striking down District of Columbia law that "specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted"). But this still leaves us to question whether the surcharge laws have a "connection with" the ERISA plans, and here an uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

A

As we have said before, § 514 indicates Congress's intent to establish the regulation of employee welfare benefit plans "as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.,* 451 U. S. 504, 523 (1981). We have found that in passing § 514(a), Congress intended

> "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . , [and to prevent] the potential for conflict in substantive law . . . requiring

> the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand*, 498 U. S., at 142.

This objective was described in the House of Representatives by a sponsor of the Act, Representative Dent, as being to "eliminat[e] the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974). Senator Williams made the same point, that "with the narrow exceptions specified in the bill, the substantive and enforcement provisions . . . are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." *Id.*, at 29933. The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.

Accordingly in *Shaw*, for example, we had no trouble finding that New York's "Human Rights Law, which prohibit[ed] employers from structuring their employee benefit plans in a manner that discriminate[d] on the basis of pregnancy, and [New York's] Disability Benefits Law, which require[d] employers to pay employees specific benefits, clearly 'relate[d] to' benefit plans." 463 U. S., at 97. These mandates affecting coverage could have been honored only by varying the subjects of a plan's benefits whenever New York law might have applied, or by requiring every plan to provide all beneficiaries with a benefit demanded by New York law if New York law could have been said to require it for any one beneficiary. Similarly, Pennsylvania's law that prohibited "plans from . . . requiring reimbursement [from the beneficiary] in the event of recovery from a third party" related to employee benefit plans within the meaning of § 514(a). *FMC Corp.* v. *Holliday*, 498 U. S. 52, 60 (1990). The law "prohibit[ed] plans from being structured in a manner requiring reimbursement in the event of recovery from a third party" and "require[d] plan providers to calculate benefit levels in

Pennsylvania based on expected liability conditions that differ from those in States that have not enacted similar anti-subrogation legislation," thereby "frustrat[ing] plan administrators' continuing obligation to calculate uniform benefit levels nationwide." *Ibid.* Pennsylvania employees who recovered in negligence actions against tortfeasors would, by virtue of the state law, in effect have been entitled to benefits in excess of what plan administrators intended to provide, and in excess of what the plan provided to employees in other States. Along the same lines, New Jersey could not prohibit plans from setting workers' compensation payments off against employees' retirement benefits or pensions, because doing so would prevent plans from using a method of calculating benefits permitted by federal law. *Alessi*, *supra*, at 524. In each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption. See *Ingersoll-Rand*, *supra.*

B

Both the purpose and the effects of the New York surcharge statute distinguish it from the examples just given. The charge differentials have been justified on the ground that the Blues pay the hospitals promptly and efficiently and, more importantly, provide coverage for many subscribers whom the commercial insurers would reject as unacceptable risks. The Blues' practice, called open enrollment, has consistently been cited as the principal reason for charge differentials, whether the differentials resulted from voluntary negotiation between hospitals and payers as was the case prior to the NYPHRM system, or were created by the surcharges as is the case now. See, *e. g.*, Charge Differential Analysis Committee, New York State Hospital Review and Planning Council, Report (1989), reprinted in Joint Appendix in No. 93–7132 (CA2), pp. 702, 705, 706 (J. A. CA2); J. Corcoran,

Superintendent of Insurance, Update of 1984 Position Paper of The New York State Insurance Department on Inpatient Reimbursement Rate Differential Provided Non-Profit Insurers 6–7 (1988) (J. A. CA2, at 699–700); R. Trussell, Prepayment for Hospital Care In New York State 170 (1958) (J. A. CA2, at 664) (Trussell); Thorpe, Does All-Payer Rate Setting Work? The Case of the New York Prospective Hospital Reimbursement Methodology, 12 J. Health Politics, Policy, & Law 391, 402 (1987).[5] Since the surcharges are presumably passed on at least in part to those who purchase commercial insurance or HMO membership, their effects follow from their purpose. Although there is no evidence that the surcharges will drive every health insurance consumer to the Blues, they do make the Blues more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans.

An indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself; commercial insurers and HMO's may still offer more attractive packages

[5] Although respondents argue that the surcharges have become superfluous now that all insurers have become subject to certain open enrollment requirements, see Brief for Respondents Travelers Insurance Co. et al. 6–7, n. 5; 1992 N. Y. Laws, ch. 501, § 4 (effective Apr. 1, 1993), N. Y. Ins. Law § 3231 (McKinney Supp. 1995), it is not our responsibility to review the continuing substantive rationale for the surcharges. Even so, the surcharges may well find support in an effort to compensate the Blues for the current makeup of their insurance pool, which presumably continues to reflect their longer history of open enrollment policies. See J. Corcoran, Superintendent of Insurance, Position Paper of New York State Insurance Department on Inpatient Reimbursement Rate Differential Provided Non-Profit Insurers 8 (1984) (J. A. CA2, at 679) ("If there is any possibility of an abrupt abandonment of the current hospital discount, consideration should be given to the past history of health insurance enrollment in New York which has left the Blue Cross/Blue Shield Plans with a core of uninsurables obtained over the years and the ongoing liability resulting from that enrollment").

than the Blues. Nor does the indirect influence of the surcharges preclude uniform administrative practice or the provision of a uniform interstate benefit package if a plan wishes to provide one. It simply bears on the costs of benefits and the relative costs of competing insurance to provide them. It is an influence that can affect a plan's shopping decisions, but it does not affect the fact that any plan will shop for the best deal it can get, surcharges or no surcharges.

There is, indeed, nothing remarkable about surcharges on hospital bills, or their effects on overall cost to the plans and the relative attractiveness of certain insurers. Rate variations among hospital providers are accepted examples of cost variation, since hospitals have traditionally "attempted to compensate for their financial shortfalls by adjusting their price . . . schedules for patients with commercial health insurance." Thorpe, 12 J. Health Politics, Policy, & Law, at 394. Charge differentials for commercial insurers, even prior to state regulation, "varied dramatically across regions, ranging from 13 to 36 percent," presumably reflecting the geographically disparate burdens of providing for the uninsured. *Id.*, at 400; see *id.*, at 398–399; see also, *e. g.*, Trussell 170 (J. A. CA2, at 664); Bobinski, Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured, 24 U. C. D. L. Rev. 255, 267, and n. 44 (1990).

If the common character of rate differentials even in the absence of state action renders it unlikely that ERISA preemption was meant to bar such indirect economic influences under state law, the existence of other common state action with indirect economic effects on a plan's costs leaves the intent to pre-empt even less likely. Quality standards, for example, set by the State in one subject area of hospital services but not another would affect the relative cost of providing those services over others and, so, of providing different packages of health insurance benefits. Even basic regulation of employment conditions will invariably affect the cost and price of services.

Quality control and workplace regulation, to be sure, are presumably less likely to affect premium differentials among competing insurers, but that does not change the fact that such state regulation will indirectly affect what an ERISA or other plan can afford or get for its money. Thus, in the absence of a more exact guide to intended pre-emption than § 514, it is fair to conclude that mandates for rate differentials would not be pre-empted unless other regulation with indirect effects on plan costs would be superseded as well. The bigger the package of regulation with indirect effects that would fall on the respondents' reading of § 514, the less likely it is that federal regulation of benefit plans was intended to eliminate state regulation of health care costs.

Indeed, to read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans that purchase insurance policies or HMO memberships that would cover such services would effectively read the limiting language in § 514(a) out of the statute, a conclusion that would violate basic principles of statutory interpretation and could not be squared with our prior pronouncement that "[p]re-emption does not occur . . . if the state law has only a tenuous, remote, or peripheral connection with covered plans, as is the case with many laws of general applicability." *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U. S., at 130, n. 1 (internal quotation marks and citations omitted). While Congress's extension of pre-emption to all "state laws relating to benefit plans" was meant to sweep more broadly than "state laws dealing with the subject matters covered by ERISA[,] reporting, disclosure, fiduciary responsibility, and the like," *Shaw*, 463 U. S., at 98, and n. 19, nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern, see *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S., at 719; 1 B. Furrow, T. Greaney,

S. Johnson, T. Jost, & R. Schwartz, Health Law §§ 1–6, 1–23 (1995).

In sum, cost uniformity was almost certainly not an object of pre-emption, just as laws with only an indirect economic effect on the relative costs of various health insurance packages in a given State are a far cry from those "conflicting directives" from which Congress meant to insulate ERISA plans. See 498 U. S., at 142. Such state laws leave plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money. We therefore conclude that such state laws do not bear the requisite "connection with" ERISA plans to trigger pre-emption.

C

This conclusion is confirmed by our decision in *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825 (1988), which held that ERISA pre-emption falls short of barring application of a general state garnishment statute to participants' benefits in the hands of an ERISA welfare benefit plan. We took no issue with the argument of the *Mackey* plan's trustees that garnishment would impose administrative costs and burdens upon benefit plans, *id.*, at 831, but concluded from the text and structure of ERISA's pre-emption and enforcement provisions that "Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits." *Id.*, at 831–832. If a law authorizing an indirect source of administrative cost is not pre-empted, it should follow that a law operating as an indirect source of merely economic influence on administrative decisions, as here, should not suffice to trigger pre-emption either.

The commercial challengers counter by invoking the earlier case of *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), which considered whether a State could mandate coverage of specified minimum mental-health-care

benefits by policies insuring against hospital and surgical expenses. Because the regulated policies included those bought by employee welfare benefit plans, we recognized that the law "directly affected" such plans. *Id.*, at 732. Although we went on to hold that the law was ultimately saved from pre-emption by the insurance saving clause, § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), respondents proffer the first steps in our decision as support for their argument that all laws affecting ERISA plans through their impact on insurance policies "relate to" such plans and are pre-empted unless expressly saved by the statute. The challengers take *Metropolitan Life* too far, however.

The Massachusetts statute applied not only to "'[a]ny blanket or general policy of insurance . . . or any policy of accident and sickness insurance'" but also to "'any employees' health and welfare fund which provide[d] hospital expense and surgical expense benefits.'" 471 U. S., at 730, n. 11. In fact, the State did not even try to defend its law as unrelated to employee benefit plans for the purpose of § 514(a). *Id.*, at 739. As a result, there was no reason to distinguish with any precision between the effects on insurers that are sufficiently connected with employee benefit plans to "relate to" the plans and those effects that are not. It was enough to address the distinction bluntly, saying on the one hand that laws like the one in *Metropolitan Life* relate to plans since they "bea[r] indirectly but substantially on all insured benefit plans, . . . requir[ing] them to purchase the mental-health benefits specified in the statute when they purchase a certain kind of common insurance policy," *ibid.*, but saying on the other that "laws that regulate only the insurer, or the way in which it may sell insurance, do not 'relate to' benefit plans," *id.*, at 741. Even this basic distinction recognizes that not all regulations that would influence the cost of insurance would relate to employee benefit plans within the meaning of § 514(a). If, for example, a State were to regulate sales of insurance by commercial insurers more stringently

than sales by insurers not for profit, the relative cost of commercial insurance would rise; we would nonetheless say, following *Metropolitan Life*, that such laws "do not 'relate to' benefit plans in the first instance." *Ibid.* And on the same authority we would say the same about the basic tax exemption enjoyed by nonprofit insurers like the Blues since the days long before ERISA, see Marmor, New York's Blue Cross and Blue Shield, 1934–1990: The Complicated Politics of Nonprofit Regulation, 16 J. Health Politics, Policy, & Law 761, 769 (1991) (tracing New York Blue Cross's special tax treatment as a prepayment organization back to 1934); 1934 N. Y. Laws, ch. 595; and yet on respondents' theory the exemption would necessarily be pre-empted as affecting insurance prices and plan costs.

In any event, *Metropolitan Life* cannot carry the weight the commercial insurers would place on it. The New York surcharges do not impose the kind of substantive coverage requirement binding plan administrators that was at issue in *Metropolitan Life*. Although even in the absence of mandated coverage there might be a point at which an exorbitant tax leaving consumers with a Hobson's choice would be treated as imposing a substantive mandate, no showing has been made here that the surcharges are so prohibitive as to force all health insurance consumers to contract with the Blues. As they currently stand, the surcharges do not require plans to deal with only one insurer, or to insure against an entire category of illnesses they might otherwise choose to leave without coverage.

D

It remains only to speak further on a point already raised, that any conclusion other than the one we draw would bar any state regulation of hospital costs. The basic DRG system (even without any surcharge), like any other interference with the hospital services market, would fall on a theory that all laws with indirect economic effects on ERISA

plans are pre-empted under § 514(a). This would be an unsettling result and all the more startling because several States, including New York, regulated hospital charges to one degree or another at the time ERISA was passed, see, *e. g.*, Cal. Ins. Code Ann. § 11505 (West 1972) (nonprofit hospitals); Colo. Rev. Stat. §§ 10–16–130, 10–17–108(2) to 108(3), 10–17–119(b) (1973); Conn. Gen. Stat. §§ 33–166, 33–172 (medical service corporations), § 33–179k (health care centers) (1975); Md. Ann. Code, Art. 43, §§ 568H, 568U, 568W (Michie Supp. 1976); Mass. Gen. Laws Ann., ch. 176A, §§ 5, 6 (West 1958), as amended by 1968 Mass. Acts, ch. 432, § 2, and 1969 Mass. Acts, ch. 874, § 1 (hospital service corporations), Mass. Gen. Laws Ann., ch. 176B, § 4 (West 1958 and Supp. 1987) (medical service corporations); Health Maintenance Organization Act, 1973 N. J. Laws, ch. 337, § 8, N. J. Stat. Ann. § 26:2J–8(b) (West Supp. 1986); N. Y. Pub. Health Law § 2807 (McKinney 1971); 1973 Wash. Laws, ch. 5, § 15, Rev. Code Wash. Ann. § 70.39.140 (West 1975). And yet there is not so much as a hint in ERISA's legislative history or anywhere else that Congress intended to squelch these state efforts.

Even more revealing is the National Health Planning and Resources Development Act of 1974 (NHPRDA), Pub. L. 93–641, 88 Stat. 2225, §§ 1–3, repealed by Pub. L. 99–660, title VII, § 701(a), 100 Stat. 3799, which was adopted by the same Congress that passed ERISA, and only months later. The NHPRDA sought to encourage and help fund state responses to growing health care costs and the widely diverging availability of health services. § 2, 88 Stat. 2226–2227; see generally *National Gerimedical Hospital and Gerontology Center* v. *Blue Cross of Kansas City*, 452 U. S. 378, 383–388 (1981). It provided for the organization and partial funding of regional "health systems agencies" responsible for gathering data as well as for planning and developing health resources in designated health service areas. 88 Stat. 2229–2242. The scheme called for designating state health planning and

development agencies in qualifying States to coordinate development of health services policy. *Id.*, at 2242–2244. These state agencies, too, would be eligible for federal funding, *id.*, at 2249, including grants "[f]or the purpose of demonstrating the effectiveness of State Agencies regulating rates for the provision of health care . . . within the State." *Ibid.* Exemption from ERISA pre-emption is nowhere mentioned as a prerequisite to the receipt of such funding; indeed, the only legal prerequisite to be eligible for rate regulation grants was "satisfactory evidence that the State Agency has under State law the authority to carry out rate regulation functions in accordance with this section . . . ." *Ibid.*

The Secretary was required to provide technical assistance to the designated agencies by promulgating "[a] uniform system for calculating rates to be charged to health insurers and other health institutions payors by health service institutions." *Id.*, at 2254. Although the NHPRDA placed substantive restrictions on the system the Secretary could establish, the subject matter (and therefore the scope of envisioned state regulation) covers the same ground that New York's surcharges tread. The Secretary's system was supposed to:

> "(A) [b]e based on an all-inclusive rate for various categories of patients . . . [,]
>
> "(B) [p]rovide that such rates reflect the true cost of providing services to each such category of patients . . . [,]
>
> "(C) [p]rovide for an appropriate application of such system in the different types of institutions . . . [, and]
>
> "(D) [p]rovide that differences in rates to various classes of purchasers (including health insurers, direct service payors, and other health institution payors) be based on justified and documented differences in the costs of operation of health service institutions made

possible by the actions of such purchasers." *Id.*, at 2254–2255.

The last-quoted subsection seems to envision a system very much like the one New York put in place, but the significant point in any event is that the statute's provision for comprehensive aid to state health care rate regulation is simply incompatible with pre-emption of the same by ERISA. To interpret ERISA's pre-emption provision as broadly as respondents suggest would have rendered the entire NHPRDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the NHPRDA. Given that the NHPRDA was enacted after ERISA and by the same Congress, it just makes good sense to reject such an interpretation.[6]

[6] The history of Medicare regulation makes the same point, confirming that Congress never envisioned ERISA pre-emption as blocking state health care cost control, but rather meant to encourage and rely on state experimentation like New York's. See generally K. Davis, G. Anderson, D. Rowland, & E. Steinberg, Health Care Cost Containment 23–25, 81, 99 (1990). Since the time DRG systems were tried out in the 1960's and 1970's, Congress has consistently shown its awareness and encouragement of controlled payment alternatives to the federal regulatory scheme. The Social Security Amendments of 1967, Pub. L. 90–248, § 402(a), 81 Stat. 930–931, as amended 42 U. S. C. § 1395b–1, for example, granted the Secretary of Health, Education, and Welfare (now Health and Human Services) the authority to waive Medicare rules to allow for physician and hospital reimbursement according to approved state payment schedules. In the Social Security Amendments of 1972, Pub. L. 92–603, § 222(a)(5), 86 Stat. 1391, Congress specifically called upon the Secretary to report on prospective reimbursement schemes that had been thus favored already or could be in the future. Later on, after the development of all-payor ratesetting schemes like the NYPHRM and New Jersey's Health Care Cost Reduction Act of 1978, 1978 N. J. Laws, ch. 83, Congress's Medicare waiver provisions evolved to the point of explicit reference to a State's commitment to apply its hospital reimbursement control system to a substantial portion of hospitals and inpatient services statewide. See 42 U. S. C. §§ 1395ww(c)(1), (c)(5)(A). Indeed, in its Report on the Social Security Amendments of

III

That said, we do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that with fidelity to the views expressed in our prior opinions on the matter. See, *e. g.*, *Ingersoll-Rand*, 498 U. S., at 139; *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 47–48 (1987); *Shaw*, 463 U. S., at 98. We acknowledge that a state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers, and that such a state law might indeed be pre-empted under § 514. But as we have shown, New York's surcharges do not fall into either category; they affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate.

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

It is so ordered.

1983, the House Committee on Ways and Means recommended that States should not be held to traditional DRG-based reimbursement systems. "State systems provide a laboratory for innovative methods of controlling health care costs, and should, therefore, not be limited to one methodology." H. R. Rep. No. 98–25, pt. 1, pp. 146–147 (1983). The Committee concluded that "State systems covering all payors have proven effective in reducing health costs and should be encouraged. Such State programs may be useful models for our national system." *Id.*, at 147–148. While the history of Medicare waivers and implementing legislation enacted after ERISA itself is, of course, not conclusive proof of the congressional intent behind ERISA, the fact that Congress envisioned state experiments with comprehensive hospital reimbursement regulation supports our conclusion that ERISA was not meant to pre-empt basic rate regulation.

Syllabus

UNITED STATES *v.* ROBERTSON

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

No. 94–251. Argued February 27, 1995—Decided May 1, 1995

Respondent Robertson's investment in his Alaska gold mine of the proceeds from his unlawful narcotics activities prompted a federal indictment for violating the Racketeer Influenced and Corrupt Organizations Act (RICO), which makes it a crime for any person to use or invest any income derived from a pattern of racketeering activity in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate . . . commerce," 18 U. S. C. § 1962(a). Robertson was convicted on this charge, but the Court of Appeals reversed, concluding that the Government had failed to introduce sufficient evidence that the gold mine (the RICO "enterprise") was "engaged in or affect[ed] interstate commerce."

Held: Robertson's gold mine comes within § 1962(a)'s jurisdictional reach. At trial, the Government proved, *inter alia,* that Robertson purchased equipment and supplies in California and transported them to Alaska for use in the mine, brought workers from outside Alaska to work in the mine, and transported 15% of the mine's output out of Alaska. These activities assuredly brought the mine within § 1962(a)'s criterion of "an enterprise . . . engaged in . . . interstate . . . commerce." See, *e. g.*, *United States* v. *American Building Maintenance Industries,* 422 U. S. 271, 283. Because the proof thus focused on *inter*state activities rather than *intra*state activities having interstate effects, this Court need not decide whether the activities substantially affected interstate commerce under, *e. g., Wickard* v. *Filburn,* 317 U. S. 111, 127–128.

15 F. 3d 862, reversed.

Miguel A. Estrada argued the cause for the United States. With him on the briefs were *Solicitor General Days, Assistant Attorney General Harris,* and *Michael R. Dreeben,* Acting Deputy Solicitor General.

Glenn Stewart Warren, by appointment of the Court, 513 U. S. 985, argued the cause and filed a brief for respondent.*

**Jon May* and *Ephraim Margolin* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

PER CURIAM.

Respondent, Juan Paul Robertson, was charged with various narcotics offenses, and with violating § 1962(a) of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.* (1988 ed. and Supp. V), by investing the proceeds of those unlawful activities in the "acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." § 1962(a). He was convicted on some of the narcotics counts, and on the RICO count by reason of his investment in a certain gold mine. The United States Court of Appeals for the Ninth Circuit reversed the RICO conviction on the ground that the Government had failed to introduce sufficient evidence proving that the gold mine was "engaged in or affect[ed] interstate commerce." 15 F. 3d 862, 868 (1994). We granted the United States' petition for certiorari. 513 U. S. 945 (1994).

The facts relevant to the "engaged in or affecting interstate commerce" issue were as follows: Some time in 1985, Robertson entered into a partnership agreement with another man, whereby he agreed to finance a gold mining operation in Alaska. In fulfillment of this obligation, Robertson, who resided in Arizona, made a cash payment of $125,000 for placer gold mining claims near Fairbanks. He paid approximately $100,000 (in cash) for mining equipment and supplies, some of which were purchased in Los Angeles and transported to Alaska for use in the mine. Robertson also hired and paid the expenses for seven out-of-state employees to travel to Alaska to work in the mine. The partnership dissolved during the first mining season, but Robertson continued to operate the mine through 1987 as a sole proprietorship. He again hired a number of employees from outside Alaska to work in the mine. During its operating life, the mine produced between $200,000 and $290,000 worth of gold, most of which was sold to refiners within Alaska, although

Robertson personally transported approximately $30,000 worth of gold out of the State.

Most of the parties' arguments, here and in the Ninth Circuit, were addressed to the question whether the activities of the gold mine "affected" interstate commerce. We have concluded we do not have to consider that point. The "affecting commerce" test was developed in our jurisprudence to define the extent of Congress' power over purely *intra*state commercial activities that nonetheless have substantial *inter*state effects. See, *e. g.*, *Wickard* v. *Filburn*, 317 U. S. 111 (1942). The proof at Robertson's trial, however, focused largely on the *inter*state activities of Robertson's mine. For example, the Government proved that Robertson purchased at least $100,000 worth of equipment and supplies for use in the mine. Contrary to the Court of Appeals' suggestion, all of those items were not purchased locally ("drawn generally from the stream of interstate commerce," 15 F. 3d, at 869 (internal quotation marks omitted)); the Government proved that some of them were purchased in California and transported to Alaska for use in the mine's operations. Cf. *United States* v. *American Building Maintenance Industries*, 422 U. S. 271, 285 (1975) (allegation that company had made *local* purchases of equipment and supplies that were merely *manufactured* out of state was insufficient to show that company was "engaged in commerce" within the meaning of § 7 of the Clayton Act). The Government also proved that, on more than one occasion, Robertson sought workers from out of state and brought them to Alaska to work in the mine. Cf. *id.*, at 274. Furthermore, Robertson, the mine's sole proprietor, took $30,000 worth of gold, or 15% of the mine's total output, with him out of the State.

Whether or not these activities met (and whether or not, to bring the gold mine within the "affecting commerce" provision of RICO, they would *have* to meet) the requirement of substantially affecting interstate commerce, they assuredly

brought the gold mine within § 1962(a)'s alternative criterion of "any enterprise . . . engaged in . . . interstate or foreign commerce." As we said in *American Building Maintenance*, a corporation is generally "engaged 'in commerce'" when it is itself "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce." *Id.*, at 283. See also *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 195 (1974).

The judgment of the Court of Appeals is

Reversed.

Syllabus

KANSAS *v.* COLORADO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 105, Orig. Argued March 21, 1995—Decided May 15, 1995

Kansas and Colorado negotiated the Arkansas River Compact to settle disputes and remove causes of future controversies over the river's waters and to equitably divide and apportion those waters and the benefits arising from the United States' construction, operation, and maintenance of John Martin Reservoir. Under Article IV–D, the Compact is not intended to impede or prevent future beneficial development—including construction of dams and reservoirs and the prolonged or improved functioning of existing works—provided that such development does not "materially deplet[e]" stateline flows "in usable quantity or availability for use." In this action, the Special Master recommended that the Court, among other things, find that post-Compact well pumping in Colorado has resulted in a violation of Article IV–D of the Compact; find that Kansas has failed to prove that the operation of Colorado's Winter Water Storage Program (WWSP) violates the Compact; and dismiss Kansas' claim that Colorado's failure to abide by the Trinidad Reservoir Operating Principles (Operating Principles) violates the Compact. Both Kansas and Colorado have filed exceptions.

Held: The exceptions are overruled. Pp. 681–694.

(a) Article IV–D permits development of projects so long as their operation does not result in a material depletion of usable flow to Kansas users. Kansas' exception to the dismissal of its Trinidad Reservoir claim fails because Kansas has not established that Colorado's failure to obey the Operating Principles resulted in such a violation. Pp. 681–683.

(b) Because Kansas failed to meet its burden of proving its WWSP claim despite being given every reasonable opportunity to do so by the Special Master, there is no support for its exception to the Special Master's conclusion on that claim. P. 684.

(c) In selecting what method should be used to determine depletions of "usable" flow, the Special Master properly rejected the Spronk method—which Kansas' exception proposes is correct—as less compatible with Kansas' hydrological model than the method ultimately adopted by the Special Master. Pp. 684–687.

(d) In ruling on Colorado's exception to the Special Master's conclusion that laches does not bar Kansas' well-pumping claim, it is not necessary to decide whether the laches doctrine applies to a case involving

the enforcement of an interstate compact because Colorado has failed to prove that Kansas lacked due diligence in bringing its claim. Colorado errs in arguing that Kansas officials had sufficient evidence about increased well pumping in Colorado to determine that a Compact violation existed in 1956. The evidence available through 1985 was vague and conflicting. Pp. 687–689.

(e) This Court disagrees with both the legal and factual claims Colorado raises in its exception to the Special Master's finding that the Compact limits annual pumping by pre-Compact wells to 15,000 acre-feet, the highest amount actually pumped in those years. Kansas' failure to object to the replacement of pumps or increased pumping by pre-Compact wells does not support Colorado's legal argument that the limit should be the maximum amount of pumping possible using wells existing prior to the Compact. Regardless of the parties' subsequent practice, such improvements to and increased pumping by existing wells clearly fall within Article IV–D's prohibition. In making the factual determination that 15,000 acre-feet per year is the appropriate limit, the Special Master properly relied on reports by the United States Geological Survey and the Colorado Legislature, reports that have since been used by the Colorado State Engineer. Pp. 689–691.

(f) The Court agrees with the Special Master's conclusion that the 1980 Operating Plan for the John Martin Reservoir (Plan) was separately bargained for and thus there is no evidence to support the claim raised in Colorado's exception that the benefits to Kansas from the Plan were in settlement of its well claims. The Plan does not state that post-Compact well pumping in Colorado or Kansas was a cause of changes in the river's regime, and it expressly reserves the parties' rights under the Compact. Pp. 691–693.

(g) The Special Master concluded that, regardless whether the burden of proof applied to Kansas' well-pumping claim is clear and convincing evidence or preponderance of the evidence, the post-Compact well pumping in Colorado had caused material depletions of usable river flows in violation of the Compact. Thus, this Court need not resolve the issue raised by Colorado's exception: that clear and convincing evidence is the correct standard. Pp. 693–694.

Exceptions overruled, and case remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

John B. Draper, Special Assistant Attorney General of Kansas, argued the cause for plaintiff. With him on the briefs were *Robert T. Stephan*, Attorney General, *John W.*

Campbell, Deputy Attorney General, and *Leland E. Rolfs* and *Mary Ann Heckman*, Assistant Attorneys General.

David W. Robbins, Special Assistant Attorney General of Colorado, argued the cause for defendant. With him on the briefs were *Gale Norton*, Attorney General, *Stephen K. Erkenbrack*, Chief Deputy Attorney General, *Timothy M. Tymkovich*, Solicitor General, and *Dennis M. Montgomery*, Special Assistant Attorney General.

Jeffrey P. Minear argued the cause for the United States. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, and *Patricia L. Weiss*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This original action involves a dispute between Kansas, Colorado, and the United States over alleged violations of the Arkansas River Compact. The Special Master has filed a report (Report) detailing his findings and recommendations concerning the liability phase of the trial. Both Kansas and Colorado have filed exceptions to those findings and recommendations. We agree with the Special Master's disposition of the liability issues. Accordingly, we overrule the parties' exceptions.

I

The Continental Divide in the United States begins at the Canadian border in the mountains of northwestern Montana. From there, it angles southeast through Montana and Wyoming until it enters Colorado. It then runs roughly due south through Colorado, following first the crest of the Front Range of the Rocky Mountains, and then shifting slightly west to follow the crest of the Sawatch Range. The Arkansas River rises on the east side of the Continental Divide,

**Joseph B. Meyer*, Attorney General of Wyoming, *Donald M. Gerstein*, Assistant Attorney General, and *Dennis C. Cook*, Special Assistant Attorney General, filed a brief for the State of Wyoming as *amicus curiae*.

between Climax and Leadville, Colorado. Thence it flows south and east through Colorado, Kansas, Oklahoma, and Arkansas, emptying into the Mississippi River, which in turn flows into the Gulf of Mexico. As if to prove that the ridge that separates them is indeed the Continental Divide, a short distance away from the source of the Arkansas, the Colorado River rises and thence flows southwest through Colorado, Utah, and Arizona, and finally empties into the Gulf of Baja, California.

The Arkansas River flows at a steep gradient from its source south to Canon City, Colorado, whence it turns east and enters the Royal Gorge. As it flows through the Royal Gorge, the Arkansas River is at some points half a mile below the summit of the bordering cliffs. The Arkansas River thence descends gradually through the high plains of eastern Colorado and western Kansas; its elevation at the Colorado-Kansas border is 3,350 feet. It then makes its great bend northward through Kansas, and from there flows southeasterly through northeastern Oklahoma and across Arkansas. The Arkansas River covers about 1,450 miles from its source in the Colorado Rockies to the point in southeastern Arkansas where it flows into the Mississippi River. It is the fourth longest river in the United States, and it drains in an area of 185,000 square miles.

The first Europeans to see the Arkansas River were members of the expedition of Francisco Coronado, in the course of their search for the fabled Seven Golden Cities of Cibola. In 1541, they crossed the Arkansas River near what is now the Colorado-Kansas border. One year later, those in the expedition of Hernando DeSoto would see the Arkansas River 1,000 miles downstream at its mouth. The western borders of the Louisiana Purchase, acquired from France in 1803, included within them most, if not all, of the Arkansas River drainage basin. Zebulon Pike, in his expedition of 1805–1806, in the course of which he sighted the mountain peak named after him, traveled up the Arkansas River.

John C. Fremont traversed the river in the other direction in his expedition of 1843–1844.

Today, as a result of the Kerr McClellan Project, the Arkansas River is navigable for oceangoing vessels all the way from its mouth to Tulsa, Oklahoma. The Arkansas River is unique in that the pronunciation of its name changes from State to State. In Colorado, Oklahoma, and Arkansas, it is pronounced as is the name of the State of Arkansas, but in Kansas, it is pronounced Ar-KAN-sas.

The reach of the Arkansas River system at issue here is a fertile agricultural region that extends from Pueblo, Colorado, to Garden City, Kansas. This region has been developed in Colorado by 23 major canal companies and in Kansas by 6 canal companies, which divert the surface flows of the Arkansas River and distribute them to individual farmers. Report 35–38. Also relevant to this dispute, the United States has constructed three large water storage projects in the Arkansas River basin. *Id.*, at 43–48. The John Martin Reservoir, located on the Arkansas River about 60 miles west of the Kansas border, was authorized by Congress in 1936, 49 Stat. 1570, and was completed in 1948. It is the largest of the federal reservoirs, and initially it had a storage capacity of about 700,000 acre-feet.[1] Report 45. The Pueblo Reservoir, located on the Arkansas River about 150 miles west of the Kansas border, was authorized by Congress in 1962, and was substantially completed in 1975. *Id.*, at 44. In 1977, the storage capacity of the Pueblo Reservoir was estimated to be about 357,000 acre-feet. *Ibid.* Finally, the Trinidad Reservoir, located on the Purgatoire River (a major tributary of the Arkansas River) was approved by Congress in 1958, and was completed in 1977. *Id.*, at 43. The total capacity of the Trinidad Reservoir is about 114,000 acre-feet. *Ibid.*

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[1] An acre-foot is equivalent to 325,900 gallons of water; it represents the volume of water necessary to cover one acre of land with one foot of water. Report xvii.

Twice before in this century, the States of Kansas and Colorado have litigated in this Court regarding their respective rights to the waters of the Arkansas River. See *Kansas* v. *Colorado*, 206 U. S. 46 (1907); *Colorado* v. *Kansas*, 320 U. S. 383 (1943). In the first suit, the Court denied Kansas' request to enjoin diversions of the Arkansas River by Colorado because the depletions alleged by Kansas were insufficient to warrant injunctive relief. *Kansas* v. *Colorado*, *supra*, at 114–117. In the second suit, Colorado sought to enjoin lower court litigation brought against Colorado water users, while Kansas sought an equitable apportionment of the Arkansas River. *Colorado* v. *Kansas*, *supra*, at 388–389. The Court granted Colorado an injunction, but concluded that Kansas was not entitled to an equitable apportionment. 320 U. S., at 400. The Court suggested that the States resolve their differences by negotiation and agreement, pursuant to the Compact Clause of the Constitution. *Id.*, at 392. See U. S. Const., Art. I, § 10, cl. 3.

In 1949, after three years of negotiations, Kansas and Colorado approved, and Congress ratified, the Arkansas River Compact (Compact). See 63 Stat. 145; see also Report 5–6; App. to Report 1–17 (reprinting text of Compact). Article VIII of the Compact creates the Arkansas River Compact Administration (Administration) and vests it with the power and responsibility for administering the Compact. *Id.*, at 11–15. The Administration is composed of a nonvoting presiding officer designated by the President of the United States, and three voting representatives from each State. Each State has one vote, and every decision, authorization, or other action by the Administration requires a unanimous vote. *Id.*, at 12–13 (Article VIII–D).

The Compact's primary purposes are to "[s]ettle existing disputes and remove causes of future controversy . . . concerning the waters of the Arkansas River" and to "[e]quitably divide and apportion" the waters of the Arkansas River, "as well as the benefits arising from the construction, opera-

tion and maintenance by the United States of John Martin Reservoir." *Id.*, at 1–2 (Articles I–A, I–B). Article IV–D, the provision of the Compact most relevant to this dispute, states:

> "This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: *Provided*, that the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction." *Id.*, at 5 (emphasis added).

In 1983, Kansas conducted an independent investigation of possible violations of the Compact arising from the impact of increases in post-Compact well pumping in Colorado and the operation of two of the federal reservoirs. Report 9–10. In December 1985, Kansas brought this original action against the State of Colorado to resolve disputes arising under the Compact. *Id.*, at 10. The Court granted Kansas leave to file its complaint, *Kansas* v. *Colorado*, 475 U. S. 1079 (1986), and appointed Judge Wade H. McCree, Jr., to serve as Special Master, *Kansas* v. *Colorado*, 478 U. S. 1018 (1986). Upon Judge McCree's death, the Court appointed Arthur L. Littleworth as Special Master. *Kansas* v. *Colorado*, 484 U. S. 910 (1987).

Kansas advanced three principal claims, each involving an alleged Compact violation. See Report 58. First, Kansas alleged that increases in groundwater well pumping in Colorado in the years following adoption of the Compact have caused a significant decline in the Arkansas River's surface

flow in violation of Article IV–D of the Compact. Second, Kansas claimed that Colorado's Winter Water Storage Program (WWSP)—a program whereby the Bureau of Reclamation of the Department of the Interior (Bureau of Reclamation) and Colorado use excess capacity at the Pueblo Reservoir to store a portion of the winter flow of the Arkansas River—violates the Compact. Third, Kansas claimed that Colorado's failure to abide by the Trinidad Reservoir Operating Principles (Operating Principles) constituted a violation of the Compact. *Ibid.*

The Special Master bifurcated the trial into a liability phase and a remedy phase. At the conclusion of the liability phase, the Special Master filed his Report, outlining his findings and recommendations. In his Report, the Special Master recommended, among other things, that the Court: (1) find that post-Compact well pumping in Colorado has "materially depleted" the "usable" flow at the Colorado-Kansas border (stateline) in violation of Article IV–D of the Compact, Report 336; (2) find that "Kansas has failed to prove that operation of the [WWSP] program has violated the [C]ompact," *ibid.;* and (3) "dismiss the Kansas claim arising from the operation of Trinidad Reservoir," *ibid.*[2]

Both Kansas and Colorado have filed exceptions to the Special Master's Report. Kansas excepts to the Special Master's rejection of its (1) Trinidad Reservoir claim, see *id.*, at 373–433; (2) WWSP claim, see *id.*, at 306–335; and (3) preferred method for determining the usability of depletions of stateline flows, see *id.*, at 291–305. Colorado excepts to the Special Master's determination that: (1) Kansas was not guilty of inexcusable delay in making its post-Compact well-pumping claim and that Colorado was not prejudiced by this

[2] Colorado presented two counterclaims against Kansas. The Special Master recommended that the Court grant Kansas' motions to dismiss those counterclaims. Report 337. Colorado has not filed exceptions to those recommendations. We adopt the Special Master's recommendations on Colorado's counterclaims.

delay, see *id.*, at 147–170; (2) pre-Compact wells in Colorado are limited to pumping the highest amount pumped in the years during which the Compact was negotiated and that the highest amount of such pumping was 15,000 acre-feet per year, see *id.*, at 182–200; (3) increases in usable state line flows resulting from the operating plan for the John Martin Reservoir adopted by the Administration in 1980 (1980 Operating Plan) were "separately bargained for" and, therefore, should not offset depletions caused by post-Compact well pumping in Colorado, see *id.*, at 171–181; and (4) Kansas need only meet the "preponderance of the evidence" standard to prove a breach of Article IV–D of the Compact, see *id.*, at 65–70.

We turn to the parties' exceptions.

II

A

In 1958, Congress authorized construction of the Trinidad Project, a dam and a reservoir system on the Purgatoire River slightly upstream from the city of Trinidad, Colorado. See *id.*, at 382–388. Recognizing that Article IV–D of the Compact prohibited any development of the Arkansas River basin that resulted in a material depletion of usable river flow, the Bureau of Reclamation conducted studies regarding the future operation of the Trinidad Project. *Id.*, at 388–390. The Bureau of Reclamation established Operating Principles whereby the Trinidad Project could be administered "without adverse effect on downstream water users and the inflow to John Martin Reservoir." *Id.*, at 390 (internal quotation marks omitted). The Governor of Kansas reviewed the Bureau of Reclamation's proposed Operating Principles and indicated that if five additional conditions were accepted, then "Kansas would be in a position to approve the amended Operating Principles and to support completion of the project." *Id.*, at 392–393. In June 1967, the

Administration approved the Operating Principles as well as Kansas' five additional conditions. *Id.*, at 395.

In 1979, Colorado began storage of water at the Trinidad Reservoir. *Id.*, at 396. Kansas immediately complained that the Operating Principles were being violated. *Id.*, at 397. In 1988, at the request of the Administration, the Bureau of Reclamation conducted a study of the Trinidad Reservoir. It concluded that two storage practices at the Trinidad Reservoir constituted a "'departure from the intent of the operating principles.'" *Ibid.*

At trial, Kansas argued that the Operating Principles were binding on the State of Colorado and that any departure from them constituted a violation of the Compact "regardless of injury." *Id.*, at 408 (internal quotation marks omitted). Kansas, however, "offered no evidence, apart from the Bureau studies, to show that the actual operation of the Trinidad project caused it to receive less water than under historical, without-project conditions." *Id.*, at 412. Instead, Kansas sought to quantify depletions by "comparing the flows into John Martin Reservoir 'as they would have occurred under the Operating Principles with the flows that occurred under actual operations.'" *Id.*, at 409. The Special Master concluded that in order to prove a violation of the Compact, Kansas was required to demonstrate that "the Trinidad operations caused a material depletion within the meaning of Article IV–D." *Id.*, at 431. The Special Master recommends that we dismiss Kansas' Trinidad claim because "Kansas has not established, and did not attempt to establish, such injury." *Ibid.*

Kansas argues that "[d]eparture from the Operating Principles is *ipso facto* a violation of the Compact, and it [is] entirely sufficient, for purposes of quantifying the effects of the violation, to compare the actual operation with simulated operation as it should have been under the Operating Principles." Kansas' Exceptions to Special Master's Report 12. But, it must be recalled, this is an original action to enforce

the terms of the Compact.[3] Article IV–D provides that the Compact is not intended to prevent future beneficial development of the Arkansas River basin—including dams and reservoirs—provided that the river flow shall not be materially depleted. The Compact thus permits the development of projects such as Pueblo Reservoir so long as their operation does not result in a material depletion of usable flow to Kansas users. For Kansas to prevail in its contention, it would have to show that the Operating Principles had the effect of amending the Compact by granting either party the right to sue the other for violation of the Operating Principles even though the violation resulted in no material depletion of usable flow at stateline. Although the Administration is empowered to "[p]rescribe procedures for the administration of th[e] Compact," App. to Report 11 (Article VIII–B(2)), it must do so "*consistent with the provisions of th[e] Compact*," *ibid.* (Article VIII–B(1)) (emphasis added); see also Report 416 ("[T]he Compact Administration was not delegated power to change the Compact"). The theory advocated by Kansas is inconsistent with Article IV–D, which allows for the development and operation of dams and reservoirs so long as there is no resultant material depletion of usable flows at stateline.

Thus Kansas, in order to establish a Compact violation based upon failure to obey the Operating Principles, was required to demonstrate that this failure resulted in a material depletion under Article IV–D. Kansas "has not established, and did not attempt to establish, such injury." *Id.*, at 431. We overrule Kansas' exception to the Special Master's dismissal of its Trinidad Reservoir claim.

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[3] The Special Master did "not address the possible question of whether Kansas has a claim for violation of the Operating Principles that is independent of the Compact, that is, a cause of action based upon a separate agreement with Colorado, or as a third party beneficiary under the repayment contract, or otherwise." Report 408, n. 6. We express no view as to that question.

B

In 1964, the Bureau of Reclamation and Colorado began planning a program to use excess capacity at Pueblo Reservoir in order to store a portion of the winter-time flow of the Arkansas River for beneficial use at other times. Under the WWSP, winter-time flow—much of which was used previously to flood uncultivated cropland—is instead stored at the Pueblo Reservoir. Kansas contends that the Special Master erred in finding that it had failed to prove that the WWSP had "materially depleted" usable stateline flows. We disagree.

In his Report, the Special Master concluded:

> "Kansas has not proved that the WWSP has caused material Stateline depletions. Kansas' case has not been helped by its own contradictions in quantifying impacts to usable flow—ranging during this trial from 255,000 acre-feet initially, to 44,000 to 40,000; nor by the fact that depletions are essentially eliminated if accretions are taken into account." Report 335.

The Special Master examined the computer models submitted by Kansas and Colorado and determined that "the depletions shown by the Kansas model are well within the model's range of error." *Id.*, at 334–335. As a result, "[o]ne [could not] be sure whether impact or error [was] being shown." *Id.*, at 335.

We believe that the Special Master gave Kansas every reasonable opportunity to meet its burden of proving its WWSP claim. Kansas, however, failed to prove that operation of the WWSP program resulted in material depletions of usable flows in violation of Article IV–D. See *ibid.* Therefore, we overrule Kansas' exception to the Special Master's conclusion that Kansas had failed to prove its WWSP claim.

C

Article IV–D of the Compact permits future development and construction along the Arkansas River Basin provided

that it does not materially deplete stateline flows "in *usable* quantity or availability." App. to Report 5 (Article IV–D) (emphasis added). In order to establish a violation of Article IV–D, Kansas was required to establish that development in Colorado resulted in material depletions of "usable" river flow. The Compact does not define the term "usable." Cf. *Colorado* v. *Kansas*, 320 U. S., at 396–397 ("The critical matter is the amount of divertible flow at times when water is most needed for irrigation. Calculations of average annual flow, which include flood flows, are, therefore, not helpful in ascertaining the dependable supply of water usable for irrigation"). At trial, Kansas presented three methods for determining depletions of "usable" flow.

Kansas' first expert, Timothy J. Durbin, analyzed flow data for the period between 1951 and 1985 by plotting actual river diversions in Kansas against actual stateline flows. Report 293–294. Using these data, Durbin developed criteria to determine what river flows were usable. Durbin concluded that during the summer months, April through October, (1) 78% of the stateline flows were diverted; (2) flows greater than 40,000 acre-feet per month were not usable; and (3) flows greater than 140,000 acre-feet for the whole period were not usable. *Id.*, at 293. With respect to the winter months, November through March, Durbin concluded that (1) 24% of the winter flow was diverted; (2) flows greater than 7,500 acre-feet per month were not usable; and (3) flows greater than 40,000 acre-feet for the whole period were not usable. *Id.*, at 293–294.

After Colorado isolated errors in Durbin's analysis, Kansas presented a replacement case. Kansas' second group of experts, led by Stephen P. Larson, adopted the same methodology but revised certain exhibits and made minor corrections in data. As a result, Larson modified Durbin's coefficients, using 72% for the summer months and 25% for the winter months. *Id.*, at 295.

Later, well after trial had begun, Kansas enlisted the aid of Brent Spronk, who proposed yet another method to quantify depletions of "usable" stateline flow. *Id.*, at 300–305. Spronk attempted to determine the "percentage of days in each month when flows were being fully used in Kansas." *Id.*, at 301. Instead of seasonal averages, the Spronk approach yielded coefficients that varied from month to month. Spronk then multiplied these monthly coefficients by the estimated depletions in flow predicted by Kansas' hydrological model. *Id.*, at 301–302.

The Special Master concluded that "the Durbin approach, using Larson's coefficients, is the best of the several methods presented for determining usable flow" and that it provided "a reasonable way in which to determine depletions of usable flow." *Id.*, at 305. We agree. Each of the three methods that Kansas proposed for calculating usable depletions required two steps: (1) a calculation of total depletions using the Kansas hydrological model, and (2) an application of "usability" criteria. See Brief for United States in Response to Exeptions of Kansas and Colorado 30. Each of the three methods proposed by Kansas was dependent on the Kansas hydrological model to estimate total depletions. The Spronk method required the Kansas hydrological model to predict accurately depletions for each and every month. Report 303. But as Durbin, Kansas' first expert, testified, Kansas' hydrological model was only a "'good predictor' when 'looking at long periods of time.'" *Id.*, at 303, n. 130 (quoting Durbin's testimony). Thus, the Spronk method required the Kansas hydrological model to do something it was not designed to do, *i. e.*, predict accurately depletions on a monthly basis. *Id.*, at 303 ("The Spronk analysis assumes that the H–I model can accurately predict changes of Stateline flow on a monthly basis"). Because the Spronk method for determining "usable" river flows was less compatible with Kansas' hydrological model than the other methods proposed, we conclude that the Special Master properly rejected

the Spronk method in favor of the Durbin approach, as modified by the Larson coefficients.

III

A

The Special Master concluded that Kansas was not guilty of inexcusable delay in making its well-pumping claim, and that Colorado had not been prejudiced by Kansas' failure to press its claim earlier. *Id.*, at 170. Colorado has excepted to this determination. Colorado argues that the equitable doctrine of laches should bar Kansas' claim for relief. See Colorado's Exceptions to Special Master's Report (Colorado's Exceptions) 24–64. We overrule Colorado's exception.

The defense of laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello* v. *United States*, 365 U. S. 265, 282 (1961); see also Black's Law Dictionary 875 (6th ed. 1990) ("'Doctrine of laches,' is based upon maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances causing prejudice to the adverse party, operates as bar in court of equity"). This Court has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact. Cf. *Illinois* v. *Kentucky*, 500 U. S. 380, 388 (1991) (in the context of an interstate boundary dispute, "the laches defense is generally inapplicable against a State"); *Block* v. *North Dakota ex rel. Board of Univ. and School Lands*, 461 U. S. 273, 294 (1983) (O'Connor, J., dissenting) ("The common law has long accepted the principle '*nullum tempus occurrit regi*'—neither laches nor statutes of limitations will bar the sovereign"); *Colorado* v. *Kansas*, *supra*, at 394 (In the context of a suit seeking an equitable apportionment of river flows, facts demonstrating a delay in filing a complaint "might well preclude the award of the relief [requested]. But, in any event, they

gravely add to the burden [the plaintiff] would otherwise bear"). We need not, however, foreclose the applicability of laches in such cases, because we conclude that Colorado has failed to prove an element necessary to the recognition of that defense. See *Costello, supra*, at 282.

Colorado argues that Kansas knew or should have known by 1956, or at the latest, before 1968, that both the number of post-Compact wells and the amount of post-Compact pumping in Colorado had increased substantially. Colorado's Exceptions 37, 39. Colorado argues that by 1956 Kansas had sufficient information about increased well pumping in Colorado and its potential impact on usable stateline flows to call for an investigation to determine if a Compact violation existed. *Id.*, at 46.

The Special Master concluded that prior to 1984, Kansas had made no formal complaint to the Administration regarding post-Compact well pumping in Colorado. Report 155–156. Nevertheless, the Special Master concluded that Colorado's evidence did not "deal with the issue of impact on usable flow at the Stateline," *id.*, at 161, and did "not demonstrate that [the Kansas officials] were aware of the number of wells, the extent of Colorado's pumping, or the impact or even potential impact of pumping on usable Stateline flows," *id.*, at 164. The Special Master explained the difficulty of assessing the impact of increases in post-Compact well pumping on usable stateline flows because of changing conditions during the 1970's and early 1980's:

> "The 1970s were generally dry years and some reduction in flow was to have been expected. Pueblo Dam came on line in 1976 and began to reregulate native flows. Transmountain imports increased, which to some extent provided an offset to pumping. The 1980 Operating Plan was placed into effect, which Colorado alleges offset the impacts of increased pumping downstream from John Martin Reservoir. The Winter Water Storage Program was instituted. Moreover, there was no quan-

> titative or specific entitlement against which depletions to usable flow could be judged. Nor were there any agreed upon criteria for establishing what flows were usable." *Id.*, at 162–163.

As late as 1985, Colorado officials refused to permit an investigation by the Administration of well development in Colorado because they claimed that the evidence produced by Kansas did not "'suggest that well development in Colorado has had an impact on usable stateline flows.'" *Id.*, at 163 (quoting memorandum of J. William McDonald, chief of the Colorado delegation to the Administration). In light of the vague and conflicting evidence available to Kansas, we conclude that Colorado has failed to demonstrate lack of diligence, *i. e.*, inexcusable delay, on the part of Kansas.

Accordingly, we overrule Colorado's exception to the Special Master's conclusion that the defense of laches should not bar Kansas' well-pumping claim.

B

The Compact prohibits "*future beneficial development* of the Arkansas River basin" that "materially deplete[s]" the usable flows of the Arkansas River. App. to Report 5 (Article IV–D) (emphasis added). Because some wells in Colorado were in existence prior to the Compact, both parties agree that a certain amount of post-Compact well pumping is allowable under the Compact. Report 182. Kansas and Colorado, however, dispute the extent of this allowance. The Special Master determined that the "highest annual amount shown to have been pumped during the negotiations, namely 15,000 acre-feet, should be allowed under the [C]ompact." *Id.*, at 200. Colorado makes both a legal and a factual challenge to this determination. Colorado's Exceptions 66–73, 73–84.

Colorado argues as a legal matter that the Compact does not limit the pumping by pre-Compact wells to the highest amount actually pumped in pre-Compact years; rather, Colo-

rado claims that the limit on its pre-Compact pumping is the maximum amount that Colorado law permitted or the maximum amount of pumping possible using wells existing prior to the Compact. *Id.*, at 69–70. In support of its position, Colorado argues that the Special Master failed to consider the subsequent practice of the parties, *i. e.*, Kansas' failure to object to replacement of centrifugal pumps with turbine pumps or increased pumping by pre-Compact wells, and that Article VI–A(2) of the Compact supports its position.[4]

We conclude that the clear language of Article IV–D refutes Colorado's legal challenge. Article IV–D permits "future beneficial development of the Arkansas River basin . . . which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, *as well as the improved or prolonged functioning of existing works:* Provided, that the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability . . . ." App. to Report 5 (emphasis added). Regardless of subsequent practice by the parties, improved and increased pumping by existing wells clearly falls within Article IV–D's prohibition against "improved or prolonged functioning of existing works," if such action results in "materia[l] deplet[ions] in usable" river flows. *Ibid.;* see *Texas* v. *New Mexico*, 462 U. S. 554, 564 (1983) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms"). Article VI–A(2) of the Compact, which begins with the phrase, "Except as otherwise provided," App. to

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[4] Article VI–A(2) provides: "*Except as otherwise provided,* nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River." App. to Report 10 (emphasis added).

Report 10, must be read in conjunction with and as limited by Article IV–D. We agree with the Special Master that "new wells, the replacement of centrifugal with turbine pumps, and increased pumping from [pre-Compact] wells all come within [Article IV–D]." Report 194.

Second, Colorado argues as a factual matter that the Special Master unreasonably relied upon faulty reports by the United States Geological Survey (USGS) and the Colorado Legislature to conclude that the greatest amount of annual pre-Compact pumping in Colorado was 15,000 acre-feet. Colorado's Exceptions 73–74. The Special Master concluded:

> "There is no precise answer to the amount of [pre-Compact] pumping. . . . That amount must simply remain as an estimate of water use that affected the general allocation of water between the states when the [C]ompact was being negotiated. Two responsible reports, one published by the USGS and one prepared for the Colorado legislature, reached similar conclusions as to the amounts of Colorado pumping during the 1940s. . . . They have since been used by the Colorado State Engineer. I have relied on these reports and recommend that the highest annual amount shown to have been pumped during the negotiations, namely 15,000 acre-feet, should be allowed under the [C]ompact." Report 199–200.

Although the ultimate responsibility for deciding what are correct findings of fact remains with the Court, *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984), in this instance, we are in full agreement with the Special Master. Accordingly, we overrule Colorado's exception.

C

In April 1980, the Administration adopted a resolution concerning the method for operating John Martin Reservoir (1980 Operating Plan). Report 47. The 1980 Operating

Plan divides the water conserved in John Martin Reservoir into separate accounts. Kansas is allocated 40% of the conservation storage, with the remaining 60% being divided in specified percentages among the nine canal companies in Colorado Water District 67. *Id.*, at 173. The Special Master concluded that the 1980 Operating Plan for the John Martin Reservoir was "separately bargained for" and therefore should not offset depletions caused by post-Compact well pumping in Colorado. *Id.*, at 180–181. Colorado takes exception to this ruling.

Colorado argues that increases in usable stateline flows resulting from the 1980 Operating Plan should offset depletions to usable stateline flows. Colorado's Exceptions 85. Colorado maintains that the Administration adopted the 1980 Operating Plan "for more efficient utilization of water under its control because of changes in the regime of the Arkansas River," *id.*, at 91, "including [post-Compact] well pumping in Colorado and Kansas," *ibid.;* see also App. to Report 107 (Resolution Concerning an Operating Plan for John Martin Reservoir) ("WHEREAS, the Arkansas River Compact Administration . . . recognizes that, because of changes in the regime of the Arkansas River, the present operation of the conservation features of John Martin Reservoir does not result in the most efficient utilization possible of the water under its control"). We disagree.

As Colorado acknowledges, the resolution adopting the 1980 Operating Plan "does not state that [post-Compact] well pumping in Colorado or Kansas was a cause of changes in the regime of the Arkansas River." Colorado's Exceptions 88. In fact, Colorado argues in a separate part of its brief that "Kansas had made no complaint about well pumping in Colorado to the Compact Administration . . . before 1984." *Id.*, at 32. The 1980 Operating Plan expressly reserves the parties' rights under the Compact, stating that "[a]doption of this resolution does not prejudice the ability of Kansas or of any Colorado ditch to object or to otherwise represent its

interest in present or future cases or controversies before the Administration or in a court of competent jurisdiction." App. to Report 116. The Special Master concluded:

> "The 1980 Operating Plan provided benefits to both Kansas and Colorado which were separately bargained for. There is no evidence to support the claim that benefits to Kansas were in settlement of its well claims. Colorado received ample consideration under the agreement for the 1980 plan without a waiver of Kansas' well claims. The benefits received by Kansas under the plan should not be offset against compact violations, and should not be a bar to any of the Kansas claims in this case." Report 180–181.

We agree with the Special Master's resolution of Colorado's claim. Accordingly, we overrule Colorado's exception.

D

Finally, Colorado argues that Kansas is required to prove its well-pumping claim by clear and convincing evidence. Colorado's Exceptions 91. The Special Master, relying upon *Nebraska* v. *Wyoming*, 507 U. S. 584 (1993), concluded that the proper burden of proof for enforcing an interstate compact is the preponderance of the evidence standard. Report 70. The Special Master noted that the *Nebraska* Court had drawn a distinction between actions seeking to "modify" a judicial decree and actions seeking to "enforce" a judicial decree. See *Nebraska*, *supra*, at 592 ("[W]e find merit in [the] contention that, to the extent that Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies"). The Special Master concluded that an action seeking to enforce an interstate compact stood on the same footing as an action enforcing a judicial decree, and therefore was subject to the "preponderance of the evidence" standard. Report 70.

We need not, however, resolve this issue. The Special Master concluded that "regardless of which burden of proof

applies" he had "no difficulty in concluding that [post-Compact] pumping in Colorado ha[d] caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact." *Id.*, at 263. We agree with this determination, and thus overrule Colorado's exception.

IV

For these reasons, we overrule the exceptions filed by the States of Kansas and Colorado. We remand the case to the Special Master for determination of the unresolved issues in a manner not inconsistent with this opinion.

It is so ordered.

Syllabus

HUBBARD *v.* UNITED STATES

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

No. 94–172. Argued February 21, 1995—Decided May 15, 1995

Petitioner's falsehoods in unsworn papers filed in Bankruptcy Court prompted his indictment under 18 U. S. C. § 1001, which criminalizes false statements and similar misconduct occurring "in any matter within the jurisdiction of any department or agency of the United States." He was convicted after the District Court, relying on *United States* v. *Bramblett*, 348 U. S. 503, instructed the jury that a bankruptcy court is a "department of the United States" within § 1001's meaning. In affirming, the Court of Appeals concluded that the so-called "judicial function" exception developed in other Circuits, under which § 1001 reaches false statements made while a court is performing its "administrative" or "housekeeping" functions, but not its adjudicative functions, does not exist.

Held: The judgment is reversed in part.

16 F. 3d 694, reversed in part.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, III, and VI, concluding that, because a federal court is neither a "department" nor an "agency" within § 1001's meaning, the statute does not apply to false statements made in judicial proceedings. Pp. 699–708, 715.

(a) A straightforward interpretation of § 1001's text, with special emphasis on the words "department or agency," leads inexorably to the conclusion that there is no need for any judicial function exception because the statute's reach simply does not extend to courts. Under both a commonsense reading and the terms of 18 U. S. C. § 6—which applies to all of Title 18 and defines "agency" to include, *inter alia*, any federal "department, independent establishment, commission, administration, authority, board or bureau"—it seems incontrovertible that "agency" does not refer to a court. Moreover, although § 6 defines "department" to mean an "executive departmen[t] . . . unless the context shows that such term was intended to describe the . . . legislative . . . or judicial branches," there is nothing in § 1001's text, or in any related legislation, that even suggests—let alone "shows"—that something other than a component of the Executive Branch was intended in this instance. Pp. 699–702.

Syllabus

(b) The *Bramblett* Court erred by giving insufficient weight to the plain language of §§ 6 and 1001 and, instead, broadly interpreting "department" in § 1001 to refer to the Executive, Legislative, and Judicial Branches. Rather than attempting to reconcile its interpretation with the usual meaning of "department," that Court relied on a review of the evolution of § 1001 and a related statute as providing a "context" for the conclusion that "Congress could not have intended to leave frauds such as [Bramblett's] without penalty." 348 U. S., at 509. Although a statute's historical evolution should not be discounted, such an analysis normally provides less guidance to meaning than the final text. Here, a straightforward reading suggests a meaning of "department" that is fully consistent with § 6's presumptive definition. Moreover, the statutory history chronicled in *Bramblett* is at best inconclusive and does not supply a "context" sufficiently clear to warrant departure from that definition. Pp. 702–708.

(c) *Bramblett* is hereby overruled. P. 715.

JUSTICE STEVENS, joined by JUSTICE GINSBURG and JUSTICE BREYER, concluded in Parts IV and V:

1. A review of pertinent lower court decisions demonstrates that the judicial function exception is an obvious attempt to impose limits on *Bramblett*'s expansive reading of § 1001 and that the exception has a substantial and longstanding following. Pp. 708–711.

2. The doctrine of *stare decisis* does not require this Court to accept *Bramblett*'s erroneous interpretation of § 1001. Reconsideration of that case is permitted here (1) because of a highly unusual intervening development of the law—the judicial function exception—which is fairly characterized as a competing legal doctrine that can lay a legitimate claim to respect as a settled body of law, and (2) because of the absence of significant reliance interests in adhering to *Bramblett* on the part of prosecutors and Congress. Pp. 711–715.

JUSTICE SCALIA, joined by JUSTICE KENNEDY, agreed that *United States* v. *Bramblett*, 348 U. S. 503, should be overruled, but concluded that the doctrine of *stare decisis* may be ignored in this case not because the judicial function exception represents an intervening development of the law, but because of the demonstration, over time, that *Bramblett*'s mistaken reading of § 1001 poses a risk that the threat of criminal prosecution under § 1001's capacious provisions will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution. That problem can be judicially avoided (absent overruling) only by limiting *Bramblett* in a manner that is irrational or by importing exceptions, such as the judicial function exception, that have no basis in law. Pp. 716–717.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and VI, in which SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which GINSBURG and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which KENNEDY, J., joined, *post,* p. 716. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR and SOUTER, JJ., joined, *post,* p. 718.

Paul Morris argued the cause for petitioner. With him on the brief was *Andrew Boros.*

Richard P. Bress argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris, Deputy Solicitor General Dreeben,* and *Joel M. Gershowitz.*

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts IV and V.*

In unsworn papers filed in a bankruptcy proceeding, petitioner made three false statements of fact. Each of those misrepresentations provided the basis for a criminal conviction and prison sentence under the federal false statement statute, 18 U. S. C. § 1001. The question we address is whether § 1001 applies to false statements made in judicial proceedings.

I

In 1985, petitioner filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In the course of the proceedings, the trustee filed an amended complaint and a motion to compel petitioner to surrender certain business records. Petitioner opposed the relief sought by the trustee in a pair of unsworn, written responses filed with the Bankruptcy Court. Both of his responses contained falsehoods. Petitioner's answer to the trustee's complaint falsely denied the trustee's allegations that a well-drilling machine and parts for the machine were stored at petition-

*JUSTICE THOMAS joins Parts I, II, III, and VI of this opinion.

er's home and in a nearby warehouse. Petitioner's response to the trustee's discovery motion incorrectly stated that petitioner had already turned over all of the requested records.

When the misrepresentations came to light, petitioner was charged with three counts of making false statements under 18 U. S. C. § 1001.[1] That statute provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Relying on our decision in *United States* v. *Bramblett*, 348 U. S. 503 (1955), the District Court instructed the jury that a bankruptcy court is a "department . . . of the United States" within the meaning of § 1001. The jury convicted petitioner on all three § 1001 counts, and the District Court sentenced him to concurrent terms of 24 months' imprisonment.

On appeal to the Court of Appeals for the Sixth Circuit, petitioner argued that his convictions under § 1001 were barred by the so-called "judicial function" exception. First suggested over 30 years ago in *Morgan* v. *United States*, 309 F. 2d 234 (CADC 1962), cert. denied, 373 U. S. 917 (1963), this doctrine limits the extent to which § 1001 reaches conduct occurring in the federal courts. Under the exception, only those misrepresentations falling within a court's "administrative" or "housekeeping" functions can give rise to liability

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[1] Petitioner was also charged with, and convicted of, bankruptcy fraud and mail fraud under 18 U. S. C. §§ 152 and 1341 (1988 ed. and Supp. V). The validity of those convictions is not before us.

under § 1001; false statements made while a court is performing its adjudicative functions are not covered.

The Court of Appeals affirmed petitioner's convictions under § 1001. Although the judicial function exception has become entrenched over the years in a number of Circuits, the Sixth Circuit concluded, over a dissent, that the exception does not exist. 16 F. 3d 694 (1994). That conclusion created a split in the Circuits, prompting us to grant certiorari.[2] 513 U. S. 959 (1994). We now reverse.

II

Section 1001 criminalizes false statements and similar misconduct occurring "in any matter within the jurisdiction of any department or agency of the United States." In ordinary parlance, federal courts are not described as "departments" or "agencies" of the Government. As noted by the Sixth Circuit, it would be strange indeed to refer to a court as an "agency." See 16 F. 3d, at 698, n. 4 ("[T]he U. S. Court of Appeals [is not] the Appellate Adjudication Agency"). And while we have occasionally spoken of the three branches of our Government, including the Judiciary, as "department[s]," *e. g.*, *Mississippi* v. *Johnson*, 4 Wall. 475, 500 (1867), that locution is not an ordinary one. Far more common is the use of "department" to refer to a component of the Executive Branch.

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[2] The judicial function exception has been recognized in the following cases: *United States* v. *Masterpol*, 940 F. 2d 760, 764–766 (CA2 1991); *United States* v. *Holmes*, 840 F. 2d 246, 248 (CA4), cert. denied, 488 U. S. 831 (1988); *United States* v. *Abrahams*, 604 F. 2d 386, 393 (CA5 1979); *United States* v. *Mayer*, 775 F. 2d 1387, 1390 (CA9 1985) *(per curiam)*; *United States* v. *Wood*, 6 F. 3d 692, 694–695 (CA10 1993). Although the Seventh and District of Columbia Circuits have questioned the basis of the exception, see *United States* v. *Barber*, 881 F. 2d 345, 350 (CA7 1989), cert. denied, 495 U. S. 922 (1990); *United States* v. *Poindexter*, 951 F. 2d 369, 387 (CADC 1991), cert. denied, 506 U. S. 1021 (1992), the Sixth Circuit stands alone in unambiguously rejecting it.

As an initial matter, therefore, one might be tempted to conclude that § 1001 does not apply to falsehoods made during federal-court proceedings. This commonsense reading is bolstered by the statutory definitions of "department" and "agency" set forth at 18 U. S. C. § 6. First adopted in 1948, and applicable to all of Title 18, the definitions create a presumption in favor of the ordinary meaning of the terms at issue:

> "The term 'department' means one of the executive departments enumerated in section 1 [now § 101] of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.
>
> "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

Under § 6, it seems incontrovertible that "agency" does not refer to a court.[3] "Department," on the other hand, might be interpreted under § 6 to describe the Judicial Branch, but only if the "context" of § 1001 "shows" that Congress intended the word to be used in the unusual sense employed in *Mississippi* v. *Johnson.* We believe that § 6 permits such an interpretation only if the context in § 1001 is fairly powerful. "Shows" is a strong word; among its definitions is "[t]o make apparent or clear by evidence, testimony or reasoning; to prove; demonstrate." Webster's New International Dictionary 2324 (2d ed. 1949). Cf. *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council,* 506 U.¥S. 194, 200–201 (1993) (discussing similar provision

[3] We express no opinion as to whether any other entity within the Judicial Branch might be an "agency" within the meaning of § 6.

requiring adherence to presumptive definition unless context "indicate[d]" a different meaning).[4]

In *Rowland*, we explained the proper method of analyzing a statutory term's "context" to determine when a presumptive definition must yield. Such an analysis, we explained, requires a court to examine "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts . . . ." *Id.*, at 199; see also *id.*, at 212–213 (THOMAS, J., dissenting); *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 689–690, n. 53 (1978). Review of other materials is not warranted. "If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context.'" *Rowland*, 506 U. S., at 200.

In the case of § 1001, there is nothing in the text of the statute, or in any related legislation, that even suggests—let alone "shows"—that the normal definition of "department" was not intended. Accordingly, a straightforward interpretation of the text of § 1001, with special emphasis on the words "department or agency," would seem to lead inexorably to the conclusion that there is no need for any judicial function exception because the reach of the statute simply does not extend to courts. Our task, however, is complicated by the fact that the Court interpreted "department" broadly 40 years ago in *Bramblett.* We must, therefore,

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[4] Congress' use of the word "shows" is unsurprising in view of the fact that 18 U. S. C. § 6 provides statutory definitions exclusively for criminal statutes. We have often emphasized the need for clarity in the definition of criminal statutes, to provide "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931). See also *United States* v. *Batchelder*, 442 U. S. 114, 123 (1979); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). Adhering to the statutory definition of a particular term is fully consistent with this objective. Cf. *Rowland*, 506 U. S., at 199 (construing 1 U. S. C. § 1, which is generally applicable to any Act of Congress).

turn our attention to that case before deciding the fate of the judicial function exception.

III

Defendant Bramblett was a former Member of Congress who had falsely represented to the Disbursing Office of the House of Representatives that a particular person was entitled to compensation as his official clerk. He argued that he could not be convicted under § 1001 because his falsehood was directed to an office within the Legislative Branch. 348 U. S., at 504. The Court rejected this argument, concluding that the word "department," as used in § 1001, "was meant to describe the executive, legislative and judicial branches of the Government." *Id.*, at 509. Although *Bramblett* involved Congress, not the courts, the text and reasoning in the Court's opinion amalgamated all three branches of the Government. Thus, *Bramblett* is highly relevant here even though its narrow holding only extended § 1001 to false statements made within the Legislative Branch.

We think *Bramblett* must be acknowledged as a seriously flawed decision. Significantly, the *Bramblett* Court made no attempt to reconcile its interpretation with the usual meaning of "department." It relied instead on a review of the evolution of § 1001 and its statutory cousin, the false claims statute presently codified at 18 U. S. C. § 287, as providing a "context" for the conclusion that "Congress could not have intended to leave frauds such as [Bramblett's] without penalty." 348 U. S., at 509. We are convinced that the Court erred by giving insufficient weight to the plain language of §§ 6 and 1001.[5] Although the historical evolution of a stat-

[5] In addition, it is debatable at best whether the Court was correct in asserting that, but for its expansive interpretation of § 1001, Bramblett's fraud would necessarily have gone unpunished. In discussing the evolution of § 1001, the Court noted that the false claims statute, originally enacted in 1863 and by 1955 codified at 18 U. S. C. § 287, "clearly covers the presentation of false claims against any component of the Government

ute—based on decisions by the entire Congress—should not be discounted for the reasons that may undermine confidence in the significance of excerpts from congressional debates and committee reports,[6] a historical analysis normally provides less guidance to a statute's meaning than its final text. In the ordinary case, absent any "indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it." *BFP* v. *Resolution Trust Corporation*, 511 U. S. 531, 570 (1994) (SOUTER, J., dissenting).

As noted above, a straightforward reading of the statute suggests a meaning of "department" that is fully consistent with the definition set forth in § 6. See *supra*, at 699–702. Similarly unremarkable is the language of the original Act of Congress adopting what is now § 1001. That piece of legislation—the Act of June 18, 1934, 48 Stat. 996 (1934 Act)—

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to any officer of the Government." *United States* v. *Bramblett*, 348 U. S. 503, 505 (1955). In an earlier decision, it had interpreted "claim" in the false claims statute broadly, explaining that the word referred to "a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant." *United States* v. *Cohn*, 270 U. S. 339, 345–346 (1926). Bramblett could thus seemingly have been charged with violating § 287, or at least aiding and abetting in a violation of that statute, since his misrepresentation was intended to procure Government compensation. See Supplemental Memorandum for the United States in *United States* v. *Bramblett*, O. T. 1954, No. 159 (arguing that Bramblett's conviction could be affirmed because his conduct violated all the elements of § 287). In today's decision, we do not disturb the scope of § 287 as construed in either *Cohn* or *Bramblett*.

Bramblett's fraud also was arguably directed at an "agency" within the meaning of § 1001. The Court recognized this contention, noting "it might be argued, as the Government does, that the [Disbursing Office] is an 'authority' within the § 6 definition of 'agency.'" 348 U. S., at 509. The Court refused, however, to rest its decision on that more narrow interpretation. *Ibid.*

[6] See, *e. g.*, *Thompson* v. *Thompson*, 484 U. S. 174, 191–192 (1988) (SCALIA, J., concurring in judgment); but cf. Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845 (1992).

amended what was then § 35 of the Criminal Code to provide, in pertinent part:

> "[W]hoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States* or of any corporation in which the United States of America is a stockholder . . . [shall be punished]." (Emphasis added.)

This language conveys no different message regarding "department" than the current version of § 1001.

What, then, of the earlier statutory history chronicled in *Bramblett?* We believe it is at best inconclusive, and that it does not supply a "context" sufficiently clear to warrant departure from the presumptive definition in 18 U. S. C. § 6.

The earliest statutory progenitor of § 1001 was the original false claims statute, adopted as the Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863 Act). That enactment made it a criminal offense for any person, whether a civilian or a member of the military services, to

> "present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."[7]

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[7] In *Bramblett*, the Court incorrectly stated that the 1863 Act only penalized misconduct by members of the military. In fact, § 3 of the Act established criminal and civil penalties for false claims and other misdeeds

The 1863 Act also proscribed false statements, but the scope of that provision was far narrower than that of modern-day § 1001; the Act prohibited only those false statements made "for the purpose of obtaining, or aiding in obtaining, the approval or payment of [a false] claim." 12 Stat. 696. The Court explained in *Bramblett* that the false claims provision in the 1863 Act "clearly cover[ed] the presentation of false claims against any component of the Government to any officer of the Government," 348 U. S., at 505, and it asserted similar breadth for the false statement portion of the Act, *ibid.*

The false statements provision in the 1863 Act remained essentially unchanged for 55 years.[8] In 1918, Congress amended the statute to provide as follows:

> "[W]hoever, for the purpose of obtaining or aiding to obtain the payment or approval of [a false] claim, *or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry [shall be punished]." Act of Oct. 23,

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committed by "any person not in the military or naval forces of the United States." 12 Stat. 698.

[8] In 1873, the statute was codified and minor changes were made. See Rev. Stat. § 5438. The penalties were changed in the Act of May 30, 1908, 35 Stat. 555, and the statute was recodified as § 35 of the Criminal Code in the Act of Mar. 4, 1909, 35 Stat. 1095.

> 1918, ch. 194, 40 Stat. 1015–1016 (1918 Act) (emphasis added).

The scope of this new provision is unclear. Although it could be read to create criminal liability for government-wide false statements, its principal purpose seems to have been to prohibit false statements made to defraud Government corporations, which flourished during World War I. Cf. *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 386–391 (1995) (tracing history of Government corporations). In one important respect, moreover, the statute remained relatively narrow: It was limited to false statements intended to bilk the Government out of money or property. See *United States* v. *Cohn*, 270 U. S. 339 (1926). Given the continuing focus on financial frauds against the Government, the 1918 Act did not alter the fundamental character of the original false claims statute.

The 1934 Act, which created the statute we now know as § 1001, did work such a change. Congress excised from the statute the references to financial frauds, thereby severing the historical link with the false claims portion of the statute, and inserted the requirement that the false statement be made "in any matter within the jurisdiction of any department or agency of the United States." This addition, critical for present purposes, is subject to two competing inferences. On one hand, it can be read to impose new words of limitation—whose ordinary meaning connotes the Executive Branch—in an altogether reformulated statute. On the other hand, it can be viewed as stripping away the financial fraud requirement while not disturbing the pre-existing breadth the statute had enjoyed from its association with the false claims statute.

The *Bramblett* Court embraced the latter inference, finding no indication in any legislative history that the amendment was intended to narrow the scope of the statute. We think this interpretation, though not completely implausible, is nevertheless unsound. The differences between the 1934

Act and its predecessors are too dramatic to evidence a congressional intent to carry forward any features of the old provision. Moreover, our comments, over the years, regarding the 1934 legislation—including those contained in *Bramblett* itself—contradict the notion that such a "carry forward" occurred.

We have repeatedly recognized that the 1934 Act was passed at the behest of "the Secretary of the Interior to aid the enforcement of laws relating to the functions of the Department of the Interior and, in particular, to the enforcement of regulations . . . with respect to the transportation of 'hot oil.'" *United States* v. *Gilliland*, 312 U. S. 86, 93–94 (1941); see also *United States* v. *Yermian*, 468 U. S. 63, 72 (1984) (the 1934 Act was "needed to increase the protection of federal agencies from the variety of deceptive practices plaguing the New Deal administration"); *id.*, at 80 (REHNQUIST, J., dissenting) (the statute was prompted by problems arising from "the advent of the New Deal programs in the 1930's"). Indeed, the *Bramblett* Court itself acknowledged the connection between the 1934 Act and the proliferation of fraud in the newly formed Executive agencies:

> "The 1934 revision was largely the product of the urging of the Secretary of the Interior. The Senate Report, S. Rep. No. 1202, 73d Cong., 2d Sess., indicates that its purpose was to broaden the statute so as to reach not only false papers presented in connection with a claim against the Government, but also nonmonetary frauds such as those involved in the 'hot-oil' shipments." 348 U. S., at 507.

None of our opinions refers to any indication that Congress even *considered* whether the 1934 Act might apply outside the Executive Branch, much less that it affirmatively understood the new enactment to create broad liability for falsehoods in the federal courts. In light of this vacuum, it would be curious indeed if Congress truly intended the 1934 Act to

work a dramatic alteration in the law governing misconduct in the court system or the Legislature. The unlikelihood of such a scenario only strengthens our conclusion that the *Bramblett* Court erred in its interpretation of § 1001's statutory history.

Putting *Bramblett*'s historical misapprehensions to one side, however, we believe the *Bramblett* Court committed a far more basic error in its underlying approach to statutory construction. Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term. In *Bramblett*, the Court's method of analysis resulted in a decision that is at war with the text of not one, but two different Acts of Congress.

Whether the doctrine of *stare decisis* nevertheless requires that we accept *Bramblett*'s erroneous interpretation of § 1001 is a question best answered after reviewing the body of law directly at issue: the decisions adopting the judicial function exception.

IV

Although other federal courts have refrained from directly criticizing *Bramblett*'s approach to statutory construction, it is fair to say that they have greeted the decision with something less than a warm embrace. The judicial function exception, an obvious attempt to impose limits on *Bramblett*'s expansive reading of § 1001, is a prime example. As the following discussion indicates, the judicial function exception is almost as deeply rooted as *Bramblett* itself.

The seeds of the exception were planted by the Court of Appeals for the District of Columbia Circuit only seven years after *Bramblett* was decided. In *Morgan* v. *United States*, 309 F. 2d 234 (1962), cert. denied, 373 U. S. 917 (1963), the defendant, who had falsely held himself out to be a bona fide member of the bar, was prosecuted on three counts of violating § 1001 for concealing from the court his name, identity,

and nonadmission to the bar. After first acknowledging that, but for *Bramblett*, it might well have accepted the argument that Congress did not intend § 1001 to apply to the courts, the Court of Appeals upheld the conviction. But the court was clearly troubled by the potential sweep of § 1001. Noting that the statute prohibits "concealment" and "covering up" of material facts, as well as intentional falsehoods, the court wondered whether the statute might be interpreted to criminalize conduct that falls well within the bounds of responsible advocacy.[9] The court concluded its opinion with this significant comment:

> "We are certain that neither Congress nor the Supreme Court intended the statute to include traditional trial tactics within the statutory terms 'conceals or covers up.' We hold only, on the authority of the Supreme Court construction, that the statute does apply to the type of action with which appellant was charged, action which essentially involved the 'administrative' or 'housekeeping' functions, not the 'judicial' machinery of the court." 309 F. 2d, at 237.

Relying on *Morgan*, the Court of Appeals for the Sixth Circuit reversed a conviction several years later "because § 1001 does not apply to the introduction of false documents as evidence in a criminal proceeding." *United States* v. *Erhardt*, 381 F. 2d 173, 175 (1967) *(per curiam)*. The court explained that the judicial function exception suggested in *Morgan* was necessary to prevent the perjury statute, with its two-witness rule (since repealed), from being undermined. 381 F. 2d, at 175.

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[9] "'Does a defendant "cover up . . . a material fact" when he pleads not guilty?' 'Does an attorney "cover up" when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?'" *Morgan* v. *United States*, 309 F. 2d 234, 237 (CADC 1962), cert. denied, 373 U. S. 917 (1963).

Once planted, the judicial function exception began to flower in a number of other Circuits. The Ninth Circuit summarized the state of the law in 1985:

> "[T]he adjudicative functions exception to section 1001 has been suggested or recognized by appellate decisions since 1962, not long after the Supreme Court decided that section 1001 applies to matters within the jurisdiction of the judicial branch. In these twenty-three years, there has been no response on the part of Congress either repudiating the limitation or refining it. It therefore seems too late in the day to hold that no exception exists." *United States* v. *Mayer*, 775 F. 2d 1387, 1390 *(per curiam)* (footnote omitted).

The Second Circuit sounded a similar theme in 1991, relying in part on the congressional acquiescence to which the Ninth Circuit had adverted in *Mayer*. The Second Circuit wrote:

> "No court, to our knowledge, whether due to its acceptance of the exception or to prosecutorial reticence, has ever sustained a section 1001 conviction for false statements made by a defendant to a court acting in its judicial capacity. The exception was first articulated nearly thirty years ago and '. . . [i]t therefore seems too late in the day to hold that no exception exists.' *Mayer*, 775 F. 2d at 1390." *United States* v. *Masterpol*, 940 F. 2d 760, 766.[10]

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[10] Some 17 years before *Masterpol*, the Second Circuit restricted the application of § 1001 in a slightly different manner. In *United States* v. *D'Amato*, 507 F. 2d 26 (1974), the court overturned a § 1001 conviction arising out of a false affidavit submitted in the course of a private civil lawsuit. Based upon a review of relevant case law and legislative history, the court concluded that § 1001 did not apply "where the Government is involved only by way of a court deciding a matter in which the Government or its agencies are not involved." *Id.*, at 28. Accord, *United States* v. *London*, 714 F. 2d 1558, 1561–1562 (CA11 1983).

Although not all of the courts of appeals have endorsed the judicial function exception, it is nevertheless clear that the doctrine has a substantial following. See n. 2, *supra.* Moreover, as both the Ninth and the Second Circuits observed, Congress has not seen fit to repudiate, limit, or refine the exception despite its somewhat murky borders and its obvious tension with the text of the statute as construed in *Bramblett.* On the other hand, it is also true that Congress has not seen fit to overturn the holding in *Bramblett*, despite the fact that the opinions endorsing the judicial function exception evidence a good deal of respectful skepticism about the correctness of that decision.

V

With the foregoing considerations in mind, we now turn to the difficult *stare decisis* question that this case presents. It is, of course, wise judicial policy to adhere to rules announced in earlier cases. As Justice Cardozo reminded us: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's 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). Adherence to precedent also serves an indispensable institutional role within the Federal Judiciary. *Stare decisis* is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989) (quoting The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). See also *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992) (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). Respect for precedent is strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation

of its legislation." *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 736 (1977).[11]

In this case, these considerations point in two conflicting directions. On one hand, they counsel adherence to the construction of § 1001 adopted in *Bramblett;* on the other, they argue in favor of retaining the body of law that has cut back on the breadth of *Bramblett* in Circuits from coast to coast.

It would be difficult to achieve both goals simultaneously. For if the word "department" encompasses the Judiciary, as *Bramblett* stated, 348 U. S., at 509, the judicial function exception cannot be squared with the text of the statute. A court is a court—and is part of the Judicial Branch—whether it is functioning in a housekeeping or judicial capacity. Conversely, *Bramblett* could not stand if we preserved the thrust of the judicial function exception—*i. e.*, if we interpreted 18 U. S. C. § 1001 so that it did not reach conduct occurring in federal-court proceedings. Again, although *Bramblett* involved a false representation to an office within the Legislative Branch, the decision lumped all three branches together in one and the same breath. See 384 U. S., at 509 ("department" in § 1001 "was meant to describe the executive, legislative and judicial branches of the Government").

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[11] See also, *e. g., Patterson* v. *McLean Credit Union,* 491 U. S., at 172–173 (*stare decisis* has "special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.,* 476 U. S. 409, 424 (1986) (noting "the strong presumption of continued validity that adheres in the judicial interpretation of a statute"); *Runyon* v. *McCrary,* 427 U. S. 160, 189 (1976) (STEVENS, J., concurring) (declining to overturn "a line of [statutory] authority which I firmly believe to have been incorrectly decided"); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation") (citation omitted).

We think the text of § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception. We are, however, persuaded that the clarity of that text justifies a reconsideration of *Bramblett.*[12] Although such a reconsideration is appropriate only in the rarest circumstances, we believe this case permits it because of a highly unusual "intervening development of the law," see *Patterson*, 491 U. S., at 173, and because of the absence of significant reliance interests in adhering to *Bramblett.*

The "intervening development" is, of course, the judicial function exception. In a virtually unbroken line of cases, respected federal judges have interpreted § 1001 so narrowly that it has had only a limited application within the Judicial Branch. See nn. 2 and 10, *supra.* This interpretation has roots both deep and broad in the lower courts. Although the judicial function exception has not been adopted by this Court, our review of *Bramblett* supports the conclusion that the cases endorsing the exception almost certainly reflect the intent of Congress. It is thus fair to characterize the judicial function exception as a "competing legal doctrin[e]," *Patterson*, 491 U. S., at 173, that can lay a legitimate claim to respect as a settled body of law. Overruling *Bramblett* would preserve the essence of this doctrine and would, to that extent, promote stability in the law.[13]

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[12] Because the fate of the judicial function exception is tied so closely to *Bramblett*, we find no merit in the Government's suggestion that a reconsideration of the validity of that decision is not fairly included in the question on which we granted certiorari. See generally *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 379–383 (1995).

[13] The dissent criticizes us for according respect to a body of law developed in the lower courts, arguing that our decision will "induce" federal judges on the courts of appeals to "ignore" precedents from this Court and thereby invite chaos in the judicial system. *Post*, at 721. We would have thought it self-evident that the lower courts must adhere to our precedents. Indeed, the dissent's dire prediction is at odds with its own observation that "no lower court would deliberately refuse to follow the decision

Stare decisis has special force when legislators or citizens "have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991); see also *Casey*, 505 U. S., at 854–856 (joint opinion of O'CONNOR, KENNEDY, and SOUTER, JJ.). Here, however, the reliance interests at stake in adhering to *Bramblett* are notably modest. In view of the extensive array of statutes that already exist to penalize false statements within the Judicial Branch, see, *e. g.*, 18 U. S. C. § 1621 (perjury); § 1623 (false declarations before grand jury or court); § 1503 (obstruction of justice); § 287 (false claims against the United States), we doubt that prosecutors have relied on § 1001 as an important means of deterring and punishing litigation-related misconduct.[14] But we need not speculate, for we have direct evidence on this point. The United States Attorneys' Manual states quite plainly that "[p]rosecutions should not be brought under 18 U. S. C. § 1001 for false statements submitted in federal court proceedings"; it instead directs prosecutors to proceed under the perjury or obstruction of justice statutes. U. S. Dept. of

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of a higher court," see *post*, at 720. In concluding that the cases adopting the judicial function exception are faithful to the intent of the Legislature that adopted § 1001, we have obviously exercised our own independent judgment. Thus, far from "subvert[ing] the very principle on which a hierarchical court system is built," *post*, at 719, our decision merely reflects our assessment of the statutory construction issue this case presents, while serving what the dissent acknowledges to be one of the central purposes of *stare decisis:* promoting "stability and certainty in the law," *post*, at 720.

[14] The perjury and false claims statutes also cover the Legislative Branch, as does 18 U. S. C. § 1505 (obstruction of justice). The existence of overlaps with other statutes does not itself militate in favor of overruling *Bramblett;* Congress may, and often does, enact separate criminal statutes that may, in practice, cover some of the same conduct. See *United States* v. *Batchelder*, 442 U. S., at 123–124; *United States* v. *Gilliland*, 312 U. S. 86, 95 (1941). The overlaps here simply demonstrate that prosecutors cannot be said to have any significant reliance interest in *Bramblett.*

Justice, United States Attorneys' Manual ¶ 9–69.267 (1992). Clearer evidence of nonreliance can scarcely be imagined.[15]

Similarly unimpressive is the notion of congressional reliance on *Bramblett*. The longstanding judicial function exception has, to a large extent, negated the actual application of § 1001 within the Judiciary. It is unlikely that Congress has relied on what has, for many years, been an unfulfilled promise.

In sum, although the *stare decisis* issue in this case is difficult, we conclude that there are sound reasons to correct *Bramblett*'s erroneous construction of § 1001. Although we could respect prior decisions by endorsing the judicial function exception or by adhering to *Bramblett* while repudiating that exception, we believe coherence and stability in the law will best be served in this case by taking a different course. Limiting the coverage of § 1001 to the area plainly marked by its text will, as a practical matter, preserve the interpretation of § 1001 that has prevailed for over 30 years and will best serve the administration of justice in the future.

VI

Bramblett is hereby overruled. We hold that a federal court is neither a "department" nor an "agency" within the meaning of § 1001. The Court of Appeals' decision is therefore reversed to the extent that it upheld petitioner's convictions under § 1001.

It is so ordered.

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[15] The absence of significant reliance interests is confirmed by an examination of statistical data regarding actual cases brought under § 1001. The Government has secured convictions under § 1001 in 2,247 cases over the last five fiscal years, see *post*, at 722, but the dissent can identify only five reported § 1001 cases in that time period brought in connection with false statements made to the Judiciary and Legislature. *Post*, at 723, n. (At least two of the five were unsuccessful, from the Government's point of view.) This tiny handful of prosecutions does not, in our view, evidence a weighty reliance interest on the part of prosecutors in adhering to the interpretation of § 1001 set forth in *Bramblett*.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join Parts I–III and VI of JUSTICE STEVENS' opinion. *United States* v. *Bramblett*, 348 U. S. 503 (1955), should be overruled.

The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of "an arbitrary discretion in the courts" is restrained, The Federalist No. 78, p. 471 (C. Rossiter ed. 1961). Who ignores it must give reasons, and reasons that go beyond mere demonstration that the overruled opinion was wrong (otherwise the doctrine would be no doctrine at all).

The reason here, as far as I am concerned, is the demonstration, over time, that *Bramblett* has unacceptable consequences, which can be judicially avoided (absent overruling) only by limiting *Bramblett* in a manner that is irrational or by importing exceptions with no basis in law. Unlike JUSTICE STEVENS, I do not regard the Courts of Appeals' attempts to limit *Bramblett* as an "'intervening development of the law,'" *ante*, at 713 (quoting *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 173 (1989)), that puts us to a choice between two conflicting lines of authority. Such "intervening developments" by lower courts that we do not agree with are ordinarily disposed of by reversal. See, *e. g.*, *McNally* v. *United States*, 483 U. S. 350 (1987). Instead, the significance I find in the fact that so many Courts of Appeals have strained so mightily to discern an exception that the statute does not contain, see *ante*, at 699, n. 2 (collecting cases), is that it demonstrates how great a potential for mischief federal judges have discovered in the mistaken reading of 18 U. S. C. § 1001, a potential we did not fully appreciate when *Bramblett* was decided. To be sure, since 18 U. S. C. § 1001's prohibition of concealment is violated only when

there exists a duty to disclose, see, *e. g., United States* v. *Kingston*, 971 F. 2d 481, 489 (CA10 1992); *United States* v. *Richeson*, 825 F. 2d 17, 20 (CA4 1987); *United States* v. *Irwin*, 654 F. 2d 671, 678–679 (CA10 1981), cert. denied, 455 U. S. 1016 (1982), it does not actually prohibit any legitimate trial tactic. There remains, however, a serious concern that the *threat* of criminal prosecution under the capacious provisions of § 1001 will deter vigorous representation of opposing interests in adversarial litigation, particularly representation of criminal defendants, whose adversaries control the machinery of § 1001 prosecution.

One could avoid the problem by accepting the Courts of Appeals' invention of a "judicial function" exception, but there is simply no basis in the text of the statute for that. Similarly unprincipled would be rejecting *Bramblett*'s dictum that § 1001 applies to the courts, while adhering to *Bramblett*'s holding that § 1001 applies to Congress. This would construct a bizarre regime in which "department" means the Executive and Legislative Branches, but not the Judicial, thereby contradicting not only the statute's intent (as *Bramblett* does), but, in addition, all conceivable interpretations of the English language. Neither of these solutions furthers the goal of avoiding "an arbitrary discretion in the courts"; they seem to me much more arbitrary than simply overruling a wrongly decided case.

The other goal of *stare decisis*, preserving justifiable expectations, is not much at risk here. Those whose reliance on *Bramblett* induced them to tell the truth to Congress or the courts, instead of lying, have no claim on our solicitude. Some convictions obtained under *Bramblett* may have to be overturned, and in a few instances wrongdoers may go free who could have been prosecuted and convicted under a different statute if *Bramblett* had not been assumed to be the law. I count that a small price to pay for the uprooting of this weed.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, dissenting.

The bankruptcy trustee objected to the discharge of petitioner, a voluntary bankrupt, believing that he had filed false information. The trustee filed a complaint under 11 U. S. C. § 727, alleging petitioner stored a well-drilling machine at his residence; petitioner answered by denying the allegation "for the reason that it is untrue." App. 12, ¶ 10. The trustee also alleged in a separate motion that petitioner had, despite requests, failed to turn over all the books and records relating to the bankruptcy estate. Petitioner filed a response denying the allegation, and asserting that he had produced the requested documents at the behest of a previous trustee. Petitioner was then indicted under 18 U. S. C. § 1001, and a jury found that each of these responses was a lie.

Today, the majority jettisons a 40-year-old unanimous decision of this Court, *United States* v. *Bramblett*, 348 U. S. 503 (1955), under which petitioner's conviction plainly would have been upheld. It does so despite an admission that the Court's reading of § 1001 in *Bramblett* was "not completely implausible," *ante*, at 706. In replacing *Bramblett*'s plausible, albeit arguably flawed, interpretation of the statute with its own "sound" reading, the Court disrespects the traditionally stringent adherence to *stare decisis* in statutory decisions. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172 (1989); *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 736 (1977). The two reasons offered by the plurality in Part V of the opinion and the justification offered by the concurring opinion fall far short of the institutional hurdle erected by our past practice against overruling a decision of this Court interpreting an Act of Congress.

The first reason is styled as an "intervening development in the law"; under it, decisions of Courts of Appeals that cannot be reconciled with our earlier precedent are treated as a basis for disavowing, not the aberrant Court of Appeals deci-

sions, but, *mirabile dictu* our own decision! This novel corollary to the principle of *stare decisis* subverts the very principle on which a hierarchical court system is built. The second reason given is that there has been little or no reliance on our *Bramblett* decision; I believe that this ground is quite debatable, if not actually erroneous.

Today's decision harkens to the important reason behind the doctrine of *stare decisis*, but does not heed it. That doctrine is "a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson*, *supra*, at 172, citing The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). Respect for precedent is strongest "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.*, *supra*, at 736. Justice Brandeis' dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393 (1932), made the point this way:

> "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation." *Id.*, at 406 (citations omitted).

We have recognized a very limited exception to this principle for what had been called "intervening developments in the law." But the cases exemplifying this principle, *e. g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U. S. 320 (1972); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989), have invariably made clear that the "intervening developments" were in the case law of this Court, not of the lower federal courts. Indeed, in *Illinois Brick Co.*, we refused to follow a line of lower court decisions

which had carved out an exception from one of our precedents. 431 U. S., at 743–744.

But today's decision departs radically from the previously limited reliance on this exception. The principle of *stare decisis* is designed to promote stability and certainty in the law. While most often invoked to justify a court's refusal to reconsider its own decisions, it applies *a fortiori* to enjoin lower courts to follow the decision of a higher court. This principle is so firmly established in our jurisprudence that no lower court would deliberately refuse to follow the decision of a higher court. But cases come in all shapes and varieties, and it is not always clear whether a precedent applies to a situation in which some of the facts are different from those in the decided case. Here lower courts must necessarily make judgments as to how far beyond its particular facts the higher court precedent extends.

If there is appeal as a matter of right from the lower court to the higher court, any decision by the lower court that is viewed as mistaken by the higher court will in the normal course of events be corrected in short order by reversal on appeal. But in the present day federal court system, where review by this Court is almost entirely discretionary, a different regime prevails. We receive nearly 7,000 petitions for certiorari every Term, and can grant only a tiny fraction of them. A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction, and our Rule 10 embodies the standards by which we decide to grant review. One of the reasons contained in Rule 10.1(a) is the existence of a conflict between one court of appeals and another. The negative implication of this ground, borne out time and again in our decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents—even one deemed to be arguably inconsistent with it—will not be reviewed unless it conflicts with a decision of another court of appeals. This fact is a necessary concomitant of the limited capacity in this Court.

One of the consequences of this highly selective standard for granting review is that this Court is deprived of a very important means of assuring that the courts of appeals adhere to its precedents. It is all the more important, therefore, that no actual inducements to ignore these precedents be offered to the courts of appeals. But today's decision is just such an inducement; it tells courts of appeals that if they build up a body of case law contrary to ours, their case law will serve as a basis for overruling our precedent. It is difficult to imagine a more topsy-turvy doctrine than this, or one more likely to unsettle established legal rules that the doctrine of *stare decisis* is designed to protect.

The plurality attempts to bolster this aspect of its opinion by blandly assuring us that "the cases endorsing the exception almost certainly reflect the intent of Congress." *Ante*, at 713. Members of Congress will surely be surprised by this statement. Congress has not amended or considered amending § 1001 in the 40 years since *Bramblett* was decided. We have often noted the danger in relying on congressional inaction in construing a statute, *Brecht* v. *Abrahamson*, 507 U. S. 619, 632 (1993), citing *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 306 (1988), but even there the "inaction" referred to is a failure of Congress to enact a particular proposal. Here there was not even any proposal before Congress.

If we delve more deeply into the hypothetical thought processes of a very diligent Member of Congress who made a specialty of following cases construing § 1001, the Member would undoubtedly know of our decision in *Bramblett* 40 years ago. If he also followed decisions of the courts of appeals, he would know that in various forms—whether a "judicial function" exception or an "exculpatory no" rule—several Courts of Appeals have held § 1001 inapplicable to some statements made in the course of judicial proceedings. If, after due deliberation, he concluded that this exception was inconsistent with our opinion in *Bramblett*, he would

surely also realize that in due course, on the assumption that the Judiciary was functioning as it should, the Supreme Court would itself decide that the exception was inconsistent with *Bramblett*, and disavow the exception. But of one thing he would have been in no doubt: that under *Bramblett* one who lied to an officer of Congress was punishable under § 1001, since that was the precise holding of *Bramblett*. But it is that very justifiable expectation of Congress that is set at naught by today's decision, under which the legislative process is no longer protected by § 1001.

The plurality offers a second reason in defense of its decision to overrule *Bramblett*. It points to a lack of significant reliance interests in *Bramblett*. It dispels any reliance prosecutors might have in enforcement of § 1001 by arguing that the Government has expressed a preference for proceeding under alternative statutes that punish comparable behavior. U. S. Dept. of Justice, United States Attorneys' Manual ¶ 9–69.267 (1992). The Government offered a convincing explanation for this preference: it instructs prosecutors to proceed under alternative statutes due to the uncertain mine field posed by the judicial function exception adopted in some, but not all, Circuits. Brief for Petitioner 20, and n. 9. I do not think the Government disclaims reliance by adopting a defensive litigating strategy in response to the choice of lower courts to disregard precedent favorable to the Government. And in this particular case, the perjury alternative in 18 U. S. C. § 1621 was altogether unavailable to punish petitioner's falsehoods because his statements were not verified, and the obstruction of justice alternative in 18 U. S. C. § 1503 was of dubious utility.

Statistics compiled by the Administrative Office of the United States Courts indicate that the Government has secured convictions under § 1001 in 2,247 cases over the last five fiscal years. Because the Administrative Office does not break down its statistics by type of agency to which the defendant made a false statement, further exploration of the

subject must be limited to published decisions. It is unclear what proportion of these cases involved false statements made to the Legislative or Judicial Branch, but it appears that the Government has attempted to proceed under § 1001 for false statements made to the Judiciary and Legislature with mixed success.* To the extent it has secured valid convictions in some courts in reliance on *Bramblett*, the Government should not now be forced to endure requests for habeas relief that will inevitably be filed in the wake of the Court's opinion.

The additional comments set forth in the concurring opinion equally disregard the respect due a unanimous decision rendered by six Justices who took the same oath of office sworn by the six Justices who overrule *Bramblett* today. The doctrine of *stare decisis* presumes to reinforce the notion that justice is dispensed according to law and not to serve

*For false statements made to Bankruptcy Courts, see *United States* v. *Taylor*, 907 F. 2d 801 (CA8 1990) (upheld dismissal under exculpatory no doctrine); *United States* v. *Rowland*, 789 F. 2d 1169 (CA5) (affirmed conviction), cert. denied, 479 U. S. 964 (1986). For false statements made to Article III courts, see *United States* v. *Masterpol*, 940 F. 2d 760 (CA2 1991) (reversed conviction); *United States* v. *Holmes*, 840 F. 2d 246 (CA4) (affirmed conviction), cert. denied, 488 U. S. 831 (1988); *United States* v. *Mayer*, 775 F. 2d 1387 (CA9 1985) (reversed conviction); *United States* v. *Powell*, 708 F. 2d 455 (CA9 1983) (affirmed conviction); *United States* v. *Abrahams*, 604 F. 2d 386 (CA5 1979) (reversed conviction); *United States* v. *D'Amato*, 507 F. 2d 26 (CA2 1974) (reversed conviction); *United States* v. *Erhardt*, 381 F. 2d 173 (CA6 1967) (reversed conviction); *United States* v. *Stephens*, 315 F. Supp. 1008 (WD Okla. 1970) (denied motion to dismiss; ultimate disposition unclear). For false statements made to the Legislative Branch, see *United States* v. *Poindexter*, 951 F. 2d 369 (CADC 1991) (remand to allow independent counsel to pursue § 1001 count), cert. denied, 506 U. S. 1021 (1992); *United States* v. *Hansen*, 772 F. 2d 940 (CADC 1985) (affirmed conviction), cert. denied, 475 U. S. 1045 (1986); *United States* v. *Diggs*, 613 F. 2d 988 (CADC 1979) (affirmed conviction), cert. denied, 446 U. S. 982 (1980); *United States* v. *Levine*, 860 F. Supp. 880 (DC 1994) (denied motion to dismiss); *United States* v. *Clarridge*, 811 F. Supp. 697 (DC 1992) (denied motion to dismiss); *United States* v. *North*, 708 F. Supp. 380 (DC 1988) (denied motion to dismiss).

"the proclivities of individuals." *Vasquez* v. *Hillery*, 474 U. S. 254, 265 (1986). The opinion of one Justice that another's view of a statute was wrong, even really wrong, does not overcome the institutional advantages conferred by adherence to *stare decisis* in cases where the wrong is fully redressable by a coordinate branch of government.

This, then, is clearly a case where it is better that the matter be decided than that it be decided right. *Bramblett* governs this case, and if the rule of that case is to be overturned it should be at the hands of Congress, and not of this Court.

Syllabus

CITY OF EDMONDS *v.* OXFORD HOUSE, INC., ET AL.

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

No. 94–23. Argued March 1, 1995—Decided May 15, 1995

Respondent Oxford House operates a group home in Edmonds, Washington, for 10 to 12 adults recovering from alcoholism and drug addiction in a neighborhood zoned for single-family residences. Petitioner City of Edmonds (City) issued citations to the owner and a resident of the house, charging violation of the City's zoning code. The code provides that the occupants of single-family dwelling units must compose a "family," and defines family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons." Edmonds Community Development Code (ECDC) § 21.30.010. Oxford House asserted reliance on the Fair Housing Act (FHA), which prohibits discrimination in housing against, *inter alios*, persons with handicaps. Discrimination covered by the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." 42 U. S. C. § 3604(f)(3)(B). Edmonds subsequently sued Oxford House in federal court, seeking a declaration that the FHA does not constrain the City's zoning code family definition rule. Oxford House counterclaimed under the FHA, charging the City with failure to make a "reasonable accommodation" permitting the maintenance of the group home in a single-family zone. Respondent United States filed a separate action on the same FHA "reasonable accommodation" ground, and the cases were consolidated. The District Court held that the City's zoning code rule defining "family," ECDC § 21.30.010, is exempt from the FHA under 42 U. S. C. § 3607(b)(1) as a "reasonable . . . restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling." The Court of Appeals reversed, holding § 3607(b)(1)'s absolute exemption inapplicable.

Held: Edmonds' zoning code definition of the term "family" is not a maximum occupancy restriction exempt from the FHA under § 3607(b)(1). Pp. 731–738.

(a) Congress enacted § 3607(b)(1) against the backdrop of an evident distinction between municipal land-use restrictions and maximum occupancy restrictions. Land-use restrictions designate districts—*e. g.*,

commercial or single-family residential—in which only compatible uses are allowed and incompatible uses are excluded. Reserving land for single-family residences preserves the character of neighborhoods as family residential communities. To limit land use to single-family residences, a municipality must define the term "family"; thus family composition rules are an essential component of single-family use restrictions. Maximum occupancy restrictions, in contradistinction, cap the number of occupants per dwelling, typically on the basis of available floor space or rooms. Their purpose is to protect health and safety by preventing dwelling overcrowding. Section 3607(b)(1)'s language—"restrictions regarding the maximum number of occupants permitted to occupy a dwelling"—surely encompasses maximum occupancy restrictions, and does not fit family composition rules typically tied to land-use restrictions. Pp. 732–735.

(b) The zoning provisions Edmonds invoked against Oxford House, ECDC §§ 16.20.010 and 21.30.010, are classic examples of a use restriction and complementing family composition rule. These provisions do not cap the number of people who may live in a dwelling: So long as they are related by "genetics, adoption, or marriage," any number of people can live in a house. A separate ECDC provision—§ 19.10.000—caps the number of occupants a dwelling may house, based on floor area, and is thus a prototypical maximum occupancy restriction. In short, the City's family definition rule, ECDC § 21.30.010, describes family living, not living space per occupant. Defining family primarily by biological and legal relationships, the rule also accommodates another group association: Five or fewer unrelated people are allowed to live together as though they were family. But this accommodation cannot convert Edmonds' family values preserver into a maximum occupancy restriction. Edmonds' contention that subjecting single-family zoning to FHA scrutiny will overturn Euclidian zoning and destroy the effectiveness and purpose of single-family zoning both ignores the limited scope of the issue before this Court and exaggerates the force of the FHA's antidiscrimination provisions, which require only "reasonable" accommodations. Since only a threshold question is presented in this case, it remains for the lower courts to decide whether Edmonds' actions violate the FHA's prohibitions against discrimination. Pp. 735–738.

18 F. 3d 802, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined, *post,* p. 738.

Counsel

W. Scott Snyder argued the cause and filed briefs for petitioner.

William F. Sheehan argued the cause for private respondents. With him on the brief were *Elizabeth M. Brown*, *David E. Jones*, *John P. Relman*, *Robert I. Heller*, and *Steven R. Shapiro*.

Deputy Solicitor General Bender argued the cause for respondent United States. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Patrick*, *Cornelia T. L. Pillard*, *Jessica Dunsay Silver*, and *Gregory B. Friel*.*

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*Briefs of *amici curiae* urging reversal were filed for the City of Lubbock by *Jean E. Shotts, Jr.;* for the City of Mountlake Terrace by *Gregory G. Schrag;* for the Township of Upper St. Clair by *Robert N. Hackett;* and for the International City/County Management Association et al. by *Richard Ruda*, *Lee Fennell*, and *Michael J. Wahoske*.

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, and *Stanley J. Eichner*, *Donna L. Palermino*, and *Leo T. Sorokin*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *Frankie Sue Del Papa* of Nevada; *Tom Udall* of New Mexico, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Rosalie Simmonds Ballantine* of the Virgin Islands, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Association on Mental Retardation et al. by *Lois G. Williams*, *Jerrold J. Ganzfried*, *Gregg A. Hand*, *Leonard S. Rubenstein*, and *Ira A. Burnim;* for the American Association of Retired Persons by *Steven S. Zaleznick*, *Michael Schuster*, *Bruce B. Vignery*, and *Deborah M. Zuckerman;* for the American Planning Association by *Brian W. Blaesser* and *Daniel M. Lauber;* for the American Society of Addiction Medicine et al. by *Paul M. Smith*, *Seth P. Stein*, *Robert L. Schonfeld*, *Richard Taranto*, and *Carolyn I. Polowy;* for the American Train Dispatchers Division of Brotherhood of Locomotive Engineers et al. by *Lawrence M. Mann;* and for the National Fair Housing Alliance by *Timothy C. Hester*, *Robert A. Long, Jr.*, and *Christina T. Uhlrich*.

Briefs of *amici curiae* were filed for the City of Fultondale by *Palmer W. Norris* and *Fred Blanton, Jr.;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso*.

JUSTICE GINSBURG delivered the opinion of the Court.

The Fair Housing Act (FHA or Act) prohibits discrimination in housing against, *inter alios*, persons with handicaps.[1] Section 807(b)(1) of the Act entirely exempts from the FHA's compass "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U. S. C. § 3607(b)(1). This case presents the question whether a provision in petitioner City of Edmonds' zoning code qualifies for § 3607(b)(1)'s complete exemption from FHA scrutiny. The provision, governing areas zoned for single-family dwelling units, defines "family" as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons." Edmonds Community Development Code (ECDC) § 21.30.010 (1991).

The defining provision at issue describes who may compose a family unit; it does not prescribe "*the* maximum number of occupants" a dwelling unit may house. We hold that § 3607(b)(1) does not exempt prescriptions of the family-defining kind, *i. e.*, provisions designed to foster the family character of a neighborhood. Instead, § 3607(b)(1)'s absolute exemption removes from the FHA's scope only total occupancy limits, *i. e.*, numerical ceilings that serve to prevent overcrowding in living quarters.

I

In the summer of 1990, respondent Oxford House opened a group home in the City of Edmonds, Washington (City), for

[1] The FHA, as originally enacted in 1968, prohibited discrimination based on race, color, religion, or national origin. See 82 Stat. 83. Proscription of discrimination based on sex was added in 1974. See Housing and Community Development Act of 1974, § 808(b), 88 Stat. 729. In 1988, Congress extended coverage to persons with handicaps and also prohibited "familial status" discrimination, *i. e.*, discrimination against parents or other custodial persons domiciled with children under the age of 18. 42 U. S. C. § 3602(k).

10 to 12 adults recovering from alcoholism and drug addiction. The group home, called Oxford House-Edmonds, is located in a neighborhood zoned for single-family residences. Upon learning that Oxford House had leased and was operating a home in Edmonds, the City issued criminal citations to the owner and a resident of the house. The citations charged violation of the zoning code rule that defines who may live in single-family dwelling units. The occupants of such units must compose a "family," and family, under the City's defining rule, "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." ECDC § 21.30.010. Oxford House-Edmonds houses more than five unrelated persons, and therefore does not conform to the code.

Oxford House asserted reliance on the Fair Housing Act, 102 Stat. 1619, 42 U. S. C. § 3601 *et seq.*, which declares it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter." § 3604(f)(1)(A). The parties have stipulated, for purposes of this litigation, that the residents of Oxford House-Edmonds "are recovering alcoholics and drug addicts and are handicapped persons within the meaning" of the Act. App. 106.

Discrimination covered by the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling." § 3604(f)(3)(B). Oxford House asked Edmonds to make a "reasonable accommodation" by allowing it to remain in the single-family dwelling it had leased. Group homes for recovering substance abusers, Oxford urged, need 8 to 12 residents to be financially and therapeutically viable. Edmonds declined to permit Oxford House to stay in a single-family residential zone, but passed an ordi-

nance listing group homes as permitted uses in multifamily and general commercial zones.

Edmonds sued Oxford House in the United States District Court for the Western District of Washington, seeking a declaration that the FHA does not constrain the City's zoning code family definition rule. Oxford House counterclaimed under the FHA, charging the City with failure to make a "reasonable accommodation" permitting maintenance of the group home in a single-family zone. The United States filed a separate action on the same FHA "reasonable accommodation" ground, and the two cases were consolidated. Edmonds suspended its criminal enforcement actions pending resolution of the federal litigation.

On cross-motions for summary judgment, the District Court held that ECDC § 21.30.010, defining "family," is exempt from the FHA under § 3607(b)(1) as a "reasonable . . . restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling." App. to Pet. for Cert. B–7. The United States Court of Appeals for the Ninth Circuit reversed; holding § 3607(b)(1)'s absolute exemption inapplicable, the Court of Appeals remanded the cases for further consideration of the claims asserted by Oxford House and the United States. *Edmonds* v. *Washington State Building Code Council*, 18 F. 3d 802 (1994).

The Ninth Circuit's decision conflicts with an Eleventh Circuit decision declaring exempt under § 3607(b)(1) a family definition provision similar to the Edmonds prescription. See *Elliott* v. *Athens*, 960 F. 2d 975 (1992).[2] We granted

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[2] The single-family residential zoning provision at issue in *Elliott* defines "family," in relevant part, as "[o]ne (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons." 960 F. 2d, at 976.

certiorari to resolve the conflict, 513 U. S. 959 (1994), and we now affirm the Ninth Circuit's judgment.[3]

II

The sole question before the Court is whether Edmonds' family composition rule qualifies as a "restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling" within the meaning of the FHA's absolute exemption. 42 U. S. C. § 3607(b)(1).[4] In answering this question, we are mindful of the Act's stated policy "to provide, within constitutional limitations, for fair housing throughout the United States." § 3601. We also note precedent recognizing the FHA's "broad and inclusive" compass, and therefore according a "generous construction" to the Act's complaint-filing provision. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209, 212 (1972). Accordingly, we regard this case as an instance in which an exception to "a general state-

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[3] On May 17, 1993, the State of Washington enacted a law providing:

"No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, 'handicaps' are as defined in the federal fair housing amendments act of 1988 (42 U. S. C. Sec. 3602)." Wash. Rev. Code § 35.63.220 (1994).

The United States asserts that Washington's new law invalidates ECDC § 21.30.010, Edmonds' family composition rule, as applied to Oxford House-Edmonds. Edmonds responds that the effect of the new law is "far from clear." Reply to Brief in Opposition 4. Even if the new law prevents Edmonds from enforcing its rule against Oxford House, a live controversy remains because the United States seeks damages and civil penalties from Edmonds, under 42 U. S. C. §§ 3614(d)(1)(B) and (C), for conduct occurring prior to enactment of the state law. App. 85.

[4] Like the District Court and the Ninth Circuit, we do not decide whether Edmonds' zoning code provision defining "family," as the City would apply it against Oxford House, violates the FHA's prohibitions against discrimination set out in 42 U. S. C. §§ 3604(f)(1)(A) and (f)(3)(B).

ment of policy" is sensibly read "narrowly in order to preserve the primary operation of the [policy]." *Commissioner* v. *Clark*, 489 U. S. 726, 739 (1989).[5]

A

Congress enacted § 3607(b)(1) against the backdrop of an evident distinction between municipal land-use restrictions and maximum occupancy restrictions.

Land-use restrictions designate "districts in which only compatible uses are allowed and incompatible uses are excluded." D. Mandelker, Land Use Law § 4.16, pp. 113–114 (3d ed. 1993) (hereinafter Mandelker). These restrictions typically categorize uses as single-family residential, multiple-family residential, commercial, or industrial. See, *e. g.*, 1 E. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 8.01, pp. 8–2 to 8–3 (4th ed. 1995); Mandelker § 1.03, p. 4; 1 E. Yokley, Zoning Law and Practice § 7–2, p. 252 (4th ed. 1978).

Land-use restrictions aim to prevent problems caused by the "pig in the parlor instead of the barnyard." *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388 (1926). In particular, reserving land for single-family residences preserves the character of neighborhoods, securing "zones where family values, youth values, and the blessings of quiet

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[5] The dissent notes *Gregory* v. *Ashcroft*, 501 U. S. 452 (1991), as an instance in which the Court did not tightly cabin an exemption contained in a statute proscribing discrimination. See *post*, at 743–744. *Gregory* involved an exemption in the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. §§ 621–634, covering state and local elective officials and "appointee[s] on the policymaking level." § 630(f). The question there was whether state judges fit within the exemption. We held that they did. A state constitutional provision, not a local ordinance, was at stake in *Gregory*—a provision going "beyond an area traditionally regulated by the States" to implicate "a decision of the most fundamental sort for a sovereign entity." 501 U. S., at 460. In that light, the Court refused to attribute to Congress, absent plain statement, any intent to govern the tenure of state judges. Nothing in today's opinion casts a cloud on the soundness of that decision.

seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 9 (1974); see also *Moore* v. *East Cleveland*, 431 U. S. 494, 521 (1977) (Burger, C. J., dissenting) (purpose of East Cleveland's single-family zoning ordinance "is the traditional one of preserving certain areas as family residential communities"). To limit land use to single-family residences, a municipality must define the term "family"; thus family composition rules are an essential component of single-family residential use restrictions.

Maximum occupancy restrictions, in contradistinction, cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms. See, *e. g.*, International Conference of Building Officials, Uniform Housing Code § 503(b) (1988); Building Officials and Code Administrators International, Inc., BOCA National Property Maintenance Code §§ PM–405.3, PM–405.5 (1993) (hereinafter BOCA Code); Southern Building Code Congress, International, Inc., Standard Housing Code §§ 306.1, 306.2 (1991); E. Mood, APHA–CDC Recommended Minimum Housing Standards § 9.02, p. 37 (1986) (hereinafter APHA–CDC Standards).[6] These restrictions ordinarily apply uniformly to *all* residents of *all* dwelling units. Their purpose is to protect health and safety by preventing dwelling overcrowding. See, *e. g.*, BOCA Code §§ PM–101.3, PM–405.3, PM–405.5 and commentary; Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B. U. L. Rev. 1, 41–45 (1976).

We recognized this distinction between maximum occupancy restrictions and land-use restrictions in *Moore* v. *East Cleveland*, 431 U. S. 494 (1977). In *Moore*, the Court held unconstitutional the constricted definition of "family" con-

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[6] Contrary to the dissent's suggestion, see *post*, at 745, n. 5, terminology in the APHA–CDC Standards bears a marked resemblance to the formulation Congress used in § 3607(b)(1). See APHA–CDC Standards § 2.51, p. 12 (defining "Permissible Occupancy" as "the maximum number of individuals permitted to reside in a dwelling unit, or rooming unit").

tained in East Cleveland's housing ordinance. East Cleveland's ordinance "select[ed] certain categories of relatives who may live together and declare[d] that others may not"; in particular, East Cleveland's definition of "family" made "a crime of a grandmother's choice to live with her grandson." *Id.*, at 498–499 (plurality opinion). In response to East Cleveland's argument that its aim was to prevent overcrowded dwellings, streets, and schools, we observed that the municipality's restrictive definition of family served the asserted, and undeniably legitimate, goals "marginally, at best." *Id.*, at 500 (footnote omitted). Another East Cleveland ordinance, we noted, "specifically addressed . . . the problem of overcrowding"; that ordinance tied "the maximum permissible occupancy of a dwelling to the habitable floor area." *Id.*, at 500, n. 7; accord, *id.*, at 520, n. 16 (STEVENS, J., concurring in judgment). Justice Stewart, in dissent, also distinguished restrictions designed to "preserv[e] the character of a residential area," from prescription of "a minimum habitable floor area per person," *id.*, at 539, n. 9, in the interest of community health and safety.[7]

Section 3607(b)(1)'s language—"restrictions regarding the maximum number of occupants permitted to occupy a dwelling"—surely encompasses maximum occupancy restrictions.[8]

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[7] Other courts and commentators have similarly differentiated between land-use restrictions and maximum occupancy restrictions. See, *e. g.*, *State* v. *Baker*, 81 N. J. 99, 110, 405 A. 2d 368, 373 (1979); 7A E. McQuillin, The Law of Municipal Corporations § 24.504 (3d ed. 1989); Abbott, Housing Policy, Housing Codes and Tenant Remedies: An Integration, 56 B. U. L. Rev. 1, 41 (1976).

[8] The plain import of the statutory language is reinforced by the House Committee Report, which observes:

"A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H. R. Rep. No. 100–711, p. 31 (1988).

But the formulation does not fit family composition rules typically tied to land-use restrictions. In sum, rules that cap the total number of occupants in order to prevent overcrowding of a dwelling "plainly and unmistakably," see *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493 (1945), fall within § 3607(b)(1)'s absolute exemption from the FHA's governance; rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain, do not.[9]

B

Turning specifically to the City's Community Development Code, we note that the provisions Edmonds invoked against Oxford House, ECDC §§ 16.20.010 and 21.30.010, are classic examples of a use restriction and complementing family composition rule. These provisions do not cap the number of people who may live in a dwelling. In plain terms, they di-

[9] Tellingly, Congress added the § 3607(b)(1) exemption for maximum occupancy restrictions at the same time it enlarged the FHA to include a ban on discrimination based on "familial status." See *supra*, at 728, n. 1. The provision making it illegal to discriminate in housing against families with children under the age of 18 prompted fears that landlords would be forced to allow large families to crowd into small housing units. See, *e. g.*, Fair Housing Amendments Act of 1987: Hearings on H. R. 1158 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 1st Sess., 656 (1987) (remarks of Rep. Edwards) (questioning whether a landlord must allow a family with 10 children to live in a two-bedroom apartment). Section 3607(b)(1) makes it plain that, pursuant to local prescriptions on maximum occupancy, landlords legitimately may refuse to stuff large families into small quarters. Congress further assured in § 3607(b)(1) that retirement communities would be exempt from the proscription of discrimination against families with minor children. In the sentence immediately following the maximum occupancy provision, § 3607(b)(1) states: "Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons."

rect that dwellings be used only to house families. Captioned "USES," ECDC § 16.20.010 provides that the sole "Permitted Primary Us[e]" in a single-family residential zone is "[s]ingle-family dwelling units." Edmonds itself recognizes that this provision simply "defines those uses permitted in a single family residential zone." Pet. for Cert. 3.

A separate provision caps the number of occupants a dwelling may house, based on floor area:

> "Floor Area. Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." ECDC § 19.10.000 (adopting Uniform Housing Code § 503(b) (1988)).[10]

This space and occupancy standard is a prototypical maximum occupancy restriction.

Edmonds nevertheless argues that its family composition rule, ECDC § 21.30.010, falls within § 3607(b)(1), the FHA exemption for maximum occupancy restrictions, because the rule caps at five the number of unrelated persons allowed to occupy a single-family dwelling. But Edmonds' family composition rule surely does not answer the question: "What is the maximum number of occupants permitted to occupy a house?" So long as they are related "by genetics, adoption, or marriage," any number of people can live in a house. Ten siblings, their parents and grandparents, for example, could dwell in a house in Edmonds' single-family residential zone without offending Edmonds' family composition rule.

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[10] An exception to this provision sets out requirements for efficiency units in apartment buildings. See ECDC § 19.10.000 (1991) (adopting Uniform Housing Code § 503(b) (1988)).

Family living, not living space per occupant, is what ECDC § 21.30.010 describes. Defining family primarily by biological and legal relationships, the provision also accommodates another group association: Five or fewer unrelated people are allowed to live together as though they were family. This accommodation is the peg on which Edmonds rests its plea for § 3607(b)(1) exemption. Had the City defined a family solely by biological and legal links, § 3607(b)(1) would not have been the ground on which Edmonds staked its case. See Tr. of Oral Arg. 11–12, 16. It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction once a town adds to a related persons prescription "and also two unrelated persons."[11]

Edmonds additionally contends that subjecting single-family zoning to FHA scrutiny will "overturn Euclidian zoning" and "destroy the effectiveness and purpose of single-family zoning." Brief for Petitioner 11, 25. This contention both ignores the limited scope of the issue before us and exaggerates the force of the FHA's antidiscrimination provisions. We address only whether Edmonds' family composition rule qualifies for § 3607(b)(1) exemption. Moreover, the FHA antidiscrimination provisions, when applicable, require only "reasonable" accommodations to afford persons with handicaps "equal opportunity to use and enjoy" housing. §§ 3604(f)(1)(A) and (f)(3)(B).

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[11] This curious reasoning drives the dissent. If Edmonds allowed only related persons (whatever their number) to dwell in a house in a single-family zone, then the dissent, it appears, would agree that the § 3607(b)(1) exemption is unavailable. But so long as the City introduces a specific number—*any* number (two will do)—the City can insulate its single-family zone *entirely* from FHA coverage. The exception-takes-the-rule reading the dissent advances is hardly the "generous construction" warranted for antidiscrimination prescriptions. See *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 212 (1972).

* * *

The parties have presented, and we have decided, only a threshold question: Edmonds' zoning code provision describing who may compose a "family" is not a maximum occupancy restriction exempt from the FHA under § 3607(b)(1). It remains for the lower courts to decide whether Edmonds' actions against Oxford House violate the FHA's prohibitions against discrimination set out in §§ 3604(f)(1)(A) and (f)(3)(B). For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

Congress has exempted from the requirements of the Fair Housing Act (FHA) "*any* reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U. S. C. § 3607(b)(1) (emphasis added). In today's decision, the Court concludes that the challenged provisions of petitioner's zoning code do not qualify for this exemption, even though they establish a specific number—five—as the maximum number of unrelated persons permitted to occupy a dwelling in the single-family neighborhoods of Edmonds, Washington. Because the Court's conclusion fails to give effect to the plain language of the statute, I respectfully dissent.

I

Petitioner's zoning code reserves certain neighborhoods primarily for "[s]ingle-family dwelling units." Edmonds Community Development Code (ECDC) § 16.20.010(A)(1) (1991), App. 225. To live together in such a dwelling, a group must constitute a "family," which may be either a traditional kind of family, comprising "two or more persons re-

lated by genetics, adoption, or marriage," or a nontraditional one, comprising "a group of five or fewer persons who are not [so] related." § 21.30.010, App. 250. As respondent United States conceded at oral argument, the effect of these provisions is to establish a rule that "no house in [a single-family] area of the city shall have more than five occupants unless it is a [traditional kind of] family." Tr. of Oral Arg. 46. In other words, petitioner's zoning code establishes for certain dwellings "a five-occupant limit, [with] an exception for [traditional] families." *Ibid.*

To my mind, the rule that "no house . . . shall have more than five occupants" (a "five-occupant limit") readily qualifies as a "restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling." In plain fashion, it "restrict[s]"—to five—"the maximum number of occupants permitted to occupy a dwelling." To be sure, as the majority observes, the restriction imposed by petitioner's zoning code is not an absolute one, because it does not apply to related persons. See *ante*, at 736. But § 3607(b)(1) does not set forth a narrow exemption only for "absolute" or "unqualified" restrictions regarding the maximum number of occupants. Instead, it sweeps broadly to exempt *any* restrictions *regarding* such maximum number. It is difficult to imagine what broader terms Congress could have used to signify the categories or kinds of relevant governmental restrictions that are exempt from the FHA.[1]

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[1] A broad construction of the word "any" is hardly novel. See, *e. g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 96 (1993) (citing, as examples where "Congress spoke without qualification" in ERISA, an exemption for "'*any security*' issued to a plan by a registered investment company" and an exemption for "'*any assets* of . . . an insurance company or *any assets* of a plan which are held by . . . an insurance company'" (quoting 29 U. S. C. §§ 1101(b)(1), 1103(b)(2)) (emphasis in *John Hancock*)); *Citizens' Bank* v. *Parker*, 192 U. S. 73, 81 (1904) ("The word *any* excludes selection or distinction. It declares the exemption without limitation").

Consider a real estate agent who is assigned responsibility for the city of Edmonds. Desiring to learn all he can about his new territory, the agent inquires: "Does the city have *any* restrictions regarding the maximum number of occupants permitted to occupy a dwelling?" The accurate answer must surely be in the affirmative—yes, the maximum number of unrelated persons permitted to occupy a dwelling in a single-family neighborhood is five. Or consider a different example. Assume that the Federal Republic of Germany imposes no restrictions on the speed of "cars" that drive on the Autobahn but does cap the speed of "trucks" (which are defined as all other vehicles). If a conscientious visitor to Germany asks whether there are "*any* restrictions regarding the maximum speed of motor vehicles permitted to drive on the Autobahn," the accurate answer again is surely the affirmative one—yes, there is a restriction regarding the maximum speed of trucks on the Autobahn.

The majority does not ask whether petitioner's zoning code imposes any restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Instead, observing that pursuant to ECDC § 21.30.010, "any number of people can live in a house," so long as they are "related 'by genetics, adoption, or marriage,' " the majority concludes that § 21.30.010 does not qualify for § 3607(b)(1)'s exemption because it "surely does not answer the question: 'What is the maximum number of occupants permitted to occupy a house?' " *Ante,* at 736. The majority's question, however, does not accord with the text of the statute. To take advantage of the exemption, a local, state, or federal law need not impose a restriction *establishing* an *absolute* maximum number of occupants; under § 3607(b)(1), it is necessary only that such law impose a restriction "regarding" the maximum number of occupants. Surely, a restriction can "regar[d]"—or "concern," "relate to," or "bear on"—the maximum num-

ber of occupants without establishing an absolute maximum number in all cases.[2]

I would apply § 3607(b)(1) as it is written. Because petitioner's zoning code imposes a qualified "restrictio[n] regarding the maximum number of occupants permitted to occupy a dwelling," and because the statute exempts from the FHA "any" such restrictions, I would reverse the Ninth Circuit's holding that the exemption does not apply in this case.[3]

II

The majority's failure to ask the right question about petitioner's zoning code results from a more fundamental error in focusing on "maximum occupancy restrictions" and "family composition rules." See generally *ante*, at 731–734. These two terms—and the two categories of zoning rules they describe—are simply irrelevant to this case.

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[2] It is ironic that the majority cites Uniform Housing Code § 503(b) (1988), which has been incorporated into petitioner's zoning code, see ECDC § 19.10.000, App. 248, as a "prototypical maximum occupancy restriction" that would qualify for § 3607(b)(1)'s exemption. *Ante*, at 736. Because § 503(b), as the majority describes it, "caps the number of occupants a dwelling may house, *based on floor area*," *ibid.* (emphasis added), it actually caps the *density* of occupants, not their *number*. By itself, therefore, § 503(b) "surely does not answer the question: 'What is the maximum number of occupants permitted to occupy a house?' " *Ibid.* That is, even under § 503(b), there is no single absolute maximum number of occupants that applies to every house in Edmonds. Thus, the answer to the majority's question is the same with respect to both § 503(b) and ECDC § 21.30.010: "It depends." With respect to the former, it depends on the size of the house's bedrooms, see *ante*, at 736 (quoting § 503(b)); with respect to the latter, it depends on whether the house's occupants are related.

[3] I would also remand the case to the Court of Appeals to allow it to pass on respondents' argument that petitioner's zoning code does not satisfy § 3607(b)(1)'s requirement that qualifying restrictions be "reasonable." The District Court rejected this argument, concluding that petitioner's "five-unrelated-person limit is reasonable as a matter of law," App. to Pet. for Cert. B–10, but the Court of Appeals did not address the issue.

A

As an initial matter, I do not agree with the majority's interpretive premise that "this case [is] an instance in which an exception to 'a general statement of policy' is sensibly read 'narrowly in order to preserve the primary operation of the [policy].'" *Ante*, at 731–732 (quoting *Commissioner* v. *Clark*, 489 U. S. 726, 739 (1989)). Why *this* case? Surely, it is not because the FHA has a "policy"; every statute has that. Nor could the reason be that a narrow reading of 42 U. S. C. § 3607(b)(1) is necessary to preserve the primary operation of the FHA's stated policy "to provide . . . for fair housing throughout the United States." § 3601. Congress, the body responsible for deciding how specifically to achieve the objective of fair housing, obviously believed that § 3607(b)(1)'s exemption for "any . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling" is consistent with the FHA's general statement of policy. We do Congress no service—indeed, we *negate* the "primary operation" of § 3607(b)(1)—by giving that congressional enactment an artificially narrow reading. See *Rodriguez* v. *United States*, 480 U. S. 522, 526 (1987) *(per curiam)* ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law"); *Board of Governors, FRS* v. *Dimension Financial Corp.*, 474 U. S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself . . . , in the end, prevents the effectuation of congressional intent").[4]

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[4] The majority notes "precedent recognizing the FHA's 'broad and inclusive' compass, and therefore according a 'generous construction' to the Act's complaint-filing provision." *Ante*, at 731 (quoting *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209, 212 (1972)). What we actually said in *Trafficante* was that "[t]he language of the Act is broad and inclusive." *Id.*, at 209. This is true enough, but we did not "therefore" accord a generous construction either to the FHA's "antidiscrimination

In any event, as applied to the present case, the majority's interpretive premise clashes with our decision in *Gregory* v. *Ashcroft*, 501 U. S. 452, 456–470 (1991), in which we held that state judges are not protected by the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. §§ 621–634 (1988 ed. and Supp. V). Though the ADEA generally protects the employees of States and their political subdivisions, see § 630(b)(2), it exempts from protection state and local elected officials and "appointee[s] on the policymaking level," § 630(f). In concluding that state judges fell within this exemption, we did not construe it "narrowly" in order to preserve the "primary operation" of the ADEA. Instead, we specifically said that we were "not looking for a plain statement that judges are excluded" from the Act's coverage. *Gregory*, *supra*, at 467. Moreover, we said this *despite* precedent recognizing that the ADEA "'broadly prohibits'" age discrimination in the workplace. *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 120 (1985) (quoting *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978)). Cf. *ante*, at 731 (noting "precedent recognizing the FHA's 'broad and inclusive' compass" (quoting *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 209 (1972))).

Behind our refusal in *Gregory* to give a narrow construction to the ADEA's exemption for "appointee[s] on the policymaking level" was our holding that the power of Congress to "legislate in areas traditionally regulated by the States" is

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prescriptions," see *ante*, at 737, n. 11, or to its complaint-filing provision, § 810(a), 42 U. S. C. § 3610(a) (1970 ed.) (repealed 1988). Instead, without any reference to the language of the Act, we stated that we could "give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." 409 U. S., at 212. If we were to apply such logic to this case, we would presumably "give vitality" to § 3607(b)(1) by giving it a generous rather than a narrow construction.

"an extraordinary power in a federalist system," and "a power that we must assume Congress does not exercise lightly." 501 U. S., at 460. Thus, we require that "'Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States.'" *Id.*, at 461 (quoting *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989)). It is obvious that land use—the subject of petitioner's zoning code—is an area traditionally regulated by the States rather than by Congress, and that land-use regulation is one of the historic powers of the States. As we have stated, "zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U. S. 490, 508, n. 18 (1975). See also *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC* v. *Mississippi*, 456 U. S. 742, 768, n. 30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity"); *Village of Belle Terre* v. *Boraas*, 416 U. S. 1, 13 (1974) (Marshall, J., dissenting) ("I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government"). Accordingly, even if it might be sensible in other contexts to construe exemptions narrowly, that principle has no application in this case.

B

I turn now to the substance of the majority's analysis, the focus of which is "maximum occupancy restrictions" and "family composition rules." The first of these two terms has the sole function of serving as a label for a category of zoning rules simply invented by the majority: rules that "cap the number of occupants per dwelling, typically in relation to available floor space or the number and type of rooms," that "ordinarily apply uniformly to *all* residents of *all* dwelling units," and that have the "purpose . . . to protect health and safety by preventing dwelling overcrowding." *Ante*, at

733.[5] The majority's term does bear a familial resemblance to the statutory term "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," but it should be readily apparent that the category of zoning rules the majority labels "maximum occupancy restrictions" does not exhaust the category of restrictions exempted from the FHA by § 3607(b)(1). The plain words of the statute do not refer to "available floor space or the number and type of rooms"; they embrace no requirement that the exempted restrictions "apply uniformly to *all* residents of *all* dwelling units"; and they give no indication that such restrictions

[5] To my knowledge, no federal or state judicial opinion—other than three § 3607(b)(1) decisions dating from 1992 and 1993—employs the term "maximum occupancy restrictions." Likewise, not one of the model codes from which the majority constructs its category of zoning rules uses that term either. See *ante*, at 733 (citing authorities). Accordingly, it is difficult to conceive how Congress, in 1988, could have "enacted § 3607(b)(1) against the backdrop of an evident distinction between municipal land-use restrictions and maximum occupancy restrictions." *Ante*, at 732.

In this context, the majority seizes on a phrase that appears in a booklet published jointly by the American Public Health Association and the Centers for Disease Control—"'the maximum number of individuals permitted to reside in a dwelling unit, or rooming unit.'" *Ante*, at 733, n. 6 (quoting APHA–CDC Recommended Minimum Housing Standards § 2.51, p. 12 (1986)). Even if, as the majority boldly asserts, this phrase "bears a marked resemblance to the formulation Congress used in § 3607(b)(1)," *ante*, at 733, n. 6, I fail to comprehend how that would add to our understanding of the statute. The majority surely cannot hope to invoke the rule that where "'Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Molzof* v. *United States*, 502 U. S. 301, 307 (1992) (quoting *Morissette* v. *United States*, 342 U. S. 246, 263 (1952)). The quoted phrase from the APHA–CDC publication can hardly be called a "ter[m] of art"—let alone a term in which is "accumulated the legal tradition and meaning of centuries of practice." See also *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981) (applying the rule to "terms that have accumulated settled meaning under either equity or the common law").

must have the "purpose . . . to protect health and safety by preventing dwelling overcrowding." *Ibid.*

Of course, the majority does not contend that the language of § 3607(b)(1) precisely describes the category of zoning rules it has labeled "maximum occupancy restrictions." Rather, the majority makes the far more narrow claim that the statutory language "surely encompasses" that category. *Ante*, at 734. I readily concede this point.[6] But the obvious conclusion that § 3607(b)(1) encompasses "maximum occupancy restrictions" tells us nothing about whether the statute *also* encompasses ECDC § 21.30.010, the zoning rule at issue here. In other words, although the majority's discussion will no doubt provide guidance in future cases, it is completely irrelevant to the question presented in *this* case.

The majority fares no better in its treatment of "family composition rules," a term employed by the majority to describe yet another invented category of zoning restrictions. Although today's decision seems to hinge on the majority's judgment that ECDC § 21.30.010 is a "classic exampl[e] of a . . . family composition rule," *ante*, at 735, the majority says virtually nothing about this crucial category. Thus, it briefly alludes to the derivation of "family composition rules" and provides a single example of them.[7] Apart from these two references, however, the majority's analysis consists

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[6] According to the majority, its conclusion that § 3607(b)(1) encompasses all "maximum occupancy restrictions" is "reinforced by" H. R. Rep. No. 100–711, p. 31 (1988). See *ante*, at 734, n. 8. Since I agree with this narrow conclusion, I need not consider whether the cited Committee Report is either authoritative or persuasive.

[7] See *ante*, at 733 ("To limit land use to single-family residences, a municipality must define the term 'family'; thus family composition rules are an essential component of single-family residential use restrictions"); *ante*, at 734 ("East Cleveland's ordinance 'select[ed] certain categories of relatives who may live together and declare[d] that others may not'; in particular, East Cleveland's definition of 'family' made 'a crime of a grandmother's choice to live with her grandson'" (quoting *Moore* v. *East Cleveland*, 431 U. S. 494, 498–499 (1977) (plurality opinion))).

solely of announcing its conclusion that "the formulation [of § 3607(b)(1)] does not fit family composition rules." *Ibid.* This is not reasoning; it is *ipse dixit.* Indeed, it is not until *after* this conclusion has been announced that the majority (in the course of summing up) even defines "family composition rules" at all. See *ibid.* (referring to "rules designed to preserve the family character of a neighborhood, fastening on the composition of households rather than on the total number of occupants living quarters can contain").

Although the majority does not say so explicitly, one might infer from its belated definition of "family composition rules" that § 3607(b)(1) does not encompass zoning rules that have one particular purpose ("to preserve the family character of a neighborhood") or those that refer to the qualitative as well as the quantitative character of a dwelling (by "fastening on the composition of households rather than on the total number of occupants living quarters can contain"). *Ibid.* Yet terms like "family character," "composition of households," "total [that is, absolute] number of occupants," and "living quarters" are noticeably absent from the text of the statute. Section 3607(b)(1) limits neither the permissible purposes of a qualifying zoning restriction nor the ways in which such a restriction may accomplish its purposes. Rather, the exemption encompasses "any" zoning restriction—whatever its purpose and by whatever means it accomplishes that purpose—so long as the restriction "regard[s]" the maximum number of occupants. See generally *supra*, at 739–742. As I have explained, petitioner's zoning code does precisely that.[8]

[8] All that remains of the majority's case is the epithet that my reasoning is "curious" because it yields an "exception-takes-the-rule reading" of § 3607(b)(1). *Ante*, at 737, n. 11. It is not clear why the majority thinks my reading will eviscerate the FHA's antidiscrimination prescriptions. The FHA protects handicapped persons from traditionally defined (intentional) discrimination, 42 U. S. C. §§ 3604(f)(1), (2), and three kinds of specially defined discrimination: "refusal to permit . . . reasonable modifications of existing premises"; "refusal to make reasonable accommodations in rules, policies, practices, or services"; and "failure to design and con-

In sum, it does not matter that ECDC § 21.30.010 describes "[f]amily living, not living space per occupant," *ante*, at 737, because it is immaterial under § 3607(b)(1) whether § 21.30.010 constitutes a "family composition rule" but not a "maximum occupancy restriction." The sole relevant question is whether petitioner's zoning code imposes "any . . . restrictions regarding the maximum number of occupants permitted to occupy a dwelling." Because I believe it does, I respectfully dissent.

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struct [multifamily] dwellings" such that they are accessible and usable, §§ 3604(f)(3)(A), (B), (C). Yet only *one* of these four kinds of discrimination—the "reasonable accommodations" prescription of § 3604(f)(3)(B)—is even arguably implicated by zoning rules like ECDC § 21.30.010. In addition, because the exemption refers to "local, State, or Federal restrictions," even the broadest reading of § 3607(b)(1) could not possibly insulate *private* refusals to make reasonable accommodations for handicapped persons. Finally, as I have already noted, see *supra*, at 741, n. 3, restrictions must be "reasonable" in order to be exempted by § 3607(b)(1).

Syllabus

REYNOLDSVILLE CASKET CO. ET AL. *v.* HYDE

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 94–3. Argued February 27, 1995—Decided May 15, 1995

More than three years after respondent Hyde was in an accident in Ohio with a truck owned by a Pennsylvania company, she filed suit in an Ohio county court against the company and the truck's driver, petitioners herein. The suit was timely under an Ohio provision that tolls the running of the State's 2-year statute of limitations in lawsuits against out-of-state defendants. However, while her case was pending, this Court, in *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888, held that the tolling provision places an unconstitutional burden upon interstate commerce. The county court dismissed her suit as untimely, but it was ultimately reinstated by the State Supreme Court, which held that *Bendix* could not be applied retroactively to bar claims that had accrued prior to the announcement of that decision.

Held: The Supremacy Clause bars Ohio from applying its tolling statute to pre-*Bendix* torts. Pp. 752–759.

(a) Hyde acknowledges that this Court, in *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 97, held that, when it decides a case and applies the new legal rule of that case to the parties before it, then it and other courts must treat the same rule as "retroactive," applying it, for example, to pending cases, whether or not they involve predecision events. She thereby concedes that *Bendix* applies to her case and retroactively invalidated the tolling provision that makes her suit timely. She argues instead that the issue here is not one of retroactivity, and that the Ohio Supreme Court's action is permissible because all that court has done is to fashion a remedy that takes into consideration her reliance on pre-*Bendix* law. Pp. 752–753.

(b) There are serious problems with Hyde's argument. The Ohio Supreme Court's syllabus (the legally authoritative statement of its holding) speaks, not about remedy, but about retroactivity. That court's refusal to dismiss her suit on the ground that she may have reasonably relied upon pre-*Bendix* law is the very sort of justification that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule. She correctly notes that, as courts apply "retroactively" a new rule of law to pending cases, they may find instances where the new rule, for well-established legal reasons, does not determine the outcome of the case. However, this case involves no instance or special circumstance that might somehow justify the result she seeks.

It does not concern (1) an alternative way of curing the constitutional violation; or (2) a previously existing, independent legal basis for denying relief, see, *e. g., McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 40–41; or (3) a well-established general legal rule, such as qualified immunity, that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, see, *e. g., Harlow* v. *Fitzgerald*, 457 U. S. 800, 818; or (4) a principle of law that limits the principle of retroactivity itself, see *Teague* v. *Lane*, 489 U. S. 288. Hyde has offered no more than simple reliance as a basis for creating an exception to *Harper*'s retroactivity rule and has conceded that *Harper* governs this case. Her concession means that she cannot prevail. Pp. 753–759.

68 Ohio St. 3d 240, 626 N. E. 2d 75, reversed.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 759. KENNEDY, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 761.

William E. Riedel argued the cause and filed briefs for petitioners.

Timothy B. Dyk argued the cause for respondent. With him on the brief was *David J. Eardley.**

JUSTICE BREYER delivered the opinion of the Court.

In *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888 (1988), this Court held unconstitutional (as impermissibly burdening interstate commerce) an Ohio "tolling" provision that, in effect, gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants. Subsequently, in the case before us, the Supreme Court of

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**Irene C. Keyse-Walker* filed a brief for the Dalkon Shield Claimants Trust as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Ohio by *Lee Fisher*, Attorney General, *Richard A. Cordray*, State Solicitor, and *Simon B. Karas;* and for Brown & Szaller Co., L. P. A., et al. by *James F. Szaller*, *Robert A. Marcis*, *Larry S. Stewart*, and *Jeffrey R. White.*

Ohio held that, despite *Bendix*, Ohio's tolling law continues to apply to tort claims that accrued before that decision. This holding, in our view, violates the Constitution's Supremacy Clause. We therefore reverse the Ohio Supreme Court's judgment.

The accident that led to this case, a collision between a car and a truck, occurred in Ashtabula County, Ohio, on March 5, 1984. More than three years later, on August 11, 1987, Carol Hyde (respondent here) sued the truck's driver, John Blosh, and its owner, Reynoldsville Casket Company (petitioners). All parties concede that, had Blosh and Reynoldsville made their home in Ohio, Ohio law would have given Hyde only two years to bring her lawsuit. See Ohio Rev. Code Ann. §2305.10 (1991). But, because petitioners were from Pennsylvania, a special provision of Ohio law tolled the running of the statute of limitations, making the lawsuit timely. See §2305.15(A) (tolling the statute of limitations while a person against whom "a cause of action accrues" is "out of" or "departs from" the State).

Ten months after Hyde brought her suit, this Court, in *Bendix*, *supra*, held that the tolling provision on which she relied, §2305.15(A), places an unconstitutional burden upon interstate commerce. Soon thereafter, the Ashtabula County Court of Common Pleas, finding this case indistinguishable from *Bendix*, held that the tolling provision could not constitutionally be applied to the case, and dismissed the lawsuit as untimely. The intermediate appellate state court affirmed the dismissal. However, the Ohio Supreme Court reinstated the suit. Its syllabus, which under Ohio law sets forth the authoritative basis for its decision, see Ohio Supreme Court Rules for the Reporting of Opinions Rule 1(B) (1994–1995); *Akers* v. *Serv-A-Portion, Inc.*, 31 Ohio St. 3d 78, 79, n. 1, 508 N. E. 2d 964, 965, n. 1 (1987), simply says, "*Bendix Autolite Corp. v. Midwesco Enterprises, Inc.* . . . may not be retroactively applied to bar claims in state courts which had accrued prior to the announcement of that deci-

sion. (Section 16, Article I, Ohio Constitution, applied.)" 68 Ohio St. 3d 240, 240–241, 626 N. E. 2d 75 (1994). We granted certiorari to decide whether the Federal Constitution permits Ohio to continue to apply its tolling statute to pre-*Bendix* torts. And, as we have said, we conclude that it does not.

Hyde acknowledges that this Court, in *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86, 97 (1993), held that, when (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as "retroactive," applying it, for example, to all pending cases, whether or not those cases involve predecision events. She thereby concedes that, the Ohio Supreme Court's syllabus to the contrary notwithstanding, *Bendix* applies to her case. And, she says, as "a result of *Harper*, there is no question that *Bendix* retroactively invalidated" the tolling provision that makes her suit timely. Brief for Respondent 8.

Although one might think that is the end of the matter, Hyde ingeniously argues that it is not. She asks us to look at what the Ohio Supreme Court has done, not through the lens of "retroactivity," but through that of "remedy." States, she says, have a degree of legal leeway in fashioning remedies for constitutional ills. She points to *Chevron Oil Co.* v. *Huson,* 404 U. S. 97 (1971), in which this Court applied *prospectively only* its ruling that a 1-year statute of limitations governed certain tort cases—primarily because that ruling had "effectively overruled a long line of decisions" applying a more generous limitations principle (that of laches), upon which plaintiffs had reasonably relied. *Id.*, at 107. She concedes that *Harper* overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law. But, she notes the possibility of recharacterizing *Chevron Oil* as a case in which the Court simply took reliance interests into account in tailoring an appropriate remedy for a violation of federal law. See

Harper, supra, at 133–134 (O'CONNOR, J., dissenting); *American Trucking Assns., Inc.* v. *Smith,* 496 U. S. 167, 218–225 (1990) (STEVENS, J., dissenting). And she quotes Justice Harlan, who, before *Chevron Oil,* pointed out that "equitable considerations" such as "'reliance'" might prove relevant to "relief." *United States* v. *Estate of Donnelly,* 397 U. S. 286, 296–297 (1970) (concurring opinion).

Thus, Hyde asks, why not look at what the Ohio Supreme Court has done in this case as if it were simply an effort to fashion a remedy that takes into consideration her reliance on pre-*Bendix* law? Here, the remedy would actually consist of providing *no* remedy for the constitutional violation or, to put the matter more precisely, of continuing to toll the 2-year statute of limitations in pre-*Bendix* cases, such as hers, as a state law "equitable" device for reasons of reliance and fairness. She claims that use of this device violates no federal constitutional provision (such as the Due Process Clause) and is therefore permissible.

One serious problem with Hyde's argument lies in the Ohio Supreme Court's legal description of why, in fact, it refused to dismiss Hyde's case. As we have pointed out, the Ohio Supreme Court's syllabus (the legally authoritative statement of its holding) speaks, not about remedy, but about retroactivity. Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law—a reliance of the same kind and degree as that involved in *Chevron Oil.* But, this type of justification—often present when prior law is overruled—is the very sort that this Court, in *Harper,* found insufficient to deny retroactive application of a new legal rule (that had been applied in the case that first an-

nounced it). If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on "remedy" rather than "nonretroactivity"?

Hyde tries to answer this question by pointing to other cases in which, she claims, this Court has allowed state courts effectively to avoid retroactive application of federal law by denying a particular remedy for violation of that law or by refusing to provide any remedy at all. She argues that these cases are similar enough to her own to permit a "remedial" exception to the retroactive application of *Bendix*. We have examined the cases to which Hyde looks for support, and conclude that they all involve very different circumstances.

First, Hyde points to a statement in the opinion announcing the Court's judgment in *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529 (1991), that once "a rule is found to apply 'backward,' there may then be a further issue of remedies, *i. e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.*, at 535 (opinion of SOUTER, J.); *ibid.* ("Subject to possible constitutional thresholds, . . . the remedial inquiry is one governed by state law, at least where the case originates in state court"); *American Trucking Assns., Inc.* v. *Smith*, 496 U. S., at 178 (opinion of O'CONNOR, J.) (speaking of the need to "distinguish the question of retroactivity . . . from the distinct remedial question"); *id.*, at 210 (STEVENS, J., dissenting) (distinguishing "between retroactivity as a choice-of-law rule and retroactivity as a remedial principle"). This language, however, read both literally and in context, makes clear that the ordinary application of a new rule of law "backwards," say, to pending cases, may *or may not*, involve a further matter of remedies. Whether it does so, and, if so, what kind of remedy the state court may fashion, depend—like almost all legal issues—

upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort.

Second, Hyde points to tax cases in which the Court applied retroactively new rules holding certain state tax laws unconstitutional, but nonetheless permitted the state courts a degree of leeway in designing a remedy, including a remedy that would deny state taxpayers, with pending refund cases, the refund that they sought. See *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86 (1993); *Beam*, *supra*. If state courts may at the same time apply new law (invalidating tax statutes) and withhold relief (tax refunds) from tax plaintiffs, asks Hyde, why can they not at the same time apply new law (invalidating tolling statutes) and withhold relief (dismissal) from tort defendants?

The answer to this question lies in the special circumstances of the tax cases. The Court has suggested that some of them involve a particular kind of constitutional violation—a kind that the State could cure without repaying back taxes. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U. S. 18, 40–41 (1990). Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups. Where the violation stemmed from, say, taxing the retirement funds of one group (retired Federal Government employees) but not those of another (retired state government employees), see *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803 (1989), then the State might cure the problem either (1) by taxing both (imposing, say, back taxes on the previously advantaged group, to the extent constitutionally permissible), or (2) by taxing neither (and refunding back taxes). Cf. *McKesson Corp.*, *supra*, at 40–41, and n. 23. And, if the State chooses the first, then the taxpayers need receive no refund. But, that result flows not from some general "reme-

dial" exception to "retroactivity" law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution.

One can imagine a roughly comparable situation in the statute of limitations context. Suppose that Ohio violated the Constitution by treating two similar classes of tort defendants differently, say, by applying a 2-year statute of limitations to the first (in-state defendants) but a 4-year statute to the second (out-of-state defendants). Ohio might have cured this (imaginary) constitutional problem either (1) by applying a 4-year statute to both groups, or (2) by applying a 2-year statute to both groups. Had it chosen the first of these remedies, then Hyde's case could continue because the 4-year statute would no longer violate the Federal Constitution. This imaginary case, however, is not the case at hand, for the Ohio Supreme Court's "remedy" here (allowing Hyde to proceed) does not cure the tolling statute's problem of unconstitutionality. And, her tort claim critically depends upon Ohio tolling law that continues to violate the Commerce Clause.

Other tax examples present different, remedial problems. Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But what if a preexisting, separate, independent rule of state law, having nothing to do with retroactivity—a rule containing certain procedural requirements for any refund suit—nonetheless barred the taxpayers' refund suit? See *McKesson Corp.*, *supra*, at 45; *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim. See *McKesson Corp.*, *supra*, at 45.

This tax scenario simply reflects the legal commonplace that, when two different rules of law each independently bar recovery, then a decision, the retroactive application of which invalidates one rule, will make no difference to the result. The other, constitutionally adequate rule remains in place. Hyde cannot bring her case within the protection of this principle, for the Ohio Supreme Court did not rest its holding upon a pre-existing, separate rule of state law (having nothing to do with retroactivity) that independently permitted her to proceed. Rather, the maintenance of her action critically depends upon the continued application of the Ohio statute's "tolling" principle—a principle that this Court has held unconstitutional.

Third, Hyde points to the law of qualified immunity, which, she says, imposes a "remedial" limitation upon the "retroactive" application of a new rule to pending cases. To understand her argument, consider the following scenario: (1) Smith sues a police officer claiming injury because of an unconstitutional arrest; (2) the police officer asserts that the arrest was constitutional; (3) this Court then holds, in a different case, that an identical arrest is *not* constitutional; (4) the holding of this different case applies retroactively to Smith's case; but (5) the police officer still wins on grounds of qualified immunity because the new rule of law was not "clearly established" at the time of the arrest. See generally *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). In one sense, Smith lost for a reason similar to the tax plaintiffs mentioned above, namely, that a previously existing, separate, constitutional legal ground (that of the law not being "clearly established") bars her claim. We acknowledge, however, that this separate legal ground does reflect certain remedial considerations. In particular, it permits government officials to rely upon old law. But, it does so lest threat of liability "'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching

discharge of their duties.'" *Id.*, at 814 (quoting *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949)). And, it reflects the concern that "society as a whole," without that immunity, would have to bear "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U. S., at 814. These very facts—that a set of special federal policy considerations have led to the creation of a well-established, independent rule of law—distinguish the qualified immunity cases from the case before us, where a concern about reliance alone has led the Ohio court to create what amounts to an ad hoc exemption from retroactivity.

Finally, Hyde points to the line of cases starting with *Teague* v. *Lane*, 489 U. S. 288 (1989), in which, she says, this Court has held that a habeas corpus petitioner cannot obtain a habeas corpus remedy where doing so would require the habeas court to apply retroactively a new rule of criminal law. The *Teague* doctrine, however, does not involve a special "remedial" limitation on the principle of "retroactivity" as much as it reflects a limitation inherent in the principle itself. New legal principles, even when applied retroactively, do not apply to cases already closed. Cf. *United States* v. *Estate of Donnelly*, 397 U. S., at 296 (Harlan, J., concurring) (at some point, "the rights of the parties should be considered frozen" and a "conviction . . . final"). And, much as the qualified immunity doctrine embodies special federal policy concerns related to the imposition of damages liability upon persons holding public office, the *Teague* doctrine embodies certain special concerns—related to collateral review of state criminal convictions—that affect which cases are closed, for which retroactivity-related purposes, and under what circumstances. No such special finality-related concerns are present here.

The upshot is that Hyde shows, through her examples, the unsurprising fact that, as courts apply "retroactively" a new rule of law to pending cases, they will find instances where

that new rule, for well-established legal reasons, does not determine the outcome of the case. Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself. But, this case involves no such instance; nor does it involve any other special circumstance that might somehow justify the result Hyde seeks. Rather, Hyde offers no more than simple reliance (of the sort at issue in *Chevron Oil*) as a basis for creating an exception to *Harper*'s rule of retroactivity—in other words, she claims that, for no special reason, *Harper* does not apply. We are back where we started. Hyde's necessary concession, that *Harper* governs this case, means that she cannot prevail.

The judgment of the Supreme Court of Ohio is

Reversed.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the opinion of the Court, which assumes that the Ohio Supreme Court denied petitioner a "remedy" for the unconstitutionality of the tolling statute, and refutes the notion that "remedial discretion" would allow that unconstitutionality to be given no effect. That was the theory on which this case was presented and argued, and it is properly decided on the same basis.

I write separately, however, to record my doubt that the case in fact presents any issue of remedies or of remedial discretion at all. A court does not—in the nature of things it *can* not—give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not in itself a cognizable

"wrong." (If it were, every citizen would have standing to challenge every law.) In fact, what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case "*disregarding the [unconstitutional] law*," *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803) (emphasis added), because a law repugnant to the Constitution "is void, and is as no law," *Ex parte Siebold*, 100 U. S. 371, 376 (1880). Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy. Or if a plaintiff seeks to enjoin acts, harmful to him, about to be taken by a government officer under an unconstitutional regulatory statute, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, *the statute notwithstanding.*" *Massachusetts* v. *Mellon*, 262 U. S. 447, 488–489 (1923) (emphasis added). In such cases, it makes sense to speak of "remedial discretion."

In the present case, however, ignoring the unconstitutional statute (which the Ohio courts were bound to do) did not result in the conclusion that some remedy must be provided (over which the courts might have some discretion). Rather, it resulted in the conclusion that the remedy which the *plaintiff* sought could *not* be provided. Respondent's suit was concededly untimely under the applicable state statute of limitations, Ohio Rev. Code Ann. § 2305.10 (1991). See *ante*, at 751. When petitioners moved to dismiss the suit, respondent replied that the suit *was* timely by virtue of the tolling provision, § 2305.15(A). The tolling provision, however, was unconstitutional, see *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888 (1988), and since it was unconstitutional it "was . . . as inoperative as if it had never been passed," *Chicago, I. & L. R. Co.* v. *Hackett*, 228 U. S. 559, 566 (1913).

In contemplation of the law, then, all that the trial court had before it was a concededly untimely suit, and (absent

some valid Ohio law other than the tolling statute) it had no alternative but to dismiss. The Court's opinion gives reasons why the Ohio law applied by the Ohio Supreme Court in this case is in its substance invalid. I add that even the rubric under which that law was announced is invalid: It has nothing to do with remedial discretion.

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

We do not read today's opinion to surrender in advance our authority to decide that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions. We cannot foresee the myriad circumstances in which the question might arise. In two classes of cases, courts already take account of these considerations: cases involving qualified immunity, which protects public officials' reliance on clearly established law, see *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982); and cases applying the *Teague* bar which, among other objectives, protects States that rely on the law existing at the time a conviction becomes final, see *Teague* v. *Lane*, 489 U. S. 288, 310 (1989). Cf. *ante*, at 758. As the Court seems to acknowledge, however, there may be other areas where the importance of the reliance interests that are disturbed precludes a remedy despite the retroactive application of the new rule. *Ante*, at 758–759. In my view, reliance on statutes of limitations falls into that category in certain circumstances, see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 371–374 (1991) (O'CONNOR, J., dissenting); *id.*, at 379 (KENNEDY, J., dissenting); *American Trucking Assns., Inc.* v. *Smith*, 496 U. S. 167, 221–222 (1990) (STEVENS, J., dissenting); *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987); *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), consistent with a long tradition of judicial authority to formulate rules ensuring fair and predictable enforcement of statutes of limitations, for

instance, through rules pertaining to tolling or waiver. See *American Trucking Assns., Inc., supra,* at 221 (STEVENS, J., dissenting) (citing *Braun* v. *Sauerwein,* 10 Wall. 218, 223 (1870)). When a hard case presents the question of our authority to deny relief in a retroactivity case, that will be soon enough to resolve it; for the law in this area is, and ought to be, shaped by the urgent necessities we confront when there is a strong case to be made for limiting relief despite the retroactive application of the law.

This is not a case where we need to address the issue whether a party is entitled to a full remedy in a retroactivity case, because that question arises only when the right is predicated upon a new rule of law, see *United States* v. *Johnson,* 457 U. S. 537, 549 (1982), and *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.,* 486 U. S. 888 (1988), did not announce a new rule. In the civil context, a case announces a new rule of law "either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil, supra,* at 106; cf. *Teague* v. *Lane, supra,* at 301 (new rule in criminal context is one not "*dictated* by precedent existing at the time the defendant's conviction became final"). Respondent could not and does not attempt to argue that the *Bendix* decision overruled clear past precedent. Rather, she asserts its holding was not clearly foreshadowed. As the Court was explicit to acknowledge in *Bendix,* however, it was "[a]pplying well-settled constitutional principles," *Bendix, supra,* at 889, not a new legal theory or one that had not been foreshadowed by other precedents.

In *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U. S. 573, 578–579 (1986), the Court identified two modes of analysis to evaluate state statutes under the Commerce Clause. The Court will consider the statute invalid without further inquiry when it "directly regulates or discriminates against interstate commerce, or when its

effect is to favor in-state economic interests over out-of-state interests," *id.*, at 579; and it will balance the State's interest against the burden on interstate commerce when the statute "has only indirect effects on interstate commerce and regulates evenhandedly," *ibid.* (citing *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970)). Respondent concedes that the *Pike* balancing test is well established but claims its application to the Ohio tolling provision in *Bendix* was not predictable.

Her argument fails on two fronts. First, in *Bendix* the Court observed the Ohio tolling provision was so blatant an affront to interstate commerce that it might be considered invalid without engaging in the balancing test. See 486 U. S., at 891; see also *id.*, at 898 (SCALIA, J., concurring). Second, the balancing test provides a clear and certain standard in cases such as *Bendix*, see *id.*, at 894–895; and even if it did not, the "application of precedent which directly controls is not the stuff of which new law is made," *Harper* v. *Virginia Dept. of Taxation*, 509 U. S. 86, 112 (1993) (KENNEDY, J., concurring in part and concurring in judgment); see *Wright* v. *West*, 505 U. S. 277, 309 (1992) (KENNEDY, J., concurring in judgment) ("Where the beginning point is a rule of . . . general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent"); see also *Keene Corp.* v. *United States*, 508 U. S. 200, 215 (1993) (case does not announce new rule where claims are resolved "under well-settled law"); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 496 (1968) (case does not announce new rule unless it indicates "that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by [the Court]").

As "a mere application of . . . existing precedent," *Harper*, *supra*, at 112 (KENNEDY, J., concurring in part and concur-

ring in judgment), *Bendix* did not "decide . . . 'an issue of first impression,'" *Ashland Oil, Inc.* v. *Caryl*, 497 U. S. 916, 920 (1990) *(per curiam)* (quoting *Chevron Oil*, *supra*, at 106), come "out of the blue," *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 556 (1991) (O'CONNOR, J., dissenting), or represent "an avulsive change which caused the current of the law thereafter to flow between new banks," *Hanover Shoe*, *supra*, at 499.

Bendix did not announce a new rule of law, so I would reverse on this ground, postponing extended discussion of reliance interests as they bear upon remedies for a case which requires us to address that issue.

Syllabus

PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER *v.* ELEM

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 94–802. Decided May 15, 1995

Relying on *Batson* v. *Kentucky*, 476 U. S. 79, respondent objected to a prosecutor's use of a peremptory challenge to strike, *inter alios*, a black male juror from the jury at his robbery trial. The Missouri trial court overruled the objection after the prosecutor explained that he struck the juror because of the juror's long, unkempt hair, his moustache, and his beard. The jury was empaneled, and respondent was convicted. On direct appeal, the State Court of Appeals affirmed the *Batson* ruling, concluding that the prosecution had not engaged in purposeful discrimination. In denying respondent's subsequent petition for habeas corpus, the Federal District Court concluded that the state courts' purposeful discrimination determination was a factual finding entitled to a presumption of correctness and that the finding had support in the record. The Court of Appeals reversed, holding that the prosecution's explanation for striking the juror was pretextual and that the trial court had clearly erred in finding no intentional discrimination.

Held: The Court of Appeals erred in its evaluation of respondent's *Batson* claim. Under *Batson*, once the opponent of a peremptory challenge has made out a prima facie racial discrimination case (step one), the proponent of the strike must come forward with a race-neutral explanation (step two). If such an explanation is given, the trial court must decide (step three) whether the opponent has proved purposeful racial discrimination. Step two requires only that the prosecution provide a race-neutral justification for the exclusion, not that the prosecution show that the justification is plausible. The prosecutor's explanation in this case satisfied step two, and the state court found that the prosecutor was not motivated by discriminatory intent. In federal habeas proceedings, a state court's factual findings are presumed to be correct if they are fairly supported by the record. The Court of Appeals erred by combining the second and third steps. In doing so, the court did not conclude or even attempt to conclude that the state court's finding of no racial motive was not supported by the record, for its whole focus was upon the motive's *reasonableness* rather than its *genuineness*.

Certiorari granted; 25 F. 3d 679, reversed and remanded.

PER CURIAM.

Respondent was convicted of second-degree robbery in a Missouri court. During jury selection, he objected to the prosecutor's use of peremptory challenges to strike two black men from the jury panel, an objection arguably based on *Batson* v. *Kentucky,* 476 U. S. 79 (1986). The prosecutor explained his strikes:

> "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with the facial hair . . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me." App. to Pet. for Cert. A–41.

The prosecutor further explained that he feared that juror number 24, who had had a sawed-off shotgun pointed at him during a supermarket robbery, would believe that "to have a robbery you have to have a gun, and there is no gun in this case." *Ibid.*

The state trial court, without explanation, overruled respondent's objection and empaneled the jury. On direct appeal, respondent renewed his *Batson* claim. The Missouri Court of Appeals affirmed, finding that the "state's explanation constituted a legitimate 'hunch'" and that "[t]he circumstances fail[ed] to raise the necessary inference of racial discrimination." *State* v. *Elem,* 747 S. W. 2d 772, 775 (Mo. App. 1988).

Respondent then filed a petition for habeas corpus under 28 U. S. C. § 2254, asserting this and other claims. Adopting the Magistrate Judge's report and recommendation, the Dis-

trict Court concluded that the Missouri courts' determination that there had been no purposeful discrimination was a factual finding entitled to a presumption of correctness under § 2254(d). Since the finding had support in the record, the District Court denied respondent's claim.

The Court of Appeals for the Eighth Circuit reversed and remanded with instructions to grant the writ of habeas corpus. It said:

> "[W]here the prosecution strikes a prospective juror who is a member of the defendant's racial group, solely on the basis of factors which are facially irrelevant to the question of whether that person is qualified to serve as a juror in the particular case, the prosecution must at least articulate some plausible race-neutral reason for believing those factors will somehow affect the person's ability to perform his or her duties as a juror. In the present case, the prosecutor's comments, 'I don't like the way [he] look[s], with the way the hair is cut. . . . And the mustach[e] and the bear[d] look suspicious to me,' do not constitute such legitimate race-neutral reasons for striking juror 22." 25 F. 3d 679, 683 (1994).

It concluded that the "prosecution's explanation for striking juror 22 . . . was pretextual," and that the state trial court had "clearly erred" in finding that striking juror number 22 had not been intentional discrimination. *Id.*, at 684.

Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez* v. *New York*, 500 U. S. 352, 358–359 (1991) (plurality opinion); *id.*, at 375 (O'Connor, J., concurring in judgment); *Batson*, *supra*, at 96–98. The

second step of this process does not demand an explanation that is persuasive, or even plausible. "At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez*, 500 U. S., at 360 (plurality opinion); *id.*, at 374 (O'CONNOR, J., concurring in judgment).

The Court of Appeals erred by combining *Batson*'s second and third steps into one, requiring that the justification tendered at the second step be not just neutral but also at least minimally persuasive, *i. e.*, a "plausible" basis for believing that "the person's ability to perform his or her duties as a juror" will be affected. 25 F. 3d, at 683. It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. *Batson*, *supra*, at 98; *Hernandez*, *supra*, at 359 (plurality opinion). At that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination. But to say that a trial judge *may choose to disbelieve* a silly or superstitious reason at step three is quite different from saying that a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious. The latter violates the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Cf. *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 511 (1993).

The Court of Appeals appears to have seized on our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," *Batson*, *supra*, at 98, n. 20 (quoting *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 258 (1981)), and that the reason must be "related to the particular case

to be tried," 476 U. S., at 98. See 25 F. 3d, at 682, 683. This warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying that he had a discriminatory motive or by merely affirming his good faith. What it means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. See *Hernandez*, *supra*, at 359; cf. *Burdine*, *supra*, at 255 ("The explanation provided must be legally sufficient to justify a judgment for the defendant").

The prosecutor's proffered explanation in this case—that he struck juror number 22 because he had long, unkempt hair, a mustache, and a beard—is race neutral and satisfies the prosecution's step two burden of articulating a nondiscriminatory reason for the strike. "The wearing of beards is not a characteristic that is peculiar to any race." *EEOC* v. *Greyhound Lines, Inc.*, 635 F. 2d 188, 190, n. 3 (CA3 1980). And neither is the growing of long, unkempt hair. Thus, the inquiry properly proceeded to step three, where the state court found that the prosecutor was not motivated by discriminatory intent.

In habeas proceedings in federal courts, the factual findings of state courts are presumed to be correct, and may be set aside, absent procedural error, only if they are "not fairly supported by the record." 28 U. S. C. § 2254(d)(8). See *Marshall* v. *Lonberger*, 459 U. S. 422, 432 (1983). Here the Court of Appeals did not conclude or even attempt to conclude that the state court's finding of no racial motive was not fairly supported by the record. For its whole focus was upon the *reasonableness* of the asserted nonracial motive (which it thought required by step two) rather than the *genuineness* of the motive. It gave no proper basis for overturning the state court's finding of no racial motive, a finding which turned primarily on an assessment of credibility, see *Batson*, 476 U. S., at 98, n. 21. Cf. *Marshall*, *supra*, at 434.

Accordingly, respondent's motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are

granted. 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 BREYER joins, dissenting.

In my opinion it is unwise for the Court to announce a law-changing decision without first ordering full briefing and argument on the merits of the case. The Court does this today when it overrules a portion of our opinion in *Batson* v. *Kentucky*, 476 U. S. 79 (1986).[1]

In *Batson*, the Court held that the Equal Protection Clause of the Fourteenth Amendment forbids a prosecutor to use peremptory challenges to exclude African-Americans from jury service because of their race. The Court articulated a three-step process for proving such violations. First, a pattern of peremptory challenges of black jurors may establish a prima facie case of discriminatory purpose. Second, the prosecutor may rebut that prima face case by tendering a race-neutral explanation for the strikes. Third, the court must decide whether that explanation is pretextual. *Id.*, at 96–98. At the second step of this inquiry, neither a mere denial of improper motive nor an incredible explanation will suffice to rebut the prima facie showing of discriminatory purpose. At a minimum, as the Court held in *Batson*, the prosecutor "must articulate a neutral explanation related to the particular case to be tried." *Id.*, at 98.[2]

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[1] This is the second time this Term that the Court has misused its summary reversal authority in this way. See *Duncan* v. *Henry*, 513 U. S. 364, 367 (1995) (STEVENS, J., dissenting).

[2] We explained: "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.' *Alexander* v. *Louisiana*, 405 U. S., at 632. If these general assertions were accepted as rebutting a defendant's prima facie case, the Equal Protection Clause 'would be but a vain and illusory requirement.' *Norris* v. *Alabama*, [294 U. S. 587, 598

Today the Court holds that it did not mean what it said in *Batson*. Moreover, the Court resolves a novel procedural question without even recognizing its importance to the unusual facts of this case.

I

In the Missouri trial court, the judge rejected the defendant's *Batson* objection to the prosecutor's peremptory challenges of two jurors, juror number 22 and juror number 24, on the ground that the defendant had not made out a prima facie case of discrimination. Accordingly, because the defendant had failed at the first step of the *Batson* inquiry, the judge saw no need even to confirm the defendant's assertion that jurors 22 and 24 were black;[3] nor did the judge require the prosecutor to explain his challenges. The prosecutor nevertheless did volunteer an explanation,[4] but the judge evaluated neither its credibility nor its sufficiency.

(1935)]. The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Batson* v. *Kentucky*, 476 U. S., at 97–98 (footnotes omitted).

[3] The following exchange took place between the defense attorney and the trial judge:

"MR. GOULET: Mr. Larner stated that the reason he struck was because of facial hair and long hair as prejudicial. Number twenty-four, Mr. William Hunt, was a victim in a robbery and he stated that he could give a fair and impartial hearing. To make this a proper record if the Court would like to call up these two individuals to ask them if they are black or will the Court take judicial notice that they are black individuals?

"THE COURT: I am not going to do that, no, sir." App. to Pet. for Cert. A–42.

[4] The prosecutor stated:

"I struck number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and a goatee type beard. Those are the only two people on the jury, numbers twenty-two and twenty-four with facial hair of any

The Missouri Court of Appeals affirmed, relying partly on the ground that the use of one-third of the prosecutor's peremptories to strike black veniremen did not require an explanation, *State* v. *Elem*, 747 S. W. 2d 772, 774 (1988), and partly on the ground that if any rebuttal was necessary then the volunteered "explanation constituted a legitimate 'hunch,'" *id.*, at 775. The court thus relied, alternatively, on steps one and two of the *Batson* analysis without reaching the question whether the prosecutor's explanation might have been pretextual under step three.

The Federal District Court accepted a Magistrate's recommendation to deny petitioner's petition for habeas corpus without conducting a hearing. The Magistrate had reasoned that state-court findings on the issue of purposeful discrimination are entitled to deference. App. to Pet. for Cert. A–27. Even though the trial court had made no such findings, the Magistrate treated the statement by the Missouri Court of Appeals that the prosecutor's reasons "constituted a legitimate 'hunch'" as a finding of fact that was supported by the record.[5] When the case reached the United States Court of Appeals for the Eighth Circuit, the parties apparently assumed that petitioner had satisfied the first step of the *Batson* analysis.[6] The disputed issue in the Court of

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kind of all the men and, of course, the women, those are the only two with the facial hair. And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me. And number twenty-four had been in a robbery in a supermarket with a sawed-off shotgun pointed at his face, and I didn't want him on the jury as this case does not involve a shotgun, and maybe he would feel to have a robbery you have to have a gun, and there is no gun in this case." *Id.*, at A–41.

[5] The Magistrate stated: "The Court of Appeals determined that the prosecutor's reasons for striking the men constituted a legitimate 'hunch' . . . . The record supports the Missouri Court of Appeals' finding of no purposeful discrimination." *Id.*, at A–27.

[6] In this Court, at least, the State does not deny that the prosecutor's pattern of challenges established a prima facie case of discrimination.

Appeals was whether the trial judge's contrary finding was academic because the prosecutor's volunteered statement satisfied step two and had not been refuted in step three.

The Court of Appeals agreed with the State that excluding juror 24 was not error because the prosecutor's concern about that juror's status as a former victim of a robbery was related to the case at hand. 25 F. 3d 679, 681, 682 (1994). The court did, however, find a *Batson* violation with respect to juror 22. In rejecting the prosecutor's "race-neutral" explanation for the strike, the Court of Appeals faithfully applied the standard that we articulated in *Batson:* The explanation was not "'*related to the particular case to be tried.*'" 25 F. 3d, at 683, quoting 476 U. S., at 98 (emphasis in Court of Appeals opinion).

Before applying the *Batson* test, the Court of Appeals noted that its analysis was consistent with both the Missouri Supreme Court's interpretation of *Batson* in *State* v. *Antwine*, 743 S. W. 2d 51 (1987) (en banc), and this Court's intervening opinion in *Hernandez* v. *New York*, 500 U. S. 352 (1991). 25 F. 3d, at 683. Referring to the second stage of the three-step analysis, the *Antwine* court had observed:

> "We do not believe, however, that *Batson* is satisfied by 'neutral explanations' which are no more than facially legitimate, reasonably specific and clear. Were facially neutral explanations sufficient without more, *Batson* would be meaningless. It would take little effort for prosecutors who are of such a mind to adopt rote 'neutral explanations' which bear facial legitimacy but conceal a discriminatory motive. We do not believe the Supreme Court intended a charade when it announced *Batson.*" 743 S. W. 2d, at 65.

In *Hernandez*, this Court rejected a *Batson* claim stemming from a prosecutor's strikes of two Spanish-speaking Latino jurors. The prosecutor explained that he struck the jurors because he feared that they might not accept an inter-

preter's English translation of trial testimony given in Spanish. Because the prosecutor's explanation was directly related to the particular case to be tried, it satisfied the second prong of the *Batson* standard. Moreover, as the Court of Appeals noted, 25 F. 3d, at 683, the plurality opinion in *Hernandez* expressly observed that striking all venirepersons who speak a given language, "without regard to the particular circumstances of the trial," might constitute a pretext for racial discrimination. 500 U. S., at 371–372 (opinion of KENNEDY, J.).[7] Based on our precedent, the Court of Appeals was entirely correct to conclude that the peremptory strike of juror 22 violated *Batson* because the reason given was unrelated to the circumstances of the trial.[8]

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[7] True, the plurality opinion in *Hernandez* stated that explanations unrelated to the particular circumstances of the trial "may be found by the trial judge to be a pretext for racial discrimination," 500 U. S., at 372, and thus it specifically referred to the third step in the *Batson* v. *Kentucky*, 476 U. S. 79 (1986), analysis. Nevertheless, if this comment was intended to modify the *Batson* standard for determining the sufficiency of the prosecutor's response to a prima facie case, it was certainly an obtuse method of changing the law.

[8] In my opinion, it is disrespectful to the conscientious judges on the Court of Appeals who faithfully applied an unambiguous standard articulated in one of our opinions to say that they appear "to have seized on our admonition in *Batson* . . . that the reason must be 'related to the particular case to be tried,' 476 U. S., at 98." *Ante*, at 768–769. Of course, they "seized on" that point because *we told them to.* The Court of Appeals was following *Batson*'s clear mandate. To criticize those judges for doing their jobs is singularly inappropriate.

The Court of Appeals for the Eighth Circuit is not the only court to have taken our admonition in *Batson* seriously. Numerous courts have acted on the assumption that we meant what we said when we required the prosecutor's neutral explanation to be "related to the particular case to be tried." See, *e. g.*, *Jones* v. *Ryan*, 987 F. 2d 960, 974 (CA3 1993); *Ex parte Bird*, 594 So. 2d 676, 682–683 (Ala. 1991); *State* v. *Henderson*, 112 Ore. App. 451, 456, 829 P. 2d 1025, 1028 (1992); *Whitsey* v. *State*, 796 S. W. 2d 707, 713–716 (Tex. Crim. App. 1989); *Jackson* v. *Commonwealth*, 8 Va. App. 176, 186–187, 380 S. E. 2d 1, 6–7 (1989); *State* v. *Butler*, 731 S. W. 2d

Today, without argument, the Court replaces the *Batson* standard with the surprising announcement that any neutral explanation, no matter how "implausible or fantastic," *ante*, at 768, even if it is "silly or superstitious," *ibid.*, is sufficient to rebut a prima facie case of discrimination. A trial court must accept that neutral explanation unless a separate "step three" inquiry leads to the conclusion that the peremptory challenge was racially motivated. The Court does not attempt to explain why a statement that "the juror had a beard," or "the juror's last name began with the letter 'S'" should satisfy step two, though a statement that "I had a hunch" should not. See *ante*, at 769; *Batson*, 476 U. S., at 98. It is not too much to ask that a prosecutor's explanation for his strikes be race neutral, reasonably specific, *and* trial related. Nothing less will serve to rebut the inference of race-based discrimination that arises when the defendant has made out a prima facie case. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 253 (1981). That, in any event, is what we decided in *Batson*.

II

The Court's peremptory disposition of this case overlooks a tricky procedural problem. Ordinarily, a federal appeals court reviewing a claim of *Batson* error in a habeas corpus proceeding must evaluate, with appropriate deference, the factual findings and legal conclusions of the state trial court. But in this case, the only finding the trial judge made was that the defendant had failed to establish a prima facie case. Everyone now agrees that finding was incorrect. The state trial judge, holding that the defendant had failed at step one,

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265, 271 (Mo. App. 1987); *Slappy* v. *State*, 503 So. 2d 350, 355 (Fla. App. 1987); *Walker* v. *State*, 611 So. 2d 1133, 1142 (Ala. Crim. App. 1992); *Huntley* v. *State*, 627 So. 2d 1011, 1012 (Ala. Crim. App. 1991). This Court today calls into question the reasoning of all of these decisions without even the courtesy of briefing and argument.

made no finding with respect to the sufficiency or credibility of the prosecutor's explanation at step two. The question, then, is whether the reviewing court should (1) go on to decide the second step of the *Batson* inquiry, (2) reverse and remand to the District Court for further proceedings, or (3) grant the writ conditioned on a proper step-two and (if necessary) step-three hearing in the state trial court. This Court's opinion today implicitly ratifies the Court of Appeals' decision to evaluate on its own whether the prosecutor had satisfied step two. I think that is the correct resolution of this procedural question, but it deserves more consideration than the Court has provided.

In many cases, a state trial court or a federal district court will be in a better position to evaluate the facts surrounding peremptory strikes than a federal appeals court. But I would favor a rule giving the appeals court discretion, based on the sufficiency of the record, to evaluate a prosecutor's explanation of his strikes. In this case, I think review is justified because the prosecutor volunteered reasons for the challenges. The Court of Appeals reasonably assumed that these were the same reasons the prosecutor would have given had the trial court required him to respond to the prima facie case. The Court of Appeals, in its discretion, could thus evaluate the explanations for their sufficiency. This presents a pure legal question, and nothing is gained by remand if the appeals court can resolve that question on the facts before it.

Assuming the Court of Appeals did not err in reaching step two, a new problem arises when that court (or, as in today's case, this Court) conducts the step-two inquiry and decides that the prosecutor's explanation was sufficient. Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson?* Again, I think the question whether the Court of Appeals decides, or whether it refers the question to a trial court, should depend on the state of the record before the Court of Appeals. Whatever

procedure is contemplated, however, I think even this Court would acknowledge that some implausible, fantastic, and silly explanations could be found to be pretextual without any further evidence. Indeed, in *Hernandez* the Court explained that a trial judge could find pretext based on nothing more than a consistent policy of excluding all Spanish-speaking jurors if that characteristic was entirely unrelated to the case to be tried. 500 U. S., at 371–372 (plurality opinion of KENNEDY, J.). Parallel reasoning would justify a finding of pretext based on a policy of excusing jurors with beards if beards have nothing to do with the pending case.

In some cases, conceivably the length and unkempt character of a juror's hair and goatee type beard might give rise to a concern that he is a nonconformist who might not be a good juror. In this case, however, the prosecutor did not identify any such concern. He merely said he did not "'like the way [the juror] looked,'" that the facial hair "'look[ed] suspicious.'" *Ante*, at 766. I think this explanation may well be pretextual as a matter of law; it has nothing to do with the case at hand, and it is just as evasive as "I had a hunch." Unless a reviewing court may evaluate such explanations when a trial judge fails to find that a prima facie case has been established, appellate or collateral review of *Batson* claims will amount to nothing more than the meaningless charade that the Missouri Supreme Court correctly understood *Batson* to disfavor. *Antwine*, 743 S. W. 2d, at 65.

In my opinion, preoccupation with the niceties of a three-step analysis should not foreclose meaningful judicial review of prosecutorial explanations that are entirely unrelated to the case to be tried. I would adhere to the *Batson* rule that such an explanation does not satisfy step two. Alternatively, I would hold that, in the absence of an explicit trial court finding on the issue, a reviewing court may hold that such an explanation is pretextual as a matter of law. The Court's unnecessary tolerance of silly, fantastic, and implausible explanations, together with its assumption that there is

a difference of constitutional magnitude between a statement that "I had a hunch about this juror based on his appearance," and "I challenged this juror because he had a mustache," demeans the importance of the values vindicated by our decision in *Batson*.

I respectfully dissent.

Syllabus

U. S. TERM LIMITS, INC., ET AL. *v.* THORNTON ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 93–1456. Argued November 29, 1994—Decided May 22, 1995*

Respondent Hill filed this suit in Arkansas state court challenging the constitutionality of § 3 of Amendment 73 to the Arkansas Constitution, which prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The trial court held that § 3 violated Article I of the Federal Constitution, and the Arkansas Supreme Court affirmed. A plurality of the latter court concluded that the States have no authority "to change, add to, or diminish" the age, citizenship, and residency requirements for congressional service enumerated in the Qualifications Clauses, U. S. Const., Art. I, § 2, cl. 2, and Art. I, § 3, cl. 3, and rejected the argument that Amendment 73 is constitutional because it is formulated as a ballot access restriction rather than an outright disqualification of congressional incumbents.

Held: Section 3 of Amendment 73 to the Arkansas Constitution violates the Federal Constitution. Pp. 787–838.

(a) The power granted to each House of Congress to judge the "Qualifications of its own Members," Art. I, § 5, cl. 1, does not include the power to alter or add to the qualifications set forth in the Constitution's text. *Powell* v. *McCormack*, 395 U. S. 486, 540. After examining *Powell*'s analysis of the Qualifications Clauses' history and text, *id.*, at 518–548, and its articulation of the "basic principles of our democratic system," *id.*, at 548, this Court reaffirms that the constitutional qualifications for congressional service are "fixed," at least in the sense that they may not be supplemented by Congress. Pp. 787–798.

(b) So too, the Constitution prohibits States from imposing congressional qualifications additional to those specifically enumerated in its text. Petitioners' argument that States possess control over qualifications as part of the original powers reserved to them by the Tenth Amendment is rejected for two reasons. First, the power to add qualifications is not within the States' pre-Tenth Amendment "original powers," but is a new right arising from the Constitution itself, and thus is

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*Together with No. 93–1828, *Bryant, Attorney General of Arkansas* v. *Hill et al.*, also on certiorari to the same court.

not reserved. Second, even if the States possessed some original power in this area, it must be concluded that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications. That this is so is demonstrated by the unanimity among the courts and learned commentators who have considered the issue; by the Constitution's structure and the text of pertinent constitutional provisions, including Art. I, § 2, cl. 1, Art. I, § 4, cl. 1, Art. I, § 6, and Art. I, § 5, cl. 1; by the relevant historical materials, including the records of the Constitutional Convention and the ratification debates, as well as Congress' subsequent experience with state attempts to impose qualifications; and, most importantly, by the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them,'" *Powell*, 395 U. S., at 547. Permitting individual States to formulate diverse qualifications for their congressional representatives would result in a patchwork that would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. The fact that, immediately after the adoption of the Constitution, many States imposed term limits and other qualifications on state officers, while only one State imposed such a qualification on Members of Congress, provides further persuasive evidence of a general understanding that the qualifications in the Constitution were unalterable by the States. Pp. 798–827.

(c) A state congressional term limits measure is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly. The Court rejects petitioners' argument that Amendment 73 is valid because it merely precludes certain congressional candidates from being certified and having their names appear on the ballot, and allows them to run as write-in candidates and serve if elected. Even if petitioners' narrow understanding of qualifications is correct, Amendment 73 must fall because it is an indirect attempt to evade the Qualifications Clauses' requirements and trivializes the basic democratic principles underlying those Clauses. Nor can the Court agree with petitioners' related argument that Amendment 73 is a permissible exercise of state power under the Elections Clause, Art. I, § 4, cl. 1, to regulate the "Times, Places and Manner of holding Elections." A necessary consequence of that argument is that Congress itself would have the power under the Elections Clause to "make or alter" a measure such as Amendment 73, a result that is unfathomable under *Powell*. Moreover, petitioners' broad construction is fundamentally inconsistent with the Framers' view of the Elections Clause, which was intended to grant States authority to protect the integrity and regularity of the election process by regulating

Syllabus

election *procedures,* see, *e. g., Storer* v. *Brown,* 415 U. S. 724, 730, 733, not to provide them with license to impose substantive qualifications that would exclude classes of candidates from federal office. Pp. 828–836.

(d) State imposition of term limits for congressional service would effect such a fundamental change in the constitutional framework that it must come through a constitutional amendment properly passed under the procedures set forth in Article V. Absent such an amendment, allowing individual States to craft their own congressional qualifications would erode the structure designed by the Framers to form a "more perfect Union." Pp. 837–838.

316 Ark. 251, 872 S. W. 2d 349, affirmed.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 838. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR and SCALIA, JJ., joined, *post,* p. 845.

J. Winston Bryant, Attorney General of Arkansas, *pro se,* argued the cause for petitioner in No. 93–1828. With him on the briefs were *Jeffrey A. Bell,* Deputy Attorney General, *Ann Purvis* and *David R. Raupp,* Assistant Attorneys General, *Griffin B. Bell, Paul J. Larkin, Jr., Richard F. Hatfield,* and *Cleta Deatherage Mitchell. John G. Kester* argued the cause for petitioners in No. 93–1456. With him on the briefs was *H. William Allen. Robert H. Bork, Theodore B. Olson,* and *Thomas G. Hungar* filed briefs for Representative Jay Dickey et al., and *Edward W. Warren* filed briefs for the Republican Party of Arkansas et al., as respondents under this Court's Rule 12.4.

Louis R. Cohen argued the cause for respondents in both cases. With him on the brief for respondents in No. 93–1828 were *W. Hardy Callcott, Peter B. Hutt II,* and *Elizabeth J. Robben. Henry Maurice Mitchell, Sherry P. Bartley, Rex E. Lee, Carter G. Phillips, Ronald S. Flagg, Mark D. Hopson, Joseph R. Guerra,* and *Jeffrey T. Green* filed a brief for respondent Thornton in No. 93–1456.

Solicitor General Days argued the cause for the United States as *amicus curiae* urging affirmance. With him on

the brief were *Assistant Attorneys General Dellinger* and *Hunger*, *Deputy Solicitor General Bender*, *Paul R. Q. Wolfson*, and *Douglas N. Letter.*†

JUSTICE STEVENS delivered the opinion of the Court.

The Constitution sets forth qualifications for membership in the Congress of the United States. Article I, § 2, cl. 2, which applies to the House of Representatives, provides:

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of Nebraska et al. by *Don Stenberg*, Attorney General of Nebraska, and *L. Steven Grasz*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Scott Harshbarger* of Massachusetts, *Joseph P. Mazurek* of Montana, *Jeffrey R. Howard* of New Hampshire, *Lee Fisher* of Ohio, *Mark Barnett* of South Dakota, *Charles W. Burson* of Tennessee, and *Joseph B. Meyer* of Wyoming; for the State of Washington by *Christine O. Gregoire*, Attorney General, *James K. Pharris* and *William B. Collins*, Senior Assistant Attorneys General, and *Jeffrey T. Even*, Assistant Attorney General; for Citizens for Term Limits et al. by *Ronald A. Zumbrun*, *Anthony T. Caso*, *Deborah J. La Fetra*, and *John M. Groen;* for the Citizens United Foundation by *William J. Olson* and *John S. Miles;* for Congressional Term Limits Coalition, Inc., by *John C. Armor* and *Lowell D. Weeks;* for the Mountain States Legal Foundation et al. by *William Perry Pendley;* for People's Advocate, Inc., et al. by *Jayna P. Karpinski;* for the United States Justice Foundation by *James V. Lacy;* for Virginians for Term Limits et al. by *Charles A. Shanor*, *Zachary D. Fasman*, *Margaret H. Spurlin*, and *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Timothy E. Flanigan*, *Daniel J. Popeo*, and *Paul D. Kamenar.*

Briefs of *amici curiae* urging reversal in No. 93–1456 were filed for the Alaska Committee for a Citizen Congress et al. by *Jeanette R. Burrage;* for the Allied Educational Foundation by *Bertram R. Gelfand* and *Jeffrey C. Dannenberg;* and for Governor John Engler by *Stephen J. Safranek.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the American Civil Liberties Union et al. by *Kevin J. Hamilton* and *Steven R. Shapiro;* for the California Democratic Party by *Daniel H. Lowenstein* and *Jonathan H. Steinberg;* for the League of Women Voters of the United States et al. by *Frederic C. Tausend* and *Herbert E. Wilgis III;* and for Henry J. Hyde by *Charles A. Rothfeld.*

> "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Article I, §3, cl. 3, which applies to the Senate, similarly provides:

> "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."

Today's cases present a challenge to an amendment to the Arkansas State Constitution that prohibits the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate. The Arkansas Supreme Court held that the amendment violates the Federal Constitution. We agree with that holding. Such a state-imposed restriction is contrary to the "fundamental principle of our representative democracy," embodied in the Constitution, that "the people should choose whom they please to govern them." *Powell* v. *McCormack*, 395 U. S. 486, 547 (1969) (internal quotation marks omitted). Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States. If the qualifications set forth in the text of the Constitution are to be changed, that text must be amended.

I

At the general election on November 3, 1992, the voters of Arkansas adopted Amendment 73 to their State Constitution. Proposed as a "Term Limitation Amendment," its preamble stated:

> "The people of Arkansas find and declare that elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials."

The limitations in Amendment 73 apply to three categories of elected officials. Section 1 provides that no elected official in the executive branch of the state government may serve more than two 4-year terms. Section 2 applies to the legislative branch of the state government; it provides that no member of the Arkansas House of Representatives may serve more than three 2-year terms and no member of the Arkansas Senate may serve more than two 4-year terms. Section 3, the provision at issue in these cases, applies to the Arkansas Congressional Delegation. It provides:

> "(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.
>
> "(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas."

Amendment 73 states that it is self-executing and shall apply to all persons seeking election after January 1, 1993.

On November 13, 1992, respondent Bobbie Hill, on behalf of herself, similarly situated Arkansas "citizens, residents,

taxpayers and registered voters," and the League of Women Voters of Arkansas, filed a complaint in the Circuit Court for Pulaski County, Arkansas, seeking a declaratory judgment that § 3 of Amendment 73 is "unconstitutional and void." Her complaint named as defendants then-Governor Clinton, other state officers, the Republican Party of Arkansas, and the Democratic Party of Arkansas. The State of Arkansas, through its Attorney General, petitioner Winston Bryant, intervened as a party defendant in support of the amendment. Several proponents of the amendment also intervened, including petitioner U. S. Term Limits, Inc.

On cross-motions for summary judgment, the Circuit Court held that § 3 of Amendment 73 violated Article I of the Federal Constitution.[1]

With respect to that holding, in a 5-to-2 decision, the Arkansas Supreme Court affirmed. *U. S. Term Limits, Inc.* v. *Hill*, 316 Ark. 251, 872 S. W. 2d 349, 351 (1994). Writing for a plurality of three justices, Justice Robert L. Brown concluded that the congressional restrictions in Amendment 73 are unconstitutional because the States have no authority "to change, add to, or diminish" the requirements for congressional service enumerated in the Qualifications Clauses. *Id.*, at 265, 872 S. W. 2d, at 356. He noted:

> "If there is one watchword for representation of the various states in Congress, it is uniformity. Federal legislators speak to national issues that affect the citizens of every state. . . . The uniformity in qualifications man-

[1] The Circuit Court also held that § 3 was severable from the other provisions of the amendment, but that the entire amendment was void under state law for lack of an enacting clause. App. to Pet. for Cert. in No. 93–1456, p. 60a. The Arkansas Supreme Court affirmed the Circuit Court's decision regarding severability, *U. S. Term Limits, Inc.* v. *Hill*, 316 Ark. 251, 270, 872 S. W. 2d 349, 359 (1994), and reversed its decision regarding the enacting clause, *id.*, at 263, 872 S. W. 2d, at 355. The decision of the Arkansas Supreme Court with respect to those issues of state law is not before us.

> dated in Article 1 provides the tenor and the fabric for representation in the Congress. Piecemeal restrictions by State would fly in the face of that order." *Ibid.*

Justice Brown's plurality opinion also rejected the argument that Amendment 73 is "merely a ballot access amendment," concluding that "[t]he intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." *Id.*, at 265–266, 872 S. W. 2d, at 356–357. Justice Brown considered the possibilities that an excluded candidate might run for Congress as a write-in candidate or be appointed to fill a vacancy to be "glimmers of opportunity . . . [that] are faint indeed—so faint in our judgment that they cannot salvage Amendment 73 from constitutional attack." *Id.*, at 266, 872 S. W. 2d, at 357. In separate opinions, Justice Dudley and Justice Gerald P. Brown agreed that Amendment 73 violates the Federal Constitution.

Two justices dissented from the federal constitutional holding. Justice Hays started from "the premise that all political authority resides in the people, limited only by those provisions of the federal or state constitutions specifically to the contrary." *Id.*, at 281, 872 S. W. 2d, at 367. Because his examination of the text and history of the Qualifications Clauses convinced him that the Constitution contains no express or implicit restriction on the States' ability to impose additional qualifications on candidates for Congress, Justice Hays concluded that § 3 is constitutional. Special Chief Justice Cracraft, drawing a distinction between a measure that "impose[s] an absolute bar on incumbent succession" and a measure that "merely makes it more difficult for an incumbent to be elected," *id.*, at 284, 872 S. W. 2d, at 368, concluded that Amendment 73 does not even implicate the Qualifications Clauses, and instead is merely a permissible ballot access restriction.

The State of Arkansas, by its Attorney General, and the intervenors petitioned for writs of certiorari. Because of the importance of the issues, we granted both petitions and

consolidated the cases for argument. See 512 U. S. 1218 (1994). We now affirm.

II

As the opinions of the Arkansas Supreme Court suggest, the constitutionality of Amendment 73 depends critically on the resolution of two distinct issues. The first is whether the Constitution forbids States to add to or alter the qualifications specifically enumerated in the Constitution. The second is, if the Constitution does so forbid, whether the fact that Amendment 73 is formulated as a ballot access restriction rather than as an outright disqualification is of constitutional significance. Our resolution of these issues draws upon our prior resolution of a related but distinct issue: whether Congress has the power to add to or alter the qualifications of its Members.

Twenty-six years ago, in *Powell* v. *McCormack*, 395 U. S. 486 (1969), we reviewed the history and text of the Qualifications Clauses[2] in a case involving an attempted exclusion

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[2] As we explained, that term may describe more than the provisions quoted, *supra*, at 783:

"In addition to the three qualifications set forth in Art. I, § 2, Art. I, § 3, cl. 7, authorizes the disqualification of any person convicted in an impeachment proceeding from 'any Office of honor, Trust or Profit under the United States'; Art. I, § 6, cl. 2, provides that 'no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office'; and § 3 of the 14th Amendment disqualifies any person 'who, having previously taken an oath . . . to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.' It has been argued that each of these provisions, as well as the Guarantee Clause of Article IV and the oath requirement of Art. VI, cl. 3, is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2." *Powell* v. *McCormack*, 395 U. S. 486, 520, n. 41 (1969).

In *Powell*, we saw no need to resolve the question whether those additional provisions constitute "qualifications," because "both sides agree that Powell was not ineligible under any of these provisions." *Ibid.* We similarly have no need to resolve that question today: Because those additional provisions are part of the text of the Constitution, they have little bearing

of a duly elected Member of Congress. The principal issue was whether the power granted to each House in Art. I, § 5, cl. 1, to judge the "Qualifications of its own Members"[3] includes the power to impose qualifications other than those set forth in the text of the Constitution. In an opinion by Chief Justice Warren for eight Members of the Court,[4] we held that it does not. Because of the obvious importance of the issue, the Court's review of the history and meaning of the relevant constitutional text was especially thorough. We therefore begin our analysis today with a full statement of what we decided in that case.

The Issue in Powell

In November 1966, Adam Clayton Powell, Jr., was elected from a District in New York to serve in the United States House of Representatives for the 90th Congress. Allegations that he had engaged in serious misconduct while serving as a committee chairman during the 89th Congress led to the appointment of a Select Committee to determine his eligibility to take his seat. That committee found that Powell met the age, citizenship, and residency requirements set forth in Art. I, § 2, cl. 2. The committee also found, however, that Powell had wrongfully diverted House funds for the use of others and himself and had made false reports on expenditures of foreign currency. Based on those findings, the House after debate adopted House Resolution 278, excluding

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on whether Congress and the States may add qualifications to those that appear in the Constitution.

[3] Art. I, § 5, cl. 1, provides in part: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business . . . ."

[4] Justice Stewart dissented on procedural grounds, arguing that the case should have been dismissed as moot. See 395 U. S., at 559–561. Other than expressing agreement with the characterization of the case as raising constitutional issues which "'touch the bedrock of our political system [and] strike at the very heart of representative government,'" *id.*, at 573, Justice Stewart did not comment on the merits.

Powell from membership in the House, and declared his seat vacant. See 395 U. S., at 489–493.

Powell and several voters of the district from which he had been elected filed suit seeking a declaratory judgment that the House Resolution was invalid because Art. I, § 2, cl. 2, sets forth the exclusive qualifications for House membership. We ultimately accepted that contention, concluding that the House of Representatives has no "authority to *exclude*[5] any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution." 395 U. S., at 522 (emphasis in original); see also *id.*, at 547.[6] In reaching that conclusion, we undertook a detailed historical review to determine the intent of the Framers. Though recognizing that the Constitutional Convention debates themselves were inconclusive, see *id.*, at 532, we determined that the "relevant historical materials" reveal that Congress has no power to alter the qualifications in the text of the Constitution, *id.*, at 522.

Powell's Reliance on History

We started our analysis in *Powell* by examining the British experience with qualifications for membership in Parliament, focusing in particular on the experience of John Wilkes. While serving as a member of Parliament, Wilkes had published an attack on a peace treaty with France. This

[5] The *Powell* Court emphasized the word "exclude" because it had been argued that the House Resolution depriving Powell of his seat should be viewed as an expulsion rather than an exclusion. Having rejected that submission, the Court expressed no opinion on issues related to the House's power to expel a Member who has been sworn in and seated.

[6] Though *Powell* addressed only the power of the House, the Court pointed out that its rationale was equally applicable to the Senate: "Since Art. I, § 5, cl. 1, applies to both Houses of Congress, the scope of the Senate's power to judge the qualification of its members necessarily is identical to the scope of the House's power, with the exception, of course, that Art. I, § 3, cl. 3, establishes different age and citizenship requirements for membership in the Senate." *Id.*, at 522, n. 44.

literary endeavor earned Wilkes a conviction for seditious libel and a 22-month prison sentence. In addition, Parliament declared Wilkes ineligible for membership and ordered him expelled. Despite (or perhaps because of) these difficulties, Wilkes was reelected several times. Parliament, however, persisted in its refusal to seat him. After several years of Wilkes' efforts, the House of Commons voted to expunge the resolutions that had expelled Wilkes and had declared him ineligible, labeling those prior actions "'subversive of the rights of the whole body of electors of this kingdom.'" *Id.*, at 528, quoting 22 Parliamentary History of England 1411 (1782) (Parl. Hist. Eng.). After reviewing Wilkes' "long and bitter struggle for the right of the British electorate to be represented by men of their own choice," 395 U. S., at 528, we concluded in *Powell* that "on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'" *Ibid.*, quoting 16 Parl. Hist. Eng. 589, 590 (1769).

Against this historical background, we viewed the Convention debates as manifesting the Framers' intent that the qualifications in the Constitution be fixed and exclusive. We found particularly revealing the debate concerning a proposal made by the Committee of Detail that would have given Congress the power to add property qualifications. James Madison argued that such a power would vest "'an improper & dangerous power in the Legislature,'" by which the Legislature "'can by degrees subvert the Constitution.'" 395 U. S., at 533–534, quoting 2 Records of the Federal Convention of 1787, pp. 249–250 (M. Farrand ed. 1911) (hereinafter Farrand).[7] Madison continued: "'A Republic may be

[7] Though we recognized that Madison was responding to a proposal that would have allowed Congress to impose property restrictions, we noted that "Madison's argument was not aimed at the imposition of a property

converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect.'" 395 U. S., at 534, quoting 2 Farrand 250. We expressly noted that the "parallel between Madison's arguments and those made in Wilkes' behalf is striking." 395 U. S., at 534.

The Framers further revealed their concerns about congressional abuse of power when Gouverneur Morris suggested modifying the proposal of the Committee of Detail to grant Congress unfettered power to add qualifications. We noted that Hugh Williamson "expressed concern that if a majority of the legislature should happen to be 'composed of any particular description of men, of lawyers for example, . . . the future elections might be secured to their own body.'" *Id.*, at 535, quoting 2 Farrand 250. We noted, too, that Madison emphasized the British Parliament's attempts to regulate qualifications, and that he observed: "'[T]he abuse they had made of it was a lesson worthy of our attention.'" 395 U. S., at 535, quoting 2 Farrand 250. We found significant that the Convention rejected both Morris' modification and the Committee's proposal.

We also recognized in *Powell* that the post-Convention ratification debates confirmed that the Framers understood the qualifications in the Constitution to be fixed and unalterable by Congress. For example, we noted that in response to the antifederalist charge that the new Constitution favored the wealthy and well born, Alexander Hamilton wrote:

> "'The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. . . . *The*

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qualification as such, but rather at the delegation to the Congress of the discretionary power to establish any qualifications." *Id.*, at 534.

> *qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are defined and fixed in the Constitution, and are unalterable by the legislature.*' " 395 U. S., at 539, quoting The Federalist No. 60, p. 371 (C. Rossiter ed. 1961) (emphasis added) (hereinafter The Federalist).

We thus attached special significance to "Hamilton's express reliance on the immutability of the qualifications set forth in the Constitution." 395 U. S., at 540. Moreover, we reviewed the debates at the state conventions and found that they "also demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution." *Ibid.;* see, *e. g., id.*, at 541, citing 3 Debates on the Adoption of the Federal Constitution 8 (J. Elliot ed. 1863) (hereinafter Elliot's Debates) (Wilson Carey Nicholas, Virginia).[8]

The exercise by Congress of its power to judge the qualifications of its Members further confirmed this understanding. We concluded that, during the first 100 years of its existence, "Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution." 395 U. S., at 542.

As this elaborate summary reveals, our historical analysis in *Powell* was both detailed and persuasive. We thus conclude now, as we did in *Powell*, that history shows that, with

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[8] Our examination of the history also caused us to reject the argument that the negative phrasing of the Clauses indicated that the Framers did not limit the power of the House to impose additional qualifications for membership. *Id.,* at 537 (noting that the Committee of Style, which edited the Qualifications Clauses to incorporate "their present negative form," had "'no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so'"); *id.*, at 539, quoting C. Warren, The Making of the Constitution 422, n. 1 (1947) (hereinafter Warren); see also 2 Farrand 553 (the Committee of Style was appointed "to revise the stile and arrange the articles which had been agreed to").

respect to Congress, the Framers intended the Constitution to establish fixed qualifications.[9]

Powell's Reliance on Democratic Principles

In *Powell*, of course, we did not rely solely on an analysis of the historical evidence, but instead complemented that analysis with "an examination of the basic principles of our democratic system." *Id.*, at 548. We noted that allowing Congress to impose additional qualifications would violate that "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'" *Id.*, at 547, quoting 2 Elliot's Debates 257 (A. Hamilton, New York).

Our opinion made clear that this broad principle incorporated at least two fundamental ideas.[10] First, we empha-

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[9] The text of the Qualifications Clauses also supports the result we reached in *Powell*. John Dickinson of Delaware observed that the enumeration of a few qualifications "would by implication tie up the hands of the Legislature from supplying omissions." 2 Farrand 123. Justice Story made the same point:

"It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." 1 J. Story, Commentaries on the Constitution of the United States § 625 (3d ed. 1858) (hereinafter Story). See also Warren 421 ("As the Constitution . . . expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply").

As Dickinson's comment demonstrates, the Framers were well aware of the *expressio unius* argument that would result from their wording of the Qualifications Clauses; they adopted that wording nonetheless. There thus is no merit either to the dissent's suggestion that Story was the first to articulate the *expressio unius* argument, see *post*, at 868–869, or to the dissent's assertion that that argument is completely without merit.

[10] The principle also incorporated the more practical concern that reposing the power to adopt qualifications in Congress would lead to a self-perpetuating body to the detriment of the new Republic. See, *e. g.*,

sized the egalitarian concept that the opportunity to be elected was open to all.[11] We noted in particular Madison's statement in The Federalist that "'[u]nder these reasonable limitations [enumerated in the Constitution], the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.'" *Powell*, 395 U. S., at 540, n. 74, quoting The Federalist No. 52, at 326. Similarly, we noted that Wilson Carey Nicholas defended the Constitution against the charge that it "violated democratic principles" by arguing: "'It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the legislature. This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence.'" 395 U. S., at 541, quoting 3 Elliot's Debates 8.

Second, we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston . . . endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural

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Powell, 395 U. S., at 533–534, quoting 2 Farrand 250 (Madison) ("'If the Legislature could regulate [the qualification of electors or elected], it can by degrees subvert the Constitution. A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorised to elect'"); 395 U. S., at 535–536 (citing statements of Williamson and Madison emphasizing the potential for legislative abuse).

[11] Contrary to the dissent's suggestion, *post*, at 879, we do not understand *Powell* as reading the Qualifications Clauses "to create a personal right to be a candidate for Congress." The Clauses did, however, further the interest of the people of the entire Nation in keeping the door to the National Legislature open to merit of every description.

rights.'" 395 U. S., at 541, n. 76, quoting 2 Elliot's Debates 292–293. Similarly, we observed that "[b]efore the New York convention . . . , Hamilton emphasized: 'The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.'" 395 U. S., at 540–541, quoting 2 Elliot's Debates 257. Quoting from the statement made in 1807 by the Chairman of the House Committee on Elections, we noted that "restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.'" 395 U. S., at 543, quoting 17 Annals of Cong. 874 (1807). Thus, in *Powell*, we agreed with the sentiment expressed on behalf of Wilkes' admission to Parliament: "'That the right of the electors to be represented by men of their own choice, was so essential for the preservation of all their other rights, that it ought to be considered as one of the most sacred parts of our constitution.'" 395 U. S., at 534, n. 65, quoting 16 Parl. Hist. Eng. 589–590 (1769).

Powell thus establishes two important propositions: first, that the "relevant historical materials" compel the conclusion that, at least with respect to qualifications imposed by Congress, the Framers intended the qualifications listed in the Constitution to be exclusive; and second, that that conclusion is equally compelled by an understanding of the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'" 395 U. S., at 547.

Powell's Holding

Petitioners argue somewhat half-heartedly that the narrow holding in *Powell*, which involved the power of the House to exclude a Member pursuant to Art. I, § 5, does not control the more general question whether Congress has the

power to add qualifications. *Powell*, however, is not susceptible to such a narrow reading. Our conclusion that Congress may not alter or add to the qualifications in the Constitution was integral to our analysis and outcome. See, *e. g.*, *id.*, at 540 (noting "Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution"). Only two Terms ago we confirmed this understanding of *Powell* in *Nixon* v. *United States*, 506 U. S. 224 (1993). After noting that the three qualifications for membership specified in Art. I, § 2, are of "a precise, limited nature" and "*unalterable by the legislature*," we explained:

> "Our conclusion in *Powell* was based on the fixed meaning of '[q]ualifications' set forth in Art. I, § 2. The claim by the House that its power to 'be the Judge of the Elections, Returns and Qualifications of its own Members' was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership." *Id.*, at 237.[12]

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[12] JUSTICE THOMAS' dissent purports to agree with the outcome of *Powell*, but rejects the reasoning in the opinion. The dissent treats *Powell* as simply an application of the "default rule" that if "the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it." *Post*, at 848, 876, 885–886. However, there is not a word in the Court's opinion in *Powell* suggesting that the decision rested on the "default rule" that undergirds the dissent's entire analysis. On the contrary, as the excerpt from *Nixon* quoted in the text plainly states, our conclusion in *Powell* was based on our understanding of the "fixed meaning of '[q]ualifications' set forth in Art. I, § 2." We concluded that the Framers affirmatively intended the qualifications set forth in the text of the Constitution to be exclusive in order to effectuate the principle that in a representative democracy the people should choose whom they please to govern them.

Moreover, the Court has never treated the dissent's "default rule" as absolute. In *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), for example, Chief Justice Marshall rejected the argument that the Constitution's silence on state power to tax federal instrumentalities requires that States

Unsurprisingly, the state courts and lower federal courts have similarly concluded that *Powell* conclusively resolved the issue whether Congress has the power to impose additional qualifications. See, *e. g.*, *Joyner* v. *Mofford*, 706 F. 2d 1523, 1528 (CA9 1983) ("In *Powell* . . . , the Supreme Court accepted this restrictive view of the Qualifications Clause—at least as applied to Congress"); *Michel* v. *Anderson*, 14 F. 3d 623 (CADC 1994) (citing *Nixon*'s description of *Powell*'s holding); *Stumpf* v. *Lau*, 108 Nev. 826, 830, 839 P. 2d 120, 122 (1992) (citing *Powell* for the proposition that "[n]ot even Congress has the power to alter qualifications for these constitutional federal officers").[13]

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have the power to do so. Under the dissent's unyielding approach, it would seem that *McCulloch* was wrongly decided. Similarly, the dissent's approach would invalidate our dormant Commerce Clause jurisprudence, because the Constitution is clearly silent on the subject of state legislation that discriminates against interstate commerce. However, though JUSTICE THOMAS has endorsed just that argument, see, *e. g.*, *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, *ante*, p. 175 (SCALIA, J., concurring in judgment, joined by THOMAS, J.), the Court has consistently rejected that argument and has continued to apply the dormant Commerce Clause, see, *e. g.*, *ante*, at 179–180; *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U. S. 888 (1988).

[13] Our decision in *Powell* and its historical analysis were consistent with prior decisions from state courts. For example, in *State ex rel. Johnson* v. *Crane*, 65 Wyo. 189, 197 P. 2d 864 (1948), the Wyoming Supreme Court undertook a detailed historical analysis and concluded that the Qualifications Clauses were exclusive. Several other courts reached the same result, though without performing the same detailed historical analysis. See, *e. g.*, *Hellmann* v. *Collier*, 217 Md. 93, 141 A. 2d 908 (1958); *State ex rel. Chandler* v. *Howell*, 104 Wash. 99, 175 P. 569 (1918); *State ex rel. Eaton* v. *Schmahl*, 140 Minn. 219, 167 N. W. 481 (1918); see generally *State ex rel. Johnson* v. *Crane*, 65 Wyo., at 204–213, 197 P. 2d, at 869–874 (citing cases).

The conclusion and analysis were also consistent with the positions taken by commentators and scholars. See, *e. g.*, n. 9, *supra;* see also Warren 412–422 (discussing history and concluding that "[t]he elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").

In sum, after examining *Powell*'s historical analysis and its articulation of the "basic principles of our democratic system," we reaffirm that the qualifications for service in Congress set forth in the text of the Constitution are "fixed," at least in the sense that they may not be supplemented by Congress.

III

Our reaffirmation of *Powell* does not necessarily resolve the specific questions presented in these cases. For petitioners argue that whatever the constitutionality of additional qualifications for membership imposed by Congress, the historical and textual materials discussed in *Powell* do not support the conclusion that the Constitution prohibits additional qualifications imposed by States. In the absence of such a constitutional prohibition, petitioners argue, the Tenth Amendment and the principle of reserved powers require that States be allowed to add such qualifications.

Before addressing these arguments, we find it appropriate to take note of the striking unanimity among the courts that have considered the issue. None of the overwhelming array of briefs submitted by the parties and *amici* has called to our attention even a single case in which a state court or federal court has approved of a State's addition of qualifications for a Member of Congress. To the contrary, an impressive number of courts have determined that States lack the authority to add qualifications. See, *e. g.*, *Chandler* v. *Howell*, 104 Wash. 99, 175 P. 569 (1918); *Eckwall* v. *Stadelman*, 146 Ore. 439, 446, 30 P. 2d 1037, 1040 (1934); *Stockton* v. *McFarland*, 56 Ariz. 138, 144, 106 P. 2d 328, 330 (1940); *State ex rel. Johnson* v. *Crane*, 65 Wyo. 189, 197 P. 2d 864 (1948); *Dillon* v. *Fiorina*, 340 F. Supp. 729, 731 (N. M. 1972); *Stack* v. *Adams*, 315 F. Supp. 1295, 1297–1298 (ND Fla. 1970); *Buckingham* v. *State*, 42 Del. 405, 35 A. 2d 903, 905 (1944); *Stumpf* v. *Lau*, 108 Nev. 826, 830, 839 P. 2d 120, 123 (1992); *Danielson* v. *Fitzsimmons*, 232 Minn. 149, 151, 44 N. W. 2d 484, 486 (1950); *In re Opinion of Judges*, 79 S. D. 585, 587,

116 N. W. 2d 233, 234 (1962). Courts have struck down state-imposed qualifications in the form of term limits, see, *e. g.*, *Thorsted* v. *Gregoire*, 841 F. Supp. 1068, 1081 (WD Wash. 1994); *Stumpf* v. *Lau*, 108 Nev., at 830, 839 P. 2d, at 123, district residency requirements, see, *e. g.*, *Hellmann* v. *Collier*, 217 Md. 93, 100, 141 A. 2d 908, 911 (1958); *Dillon* v. *Fiorina*, 340 F. Supp., at 731; *Exon* v. *Tiemann*, 279 F. Supp. 609, 613 (Neb. 1968); *State ex rel. Chavez* v. *Evans*, 79 N. M. 578, 581, 446 P. 2d 445, 448 (1968) *(per curiam)*, loyalty oath requirements, see, *e. g.*, *Shub* v. *Simpson*, 196 Md. 177, 199, 76 A. 2d 332, 341, appeal dism'd, 340 U. S. 881 (1950); *In re O'Connor*, 173 Misc. 419, 421, 17 N. Y. S. 2d 758, 760 (Super. Ct. 1940), and restrictions on those convicted of felonies, see, *e. g.*, *Application of Ferguson*, 57 Misc. 2d 1041, 1043, 294 N. Y. S. 2d 174, 176 (Super. Ct. 1968); *Danielson* v. *Fitzsimmons*, 232 Minn., at 151, 44 N. W. 2d, at 486; *State ex rel. Eaton* v. *Schmahl*, 140 Minn. 219, 220, 167 N. W. 481 (1918) *(per curiam)*. Prior to *Powell*, the commentators were similarly unanimous. See, *e. g.*, 1 W. Blackstone, Commentaries, Appendix 213 (S. Tucker ed. 1803) ("[T]hese provisions, as they require qualifications which the constitution does not, may possibly be found to be nugatory"); 1 Story § 627 (each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states"); 1 J. Kent, Commentaries on American Law 228, n. a (3d ed. 1836) ("[T]he objections to the existence of any such power [on the part of the States to add qualifications are] . . . too palpable and weighty to admit of any discussion"); G. McCrary, American Law of Elections § 322 (4th ed. 1897) ("It is not competent for any State to add to or in any manner change the qualifications for a Federal office, as prescribed by the Constitution or laws of the United States"); T. Cooley, General Principles of Constitutional Law 268 (2d ed. 1891) ("The Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state

constitutions and laws can neither add to nor take away from them"); C. Burdick, Law of the American Constitution 160 (1922) ("It is clearly the intention of the Constitution that all persons not disqualified by the terms of that instrument should be eligible to the federal office of Representative"); *id.*, at 165 ("It is as clear that States have no more right to add to the constitutional qualifications of Senators than they have to add to those for Representatives"); Warren 422 ("The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications").[14] This impressive and uniform body of judicial decisions and learned commentary indicates that the obstacles confronting petitioners are formidable indeed.

Petitioners argue that the Constitution contains no express prohibition against state-added qualifications, and that Amendment 73 is therefore an appropriate exercise of a State's reserved power to place additional restrictions on the choices that its own voters may make. We disagree for two independent reasons. First, we conclude that the power to add qualifications is not within the "original powers" of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers in-

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[14] More recently, the commentators have split, with some arguing that state-imposed term limits are constitutional, see, *e. g.*, Gorsuch & Guzman, Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitation, 20 Hofstra L. Rev. 341 (1991); Hills, A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97 (1991); Safranek, Term Limitations: Do the Winds of Change Blow Unconstitutional?, 26 Creighton L. Rev. 321 (1993), and others arguing that they are not, see, *e. g.*, Lowenstein, Are Congressional Term Limits Constitutional?, 18 Harv. J. L. & Pub. Policy 1 (1994); Eid & Kolbe, The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office, 69 Denver L. Rev. 1 (1992); Comment, Congressional Term Limits: Unconstitutional by Initiative, 67 Wash. L. Rev. 415 (1992).

tended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications.

The "plan of the convention" as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States. As Chief Justice Marshall explained, "it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument." *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193 (1819).

This classic statement by the Chief Justice endorsed Hamilton's reasoning in The Federalist No. 32 that the plan of the Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." The Federalist No. 32, at 198. The text of the Tenth Amendment unambiguously confirms this principle:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As we have frequently noted, "[t]he States unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government." *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985) (internal quotation marks and citation omitted) (em-

phasis added); see also *New York* v. *United States*, 505 U. S. 144, 155–156 (1992).

Source of the Power

Contrary to petitioners' assertions, the power to add qualifications is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States. Petitioners' Tenth Amendment argument misconceives the nature of the right at issue because that Amendment could only "reserve" that which existed before. As Justice Story recognized, "the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed." 1 Story § 627.

Justice Story's position thus echoes that of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). In *McCulloch*, the Court rejected the argument that the Constitution's silence on the subject of state power to tax corporations chartered by Congress implies that the States have "reserved" power to tax such federal instrumentalities. As Chief Justice Marshall pointed out, an "original right to tax" such federal entities "never existed, and the question whether it has been surrendered, cannot arise." *Id.*, at 430. See also *Crandall* v. *Nevada*, 6 Wall. 35, 46 (1868). In language that presaged Justice Story's argument, Chief Justice Marshall concluded: "This opinion does not deprive the States of any resources which they originally possessed." 4 Wheat., at 436.[15]

[15] Thus, contrary to the dissent's suggestion, *post*, at 856–857, Justice Story was not the first, only, or even most influential proponent of the principle that certain powers are not reserved to the States despite constitutional silence. Instead, as Chief Justice Marshall's opinion in *McCulloch* reveals, that principle has been a part of our jurisprudence for over 175 years.

With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified. The contrary argument overlooks the revolutionary character of the Government that the Framers conceived. Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation. In that system, "the States retained most of their sovereignty, like independent nations bound together only by treaties." *Wesberry* v. *Sanders,* 376 U. S. 1, 9 (1964). After the Constitutional Convention convened, the Framers were presented with, and eventually adopted a variation of, "a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature." *Id.*, at 10. In adopting that plan, the Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States. See, *e. g.*, *FERC* v. *Mississippi,* 456 U. S. 742, 791 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("The Constitution . . . permitt[ed] direct contact between the National Government and the individual citizen"). In that National Government, representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is "an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor controllable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people." 1 Story § 627. Representatives and Senators are as much officers of the entire Union as is the President. States thus "have just as much right, and no more, to prescribe new qualifications for a representative, as they have for a president. . . . It is no original prerogative of state

power to appoint a representative, a senator, or president for the union." *Ibid.*[16]

We believe that the Constitution reflects the Framers' general agreement with the approach later articulated by Justice Story. For example, Art. I, § 5, cl. 1, provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." The text of the Constitution thus gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State. For this reason, the dissent falters when it states that "the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress." *Post*, at 859.

Two other sections of the Constitution further support our view of the Framers' vision. First, consistent with Story's view, the Constitution provides that the salaries of representatives should "be ascertained by Law, and paid out of the Treasury of the United States," Art. I, § 6, rather than by individual States. The salary provisions reflect the view that representatives owe their allegiance to the people, and not to the States. Second, the provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States, namely that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be

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[16] The Constitution's provision for election of Senators by the state legislatures, see Art. I, § 3, cl. 1, is entirely consistent with this view. The power of state legislatures to elect Senators comes from an express delegation of power from the Constitution, and thus was not at all based on some aspect of original state power. Of course, with the adoption of the Seventeenth Amendment, state power over the election of Senators was eliminated, and Senators, like Representatives, were elected directly by the people.

prescribed in each State by the Legislature thereof." Art. I, § 4, cl. 1. This duty parallels the duty under Article II that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." Art. II, § 1, cl. 2. These Clauses are express delegations of power to the States to act with respect to federal elections.[17]

This conclusion is consistent with our previous recognition that, in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution. Thus, we have noted that "[w]hile, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. I." *United States* v. *Classic,* 313 U. S. 299, 315 (1941). Cf. *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 230 (1920) ("[T]he power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented").

In short, as the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself. The Tenth Amendment thus provides no basis for concluding that the States possess reserved power to add qualifications to those that are fixed in the Constitution. Instead, any state power to set the qualifications for membership in Congress must derive not from the reserved powers of state sovereignty, but rather from the delegated powers of national sovereignty. In the absence of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist.

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[17] The Clauses also reflect the idea that the Constitution treats both the President and Members of Congress as federal officers.

The Preclusion of State Power

Even if we believed that States possessed as part of their original powers some control over congressional qualifications, the text and structure of the Constitution, the relevant historical materials, and, most importantly, the "basic principles of our democratic system" all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.

Much of the historical analysis was undertaken by the Court in *Powell*. See *supra*, at 789–793. There is, however, additional historical evidence that pertains directly to the power of the States. That evidence, though perhaps not as extensive as that reviewed in *Powell*, leads unavoidably to the conclusion that the States lack the power to add qualifications.

The Convention and Ratification Debates

The available affirmative evidence indicates the Framers' intent that States have no role in the setting of qualifications. In Federalist Paper No. 52, dealing with the House of Representatives, Madison addressed the "qualifications of the electors and the elected." The Federalist No. 52, at 325. Madison first noted the difficulty in achieving uniformity in the qualifications for electors, which resulted in the Framers' decision to require only that the qualifications for federal electors be the same as those for state electors. Madison argued that such a decision "must be satisfactory to every State, because it is comfortable to the standard already established, or which may be established, by the State itself." *Id.*, at 326. Madison then explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected:

> "The qualifications of the elected, being less carefully and properly defined by the State constitutions, and being at the same time more susceptible of uniformity,

> have been very properly considered and regulated by the convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States; must, at the time of his election be an inhabitant of the State he is to represent; and, during the time of his service must be in no office under the United States. Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." *Ibid.*[18]

[18] The dissent places a novel and implausible interpretation on this paragraph. Consistent with its entire analysis, the dissent reads Madison as saying that the sole purpose of the Qualifications Clauses was to set minimum qualifications that would prevent the States from sending incompetent representatives to Congress; in other words, Madison viewed the Clauses as preventing the States from opening the door to this part of the federal service too widely. See *post*, at 900–902.

The text of The Federalist No. 52 belies the dissent's reading. First, Madison emphasized that "[t]he qualifications of the elected . . . [were] more susceptible of uniformity." His emphasis on uniformity would be quite anomalous if he envisioned that States would create for their representatives a patchwork of qualifications. Second, the idea that Madison was in fact concerned that States would open the doors to national service too widely is entirely inconsistent with Madison's emphasizing that the Constitution kept "the door . . . open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." The Federalist No. 52, at 326.

Finally the dissent argues that "Madison could not possibly have been rebuking the States for setting unduly high qualifications for their representatives in Congress," *post*, at 901, and suggests that Madison's comments do not reflect "an implicit criticism of the States for setting unduly high entrance barriers," *post*, at 902. We disagree. Though the dissent attempts to minimize the extensiveness of state-imposed qualifications by focusing on the qualifications that States imposed on delegates to Congress and the age restrictions that they imposed on state legislators, the dissent neglects to give appropriate attention to the abundance of property, religious, and other qualifications that States imposed on state

Madison emphasized this same idea in The Federalist No. 57:

> "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. *No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.*" The Federalist No. 57, at 351 (emphasis added).

The provisions in the Constitution governing federal elections confirm the Framers' intent that States lack power to add qualifications. The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections. For example, to prevent discrimination against federal electors, the Framers required in Art. I, § 2, cl. 1, that the qualifications for federal electors be the same as those for state electors. As Madison noted, allowing States to differentiate between the qualifications for state and federal electors "would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." The Federalist No. 52, at 326. Similarly, in Art. I, § 4, cl. 1, though giving the States the freedom to regulate the "Times, Places and Manner of holding Elections," the Framers created a safeguard against state abuse by giving Congress the power to "by Law make or alter such Regulations." The Convention debates make clear that the Framers' overriding concern was the potential for States' abuse of the power to set the

elected officials. As we describe in some detail, *infra,* at 823–826, nearly every State had property qualifications, and many States had religious qualifications, term limits, or other qualifications. As Madison surely recognized, without a constitutional prohibition, these qualifications could be applied to federal representatives. We cannot read Madison's comments on the "open door" of the Federal Government as anything but a rejection of the "unduly high" barriers imposed by States.

"Times, Places and Manner" of elections. Madison noted that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power." 2 Farrand 240. Gouverneur Morris feared that "the States might make false returns and then make no provisions for new elections." *Id.*, at 241. When Charles Pinckney and John Rutledge moved to strike the congressional safeguard, the motion was soundly defeated. *Id.*, at 240–241. As Hamilton later noted: "Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." The Federalist No. 59, at 363. See also *ibid.* (one justification for Times, Places and Manner Clause is that "[i]f we are in a humor to presume abuses of power, it is as fair to presume them on the part of the State governments as on the part of the general government").[19]

The Framers' discussion of the salary of representatives reveals similar concerns. When the issue was first raised, Madison argued that congressional compensation should be fixed in the Constitution, rather than left to state legislatures, because otherwise "it would create an improper dependence." 1 Farrand 216. George Mason agreed, noting

[19] The dissent attacks our holding today by arguing that the Framers' distrust of the States extended only to measures adopted by "state legislatures," and not to measures adopted by "the people themselves." *Post*, at 889. See also *post*, at 889–890 ("These delegates presumably did not want *state legislatures* to be able to tell Members of Congress from their State" how to vote) (emphasis added). The novelty and expansiveness of the dissent's attack is quite astonishing. We are aware of no case that would even suggest that the validity of a state law under the Federal Constitution would depend at all on whether the state law was passed by the state legislature or by the people directly through amendment of the state constitution. Indeed, no party has so argued. Quite simply, in our view, the dissent's distinction between state legislation passed by the state legislature and legislation passed by state constitutional amendment is untenable. The qualifications in the Constitution are fixed, and may not be altered by either States or their legislatures.

that "the parsimony of the States might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve." *Ibid.*

When the issue was later reopened, Nathaniel Gorham stated that he "wished not to refer the matter to the State Legislatures who were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them." *Id.*, at 372. Edmund Randolph agreed that "[i]f the States were to pay the members of the Nat[ional] Legislature, a dependence would be created that would vitiate the whole System." *Ibid.* Rufus King "urged the danger of creating a dependence on the States," *ibid.*, and Hamilton noted that "[t]hose who pay are the masters of those who are paid," *id.*, at 373. The Convention ultimately agreed to vest in Congress the power to set its own compensation. See Art. I, § 6.[20]

In light of the Framers' evident concern that States would try to undermine the National Government, they could not have intended States to have the power to set qualifications. Indeed, one of the more anomalous consequences of petitioners' argument is that it accepts federal supremacy over the procedural aspects of determining the times, places, and manner of elections while allowing the States *carte blanche* with respect to the substantive qualifications for membership in Congress.

The dissent nevertheless contends that the Framers' distrust of the States with respect to elections does not preclude the people of the States from adopting eligibility requirements to help narrow their own choices. See *post*, at 888–889. As the dissent concedes, *post*, at 893, however, the Framers were unquestionably concerned that the States would simply not hold elections for federal officers, and therefore the Framers gave Congress the power to "make

[20] The Framers' decision to reject a proposal allowing for States to recall their own representatives, see 1 Farrand 20, 217, reflects these same concerns.

or alter" state election regulations. Yet under the dissent's approach, the States could achieve exactly the same result by simply setting qualifications for federal office sufficiently high that no one could meet those qualifications. In our view, it is inconceivable that the Framers would provide a specific constitutional provision to ensure that federal elections would be held while at the same time allowing States to render those elections meaningless by simply ensuring that no candidate could be qualified for office. Given the Framers' wariness over the potential for state abuse, we must conclude that the specification of fixed qualifications in the constitutional text was intended to prescribe uniform rules that would preclude modification by either Congress or the States.[21]

We find further evidence of the Framers' intent in Art. I, § 5, cl. 1, which provides: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." That Art. I, § 5, vests a federal tribunal with ultimate authority to judge a Member's qualifications is fully consistent with the understanding that those qualifications are fixed in the Federal Constitution, but not with the understanding that they can be altered by the States. If the States had the right to prescribe additional qualifications—

[21] The dissent's arguments concerning these provisions of the Constitution, see *post*, at 889–895, simply reinforce our argument that the constitutional provisions surrounding elections all reveal the Framers' basic fear that the States might act to undermine the National Legislature. For example, as the dissent concedes, the Framers feared that States would use the control over salaries to influence the votes of their representative. See *post*, at 889–890. Similarly, the dissent concedes that the Times, Places and Manner Clause reflects the Framers' fear that States would not conduct federal elections at all. See *post*, at 894. We believe that the dissent's reading of the provisions at issue understates considerably the extent of the Framers' distrust. However, even under the dissent's reading of the provisions, the text of the Constitution unquestionably reveals the Framers' distrust of the States regarding elections, and thus provides powerful evidence supporting our view that the qualifications established in the Constitution are exclusive.

such as property, educational, or professional qualifications—for their own representatives, state law would provide the standard for judging a Member's eligibility. As we concluded in *Murdock* v. *Memphis*, 20 Wall. 590 (1875), federal questions are generally answered finally by federal tribunals because rights which depend on federal law "should be the same everywhere" and "their construction should be uniform." *Id.*, at 632. The judging of questions concerning rights which depend on state law is not, however, normally assigned to federal tribunals. See *id.*, at 636. The Constitution's provision for each House to be the judge of its own qualifications thus provides further evidence that the Framers believed that the primary source of those qualifications would be federal law.

We also find compelling the complete absence in the ratification debates of any assertion that States had the power to add qualifications. In those debates, the question whether to require term limits, or "rotation," was a major source of controversy. The draft of the Constitution that was submitted for ratification contained no provision for rotation.[22] In arguments that echo in the preamble to Arkansas' Amendment 73, opponents of ratification condemned the absence of a rotation requirement, noting that "there is no doubt that senators will hold their office perpetually; and in this situation, they must of necessity lose their dependence, and their attachments to the people."[23] Even proponents of ratifica-

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[22] A proposal requiring rotation for Members of the House was proposed at the Convention, see 1 Farrand 20, but was defeated unanimously, see *id.*, at 217. There is no record of any debate on either occasion.

[23] 2 Elliot's Debates 309–310 (N. Y., Smith). See also *id.*, at 287–288 (N. Y., G. Livingston) (Senators will enjoy "a security of their re-election, as long as they please. . . . In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. . . . The senators will associate only with men of their own class, and thus become strangers to the condition of the common people"); *id.*, at 30–31 (Mass., Turner) ("Knowing the numerous arts that designing men are prone to, to secure their election, and perpetuate themselves, it is my hearty wish that

tion expressed concern about the "abandonment in every instance of the necessity of rotation in office."[24] At several ratification conventions, participants proposed amendments that would have required rotation.[25]

The Federalists' responses to those criticisms and proposals addressed the merits of the issue, arguing that rotation was incompatible with the people's right to choose. As we noted above, Robert Livingston argued:

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a rotation may be provided for"); *id.*, at 62 (Mass., Kingsley) ("[W]e are deprived of annual elections, have no rotation, and cannot recall our members; therefore our federal rulers will be masters, and not servants"); Samuel Bryan, "Centinel I," Independent Gazetteer (Phil., Oct. 5, 1787), 1 Debate on the Constitution 52, 61 (B. Bailyn ed. 1990) (hereinafter Bailyn) ("[A]s there is no exclusion by rotation, [Senators] may be continued for life, which, from their extensive means of influence, would follow of course"); Letter from George Lee Turberville to Madison (Dec. 11, 1787), 1 Bailyn 477, 479 ("Why was not that truely republican mode of forcing the Rulers or sovereigns of the states to mix after stated Periods with the people again—observed"); Mercy Otis Warren, "A Columbian Patriot" (Boston, Feb. 1788), 2 Bailyn 284, 292 ("There is no provision for a rotation, nor any thing to prevent the perpetuity of office in the same hands for life. . . . By this neglect we lose the advantages of that check to the overbearing insolence of office, which by rendering him ineligible at certain periods, keeps the mind of man in equilibrio, and teaches him the feelings of the governed").

[24] Letter of Dec. 20, 1787, from Thomas Jefferson to James Madison. 1 *id.*, at 209, 211. In 1814, in another private letter, Jefferson expressed the opinion that the States had not abandoned the power to impose term limits. See Letter of Jan. 31, 1814, to Joseph C. Cabell, in 14 Writings of Thomas Jefferson 82 (A. Lipscomb ed. 1904). Though he noted that his reasoning on the matter "appears to me to be sound," he went on to note:

"but, on so recent a change of view, caution requires us not to be too confident, and that we admit this to be one of the doubtful questions on which honest men may differ with the purest of motives; and the more readily, as we find we have differed from ourselves on it." *Id.*, at 83.

The text of Jefferson's response clearly belies the dissent's suggestion that Jefferson "himself did not entertain serious doubts of its correctness." *Post*, at 874, n. 14.

[25] See n. 40, *infra.*

> "The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. This rotation is an absurd species of ostracism." 2 Elliot's Debates 292–293.

Similarly, Hamilton argued that the representatives' need for reelection rather than mandatory rotation was the more effective way to keep representatives responsive to the people, because "[w]hen a man knows he must quit his station, let his merit be what it may, he will turn his attention chiefly to his own emolument." *Id.*, at 320.[26]

Regardless of which side has the better of the debate over rotation, it is most striking that nowhere in the extensive ratification debates have we found any statement by either a proponent or an opponent of rotation that the draft constitution would permit States to require rotation for the representatives of their own citizens. If the participants in the debate had believed that the States retained the authority to impose term limits, it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces. The absence in an otherwise freewheeling debate of any suggestion that States had the power to impose additional qualifications unquestionably reflects the Framers' common understanding that States lacked that power.

In short, if it had been assumed that States could add additional qualifications, that assumption would have provided the basis for a powerful rebuttal to the arguments being advanced. The failure of intelligent and experienced advocates to utilize this argument must reflect a general agree-

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[26] George Washington made a similar argument:

"The power under the Constitution will always be in the People. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own chusing; and whenever it is executed contrary to their Interest, or not agreeable to their wishes, their Servants can, and undoubtedly will be, recalled." 1 Bailyn 305, 306–307.

ment that its premise was unsound, and that the power to add qualifications was one that the Constitution denied the States.[27]

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[27] Petitioners set forth several other arguments to support their contention that the Convention and ratification debates reveal that the qualifications in the Qualifications Clauses were not intended to be exclusive. We find none of these persuasive.

Petitioners first observe that the notes of Edmund Randolph, who was a member of the Committee of Detail, reveal that an early draft of the Qualifications Clause provided:

"The qualifications of (a) delegate*s* shall be the age of twenty-five years at least. and citizenship: (and any person possessing these qualifications may be elected except)." 2 Farrand 139 (footnote omitted).

Petitioners suggest that the deletion of the parenthetical material from the Clause suggests that the Framers did not intend the Qualifications Clause to be exclusive. We reject this argument. First, there is no evidence that the draft in Randolph's notes was ever presented to the Convention, and thus the deletion of the Clause tells us little about the views of the Convention as a whole. Moreover, even assuming that the Convention had seen the draft, the deletion of the language without comment is at least as consistent with a belief—as suggested by Dickinson, see n. 9, *supra*—that the language was superfluous as with a concern that the language was inappropriate. Finally, contrary to the rather ingenious argument advanced in the dissent, see *post*, at 887–888, it seems to us irrelevant that the draft in question did not include a comparable parenthetical clause referring to "elected" Senators because the draft contemplated that Senators, unlike Representatives, would not be chosen by popular election.

Nor is there merit to the argument that the inclusion in the Committee's final draft of a provision allowing each House to add property qualifications, see 2 Farrand 179, is somehow inconsistent with our holding today. First, there is no conflict between our holding that the qualifications for Congress are fixed in the Constitution and a provision in the Constitution itself providing for property qualifications. Indeed, that is why our analysis is consistent with the other disqualifications contained in the Constitution itself. See n. 2, *supra*. The Constitution simply prohibits the imposition by either States or Congress of additional qualifications that are not contained in the text of the Constitution. Second, of course, the property provision was deleted, thus providing further evidence that the Framers wanted to minimize the barriers that would exclude the most able citizens from service in the National Government.

Respondent Republican Party of Arkansas also argues that the negative phrasing of the Qualifications Clauses suggests that they were not meant

Congressional Experience

Congress' subsequent experience with state-imposed qualifications provides further evidence of the general consensus on the lack of state power in this area. In *Powell*, we examined that experience and noted that during the first 100 years of its existence, "Congress strictly limited its power to judge the qualifications of its members to those enumerated in the Constitution." 395 U. S., at 542. Congress first confronted the issue in 1807 when it faced a challenge to the qualifications of William McCreery, a Representative from Maryland who allegedly did not satisfy a residency requirement imposed by that State. In recommending that McCreery be seated, the Report of the House Committee on Elections noted:

> "'The committee proceeded to examine the Constitution, with relation to the case submitted to them, and find that *qualifications of members are therein determined, without reserving any authority to the State Legislatures to change, add to, or diminish those qualifications;* and that, by that instrument, Congress is constituted the sole judge of the qualifications prescribed by it, and are obliged to decide agreeably to the Constitutional rules . . . .'" *Powell*, 395 U. S., at 542, quoting 17 Annals of Cong. 871 (1807) (emphasis added).[28]

The Chairman of the House Committee on Elections elaborated during debate:

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to be exclusive. Brief for Respondents Republican Party of Arkansas et al. 5–6. This argument was firmly rejected in *Powell*, see 395 U. S., at 537–539, and n. 73; see also Warren 422, n. 1, and we see no need to revisit it now.

[28] We recognize that the "Committee of Elections were not unanimous in these sentiments," and that a "minority advocated the right of the State Legislature to prescribe additional qualifications to the members from the respective States." 17 Annals of Cong. 873 (1807).

> "'The Committee of Elections considered the qualifications of members to have been unalterably determined by the Federal Convention, unless changed by an authority equal to that which framed the Constitution at first; that neither the State nor the Federal Legislatures are vested with authority to add to those qualifications, so as to change them.'" *Powell*, 395 U. S., at 542–543, quoting from 17 Annals of Cong. 872 (1807).

As we noted in *Powell*, the congressional debate over the committee's recommendation tended to focus on the "narrow issue of the power of the States to add to the standing qualifications set forth in the Constitution," 395 U. S., at 543. The whole House, however, did not vote on the committee's Report, and instead voted only on a simple resolution: "*Resolved*, That William McCreery is entitled to his seat in this House." 17 Annals of Cong. 1238 (1807). That resolution passed by a vote of 89 to 18. *Ibid.*

Though the House Debate may be inconclusive, commentators at the time apparently viewed the seating of McCreery as confirmation of the States' lack of power to add qualifications. For example, in a letter to Joseph Cabell, Thomas Jefferson noted the argument that "to add new qualifications to those of the Constitution would be as much an alteration as to detract from them"; he then added: "And so I think the House of Representatives of Congress decided in some case; I believe that of a member from Baltimore." Letter of Jan. 31, 1814, to Joseph C. Cabell, in 14 Writings of Thomas Jefferson 82 (A. Lipscomb ed. 1904).

Similarly, for over 150 years prior to *Powell*, commentators viewed the seating of McCreery as an expression of the view of the House that States could not add to the qualifications established in the Constitution. Thus, for example, referring to the McCreery debates, one commentator noted, "By the decision in this case, [and that in another contested election], *it seems to have been settled* that the States have not a right to require qualifications from members, different

from, or in addition to, those prescribed by the constitution." Cases of Contested Elections in Congress 171 (M. Clarke & D. Hall eds. 1834) (emphasis in original). Other commentators viewed the incident similarly. See, *e. g.*, G. Paschal, The Constitution of the United States 66 (1876) (citing McCreery to support the proposition that "[t]he Constitution having fixed the qualifications of members, no *additional* qualifications can rightfully be required by the States") (emphasis in original); G. McCrary, American Law of Elections § 323 (4th ed. 1897) (citing McCreery and stating "A state law requiring that a Representative in Congress shall reside in a particular town and country within the district from which he is chosen is unconstitutional and void"); W. Sutherland, Notes on the Constitution of the United States 40 (1904) (citing McCreery to support statement that "[t]his clause fixes the qualifications of members so far as state action is concerned, and no additional qualifications can be required by the state"); C. Burdick, Law of the American Constitution 160 (1922) (citing McCreery to support the proposition that state-imposed "limitations have been held . . . not to be effective"). Finally, it is clear that in *Powell* we viewed the seating of McCreery as the House's acknowledgment that the qualifications in the Constitution were fixed. See 395 U. S., at 542–543.

The Senate experience with state-imposed qualifications further supports our conclusions. In 1887, for example, the Senate seated Charles Faulkner of West Virginia, despite the fact that a provision of the West Virginia Constitution purported to render him ineligible to serve. The Senate Committee on Privileges and Elections unanimously concluded that "no State can prescribe any qualification to the office of United States Senator in addition to those declared in the Constitution of the United States." S. Rep. No. 1, 50th Cong., 1st Sess., 4 (1887). The Senate Committee on Rules and Administration reached the same conclusion in 1964 when faced with a challenge to Pierre Salinger, who had

been appointed to serve as Senator from California. See S. Rep. No. 1381, 88th Cong., 2d Sess., 5 ("It is well settled that the qualifications established by the U. S. Constitution for the office of U. S. Senator are exclusive, and a State cannot, by constitutional or statutory provisions, add to or enlarge upon those qualifications").

We recognize, as we did in *Powell*, that "congressional practice has been erratic"[29] and that the precedential value of congressional exclusion cases is "quite limited." *Powell*, 395 U. S., at 545–546. Nevertheless, those incidents lend support to the result we reach today.

Democratic Principles

Our conclusion that States lack the power to impose qualifications vindicates the same "fundamental principle of our representative democracy" that we recognized in *Powell*, namely, that "the people should choose whom they please to govern them." *Id.*, at 547 (internal quotation marks omitted).

As we noted earlier, the *Powell* Court recognized that an egalitarian ideal—that election to the National Legislature should be open to all people of merit—provided a critical foundation for the constitutional structure. This egalitarian theme echoes throughout the constitutional debates. In The Federalist No. 57, for example, Madison wrote:

> "Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people." The Federalist No. 57, at 351.

Similarly, hoping to persuade voters in New York that the Constitution should be ratified, John Stevens, Jr., wrote:

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[29] See, *e. g.*, *Powell*, 395 U. S., at 544–546 (noting examples).

"[N]o Government, that has ever yet existed in the world, affords so ample a field, to individuals of all ranks, for the display of political talents and abilities. . . . No man who has real merit, let his situation be what it will, need despair." 1 Bailyn 487, 492. And Timothy Pickering noted that, "while several of the state constitutions prescribe certain degrees of property as indispensable qualifications for offices, this which is proposed for the U. S. throws the door wide open for the entrance of *every man* who enjoys the confidence of his fellow citizens." Letter from T. Pickering to C. Tillinghast (Dec. 24, 1787), 1 Bailyn 289, 290 (emphasis in original).[30] Additional qualifications pose the same obstacle to open elections whatever their source. The egalitarian ideal, so valued by the Framers, is thus compromised to the same degree by additional qualifications imposed by States as by those imposed by Congress.

Similarly, we believe that state-imposed qualifications, as much as congressionally imposed qualifications, would undermine the second critical idea recognized in *Powell:* that an aspect of sovereignty is the right of the people to vote for whom they wish. Again, the source of the qualification is of little moment in assessing the qualification's restrictive impact.

Finally, state-imposed restrictions, unlike the congressionally imposed restrictions at issue in *Powell*, violate a third idea central to this basic principle: that the right to choose

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[30] See also 2 Farrand 123 (it is "improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & rewards") (Dickinson); The Federalist No. 36, at 217 ("There are strong minds in every walk of life that will rise superior to the disadvantages of situation and will command the tribute due to their merit, not only from the classes to which they particularly belong, but from the society in general. The door ought to be equally open to all") (Hamilton); N. Webster, "A Citizen of America," (Phil., Oct. 17, 1787), 1 Bailyn 129, 142 ("[M]oney is not made a requisite—the places of senators are wisely left open to all persons of suitable age and merit").

representatives belongs not to the States, but to the people. From the start, the Framers recognized that the "great and radical vice" of the Articles of Confederation was "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people. See, *e. g.*, *supra*, at 802–804. The Framers implemented this ideal most clearly in the provision, extant from the beginning of the Republic, that calls for the Members of the House of Representatives to be "chosen every second Year by the People of the several States." Art. I, § 2, cl. 1. Following the adoption of the Seventeenth Amendment in 1913, this ideal was extended to elections for the Senate. The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people. As Chief Justice John Marshall observed: "The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *McCulloch* v. *Maryland*, 4 Wheat., at 404–405.[31] Ours is a "government of the people, by the people, for the people." A. Lincoln, Gettysburg Address (1863).

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[31] Cf. *Hawke* v. *Smith (No. 1)*, 253 U. S. 221, 226 (1920) ("The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States"). Compare U. S. Const., Preamble ("We the People"), with The Articles of Confederation, reprinted in 2 Bailyn 926 ("we the under signed Delegates of the States").

The Framers deemed this principle critical when they discussed qualifications. For example, during the debates on residency requirements, Morris noted that in the House, "*the people at large*, not the *States*, are represented." 2 Farrand 217 (emphasis in original) (footnote omitted). Similarly, George Read noted that the Framers "were forming a *Nati[ona]l* Gov[ernmen]t and such a regulation would correspond little with the idea that we were one people." *Ibid.* (emphasis in original). James Wilson "enforced the same consideration." *Ibid.*

Consistent with these views, the constitutional structure provides for a uniform salary to be paid from the national treasury, allows the States but a limited role in federal elections, and maintains strict checks on state interference with the federal election process. The Constitution also provides that the qualifications of the representatives of each State will be judged by the representatives of the entire Nation. The Constitution thus creates a uniform national body representing the interests of a single people.

Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure. Cf. *McCulloch* v. *Maryland*, 4 Wheat., at 428–429 ("Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States. They are given by all, for the benefit of all—and upon theory, should be subjected to that government only which belongs to all"). Such a patchwork would also sever the direct link that the Framers found so critical between the National Government and the people of the United States.[32]

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[32] There is little significance to the fact that Amendment 73 was adopted by a popular vote, rather than as an Act of the state legislature. See n. 19, *supra*. In fact, none of the petitioners argues that the constitutionality of a state law would depend on the method of its adoption. This is proper,

State Practice

Petitioners attempt to overcome this formidable array of evidence against the States' power to impose qualifications by arguing that the practice of the States immediately after the adoption of the Constitution demonstrates their understanding that they possessed such power. One may properly question the extent to which the States' own practice is a reliable indicator of the contours of restrictions that the Constitution imposed on States, especially when no court has ever upheld a state-imposed qualification of any sort. See *supra*, at 798–799. But petitioners' argument is unpersuasive even on its own terms. At the time of the Convention, "[a]lmost all the State Constitutions required members of their Legislatures to possess considerable property." See Warren 416–417.[33] Despite this near uniformity, only one

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because the voters of Arkansas, in adopting Amendment 73, were acting as citizens of the State of Arkansas, and not as citizens of the National Government. The people of the State of Arkansas have no more power than does the Arkansas Legislature to supplement the qualifications for service in Congress. As Chief Justice Marshall emphasized in *McCulloch*, "Those means are not given by the people of a particular State, not given by the constituents of the legislature, . . . but by the people of all the States." 4 Wheat., at 428–429.

The dissent concedes that the people of the Nation have an interest in preventing any State from sending "immature, disloyal, or unknowledgeable representatives to Congress," *post*, at 869, but does not explain why the people of the Nation lack a comparable interest in allowing every State to send mature, loyal, and knowledgeable representatives to Congress. In our view, the interest possessed by the people of the Nation and identified by the dissent is the same as the people's interest in making sure that, within "reasonable limitations, the door to this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith." The Federalist No. 52, at 326.

[33] See, *e. g.*, 7 Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies 3816 (F. Thorpe ed. 1909) (hereinafter Thorpe) (Virginia) (members of state legislature must be freeholders); 4 *id.*, at 2460, 2461 (New Hampshire) (freehold

State, Virginia, placed similar restrictions on Members of Congress, requiring that a representative be, *inter alia*, a "freeholder." See 1788 Va. Acts, ch. 2, § 2.[34] Just 15 years after imposing a property qualification, Virginia replaced that requirement with a provision requiring that representatives be only "qualified according to the constitution of the United States." 1813 Va. Acts, ch. 23, § 2. Moreover, several States, including New Hampshire, Georgia, Delaware, and South Carolina, revised their Constitutions at around the time of the Federal Constitution. In the revised Constitutions, each State retained property qualifications for its own

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estate of 200 pounds for state senators; estate of 100 pounds, at least half of which is freehold, for state representatives); 3 *id.*, at 1691, 1694 (Maryland) (real and personal property of over 500 pounds for House of Delegates; real and personal property of 1,000 pounds for Senate); *id.*, at 1897, 1898 (freehold estate of 300 pounds or personal estate of 600 pounds for state senators; freehold estate of 100 pounds or ratable estate of 200 pounds for state representatives); 1 *id.*, at 562 (Delaware) (state legislators must be freeholders); 5 *id.*, at 2595 (New Jersey) (members of Legislative Council must be freeholders and must have real and personal property of 1,000 pounds; members of Assembly must have real and personal property of 500 pounds); *id.*, at 2631 (New York) (state senators must be freeholders); *id.*, at 2790 (North Carolina) (100 acres of land for House; 300 acres of land in Senate); 2 *id.*, at 779 (Georgia) (150 acres of land or property of 250 pounds); 6 *id.*, at 3251 (South Carolina) (freehold estate of 2,000 pounds for state senate).

[34] Judge Tucker expressed doubt about the constitutionality of the provisions of the Virginia statute, noting that "these provisions, as they require qualifications which the constitution does not, may possibly be found to be nugatory." 1 W. Blackstone, Commentaries Appendix 213 (S. Tucker ed. 1803). Judge Tucker noted the two primary arguments against the power to add such a qualification:

"First, that in a representative government, the people have an undoubted right to judge for themselves of the qualification of their delegate, and if their opinion of the integrity of their representative will supply the want of estate, there can be no reason for the government to interfere, by saying, that the latter must and shall overbalance the former.

"Secondly; by requiring a qualification in estate it may often happen, that men the best qualified in other respects might be incapacitated from serving their country." *Ibid.*

state elected officials yet placed no property qualification on its congressional representatives.[35]

The contemporaneous state practice with respect to term limits is similar. At the time of the Convention, States widely supported term limits in at least some circumstances. The Articles of Confederation contained a provision for term limits.[36] As we have noted, some members of the Convention had sought to impose term limits for Members of Congress.[37] In addition, many States imposed term limits on

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[35] See 4 Thorpe 2477, 2479 (New Hampshire) (100 pounds for House; 200 pounds for Senate); 2 *id.*, at 786 (Georgia) (200 acres of land or 150 pounds for House; 250 acres of land or 250 pounds for Senate); 6 *id.*, at 3259 (South Carolina) (500 acres and 10 slaves or 150 pounds sterling for House; 300 pounds sterling for Senate); 1 *id.*, at 570, 571 (Delaware) (freehold for House; freehold estate of 200 acres or real and personal property of 1,000 pounds for Senate). Pennsylvania amended its Constitution in 1790. Neither the old constitution nor the amended one contained property qualifications for state representatives. See 5 *id.*, at 3084; *id.*, at 3092–3093.

Several State Constitutions also imposed religious qualifications on state representatives. For example, New Hampshire's Constitution of 1784 and its Constitution of 1792 provided that members of the State Senate and House of Representatives be "of the protestant religion." 4 *id.*, at 2460, 2461–2462 (1784 Constitution); *id.*, at 2477, 2479 (1792 Constitution). North Carolina's Constitution provided that "no clergyman, or preacher of the gospel, of any denomination, shall be capable of being a member of either the Senate, House of Commons, or Council of State," 5 *id.*, at 2793, and that "no person, who shall deny the being of God or the truth of the Protestant religion . . . shall be capable of holding any office or place of trust or profit in the civil department within this State," *ibid.* Georgia and South Carolina also had religious qualifications in their Constitutions for state legislators, see 2 *id.*, at 779 (Georgia) ("of the Protestant religion"); 6 *id.*, at 3252 (South Carolina) (must be "of the Protestant religion"), but deleted those provisions when they amended their Constitutions, in 1789, see 2 *id.*, at 785, and in 1790, see 6 *id.*, at 3258, respectively. Article VI of the Federal Constitution, however, prohibited States from imposing similar qualifications on federal legislators.

[36] See 2 Bailyn 926, 927 ("[N]o person shall be capable of being a delegate for more than three years in any term of six years").

[37] See 1 Farrand 20 ("Res[olved] that the members of the first branch of the National Legislature ought . . . to be incapable of re-election for the

state officers,[38] four placed limits on delegates to the Continental Congress,[39] and several States voiced support for term limits for Members of Congress.[40] Despite this widespread support, no State sought to impose any term limits on its own federal representatives. Thus, a proper assessment of contemporaneous state practice provides further persuasive evidence of a general understanding that the qualifications in the Constitution were unalterable by the States.[41]

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space of [blank] after the expiration of their term of service"). See also n. 22, *supra.*

[38] See, *e. g.,* G. Wood, Creation of the American Republic, 1776–1787, p. 140 (1969) (noting that 7 of the 10 State Constitutions drafted in 1776–1777 provided for term limits on their state executives); see also App. to Brief for State Petitioner 1b–34b (describing provisions of State Constitutions).

[39] 3 Thorpe 1695–1697 (Maryland); 4 *id.*, at 2467 (New Hampshire); 5 *id.*, at 3085 ((Pennsylvania); 5 *id.*, at 2793 (North Carolina).

[40] New York attached to its ratification a list of proposed amendments and "enjoin[ed] it upon their representatives in Congress to exert all their influence, and use all reasonable means, to obtain a ratification." 1 Elliot's Debates 329. One of the proposed amendments was "That no person be eligible as a senator for more than six years in any term of twelve years." *Id.*, at 330. In Virginia, the Convention similarly "enjoin[ed] it upon their representatives," 2 Bailyn 564, to adopt "a Declaration or Bill of Rights," *id.*, at 558, which would include the statement that members of the Executive and Legislative Branches "should at fixed periods be reduced to a private station, return into the mass of the people; and the vacancies be supplied by certain and regular elections; in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of Government, and the laws shall direct," *id.*, at 559. The North Carolina Convention proposed nearly identical language, see *id.*, at 566, though that Convention ultimately did not ratify the Constitution, see 4 Elliot's Debates 250–251. Thus, at least three States proposed some form of constitutional amendment supporting term limits for Members of Congress.

[41] Petitioners and the dissent also point out that Georgia, Maryland, Massachusetts, Virginia, and North Carolina added district residency requirements, and petitioners note that New Jersey and Connecticut established nominating processes for congressional candidates. They rely on

In sum, the available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in *Powell*, reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution.

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these facts to show that the States believed they had the power to add qualifications. We again are unpersuaded. First, establishing a nominating process is no more setting a qualification for office than is creating a primary. Second, it seems to us that States may simply have viewed district residency requirements as the necessary analog to state residency requirements. Thus, state practice with respect to residency requirements does not necessarily indicate that States believed that they had a broad power to add restrictions. Finally, we consider the number of state-imposed qualifications to be remarkably small. Despite the array of property, religious, and other qualifications that were contained in State Constitutions, petitioners and the dissent can point to only one instance of a state-imposed property qualification on candidates for Congress, and five instances of district residency requirements. The state practice seems to us notable for its restraint, and thus supports the conclusion that States did not believe that they generally had the power to add qualifications.

Nor are we persuaded by the more recent state practice involving qualifications such as those that bar felons from being elected. As we have noted, the practice of States is a poor indicator of the effect of restraints on the States, and no court has ever upheld one of these restrictions. Moreover, as one moves away from 1789, it seems to us that state practice is even less indicative of the Framers' understanding of state power.

Finally, it is important to reemphasize that the dissent simply has no credible explanation as to why almost every State imposed property qualifications on state representatives but not on federal representatives. The dissent relies first on the obvious but seemingly irrelevant proposition that the state legislatures were larger than state congressional delegations. *Post*, at 913–914, n. 37. If anything, the smaller size of the congressional delegation would have made States *more* likely to put qualifications on federal representatives since the election of any "pauper" would have had proportionally greater significance. The dissent also suggests that States failed to add qualifications out of fear that others, *e. g.*, Congress, believed that States lacked the power to add such qualifications. Of course, this rationale is perfectly consistent with our view that the general understanding at the time was that States lacked the power to add qualifications.

IV

Petitioners argue that, even if States may not add qualifications, Amendment 73 is constitutional because it is not such a qualification, and because Amendment 73 is a permissible exercise of state power to regulate the "Times, Places and Manner of holding Elections." We reject these contentions.

Unlike §§ 1 and 2 of Amendment 73, which create absolute bars to service for long-term incumbents running for state office, § 3 merely provides that certain Senators and Representatives shall not be certified as candidates and shall not have their names appear on the ballot. They may run as write-in candidates and, if elected, they may serve. Petitioners contend that only a legal bar to service creates an impermissible qualification, and that Amendment 73 is therefore consistent with the Constitution.

Petitioners support their restrictive definition of qualifications with language from *Storer* v. *Brown*, 415 U. S. 724 (1974), in which we faced a constitutional challenge to provisions of the California Elections Code that regulated the procedures by which both independent candidates and candidates affiliated with qualified political parties could obtain ballot position in general elections. The code required candidates affiliated with a qualified party to win a primary election, and required independents to make timely filing of nomination papers signed by at least 5% of the entire vote cast in the last general election. The code also denied ballot position to independents who had voted in the most recent primary election or who had registered their affiliation with a qualified party during the previous year.

In *Storer*, we rejected the argument that the challenged procedures created additional qualifications as "wholly without merit." *Id.*, at 746, n. 16. We noted that petitioners "would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election." *Ibid.*

We concluded that the California Code "no more establishes an additional requirement for the office of Representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support." *Ibid.* See also *Joyner* v. *Mofford*, 706 F. 2d, at 1531; *Hopfmann* v. *Connolly*, 746 F. 2d 97, 103 (CA1 1984), vacated in part on other grounds, 471 U. S. 459 (1985). Petitioners maintain that, under *Storer*, Amendment 73 is not a qualification.

We need not decide whether petitioners' narrow understanding of qualifications is correct because, even if it is, Amendment 73 may not stand. As we have often noted, "'[c]onstitutional rights would be of little value if they could be . . . indirectly denied.'" *Harman* v. *Forssenius*, 380 U. S. 528, 540 (1965), quoting *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944). The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on constitutional protections. *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939); *Harman* v. *Forssenius*, 380 U. S., at 540–541.

In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly. As the plurality opinion of the Arkansas Supreme Court recognized, Amendment 73 is an "effort to dress eligibility to stand for Congress in ballot access clothing," because the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service." 316 Ark., at 266, 872 S. W. 2d, at 357.[42] We must, of course, accept the state court's view of the purpose of its own law: We are thus authoritatively informed that the sole purpose of § 3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution. In-

[42] Justice Dudley noted in his concurrence: "I am reassured by the style of this case, U. S. Term Limits, Inc. That name implies just what this amendment is: A practical limit on the terms of the members of the Congress." 316 Ark., at 276, 872 S. W. 2d, at 364 (opinion concurring in part and dissenting in part).

deed, it cannot be seriously contended that the intent behind Amendment 73 is other than to prevent the election of incumbents. The preamble of Amendment 73 states explicitly: "[T]he people of Arkansas . . . herein limit the terms of elected officials." Sections 1 and 2 create absolute limits on the number of terms that may be served. There is no hint that § 3 was intended to have any other purpose.

Petitioners do, however, contest the Arkansas Supreme Court's conclusion that the amendment has the same practical effect as an absolute bar. They argue that the possibility of a write-in campaign creates a real possibility for victory, especially for an entrenched incumbent. One may reasonably question the merits of that contention.[43] Indeed, we are advised by the state court that there is nothing more than a faint glimmer of possibility that the excluded candidate will win.[44] Our prior cases, too, have suggested that

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[43] The uncontested data submitted to the Arkansas Supreme Court indicate that, in over 1,300 Senate elections since the passage of the Seventeenth Amendment in 1913, only 1 has been won by a write-in candidate. In over 20,000 House elections since the turn of the century, only 5 have been won by write-in candidates. App. 201–202. Indeed, it is for this reason that the Arkansas Supreme Court found the possibility of a write-in victory to be a mere "glimme[r] of opportunity for those disqualified." 316 Ark., at 266, 872 S. W. 2d, at 357; see also *id.*, at 276, 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part) ("as a practical matter, the amendment would place term limits on service in the Congress").

[44] Contrary to the dissent, *post*, at 919–920, we read a majority of the Arkansas Supreme Court as holding that Amendment 73 has the same practical effect as an absolute bar. See 316 Ark., at 266, 872 S. W. 2d, at 357 (plurality opinion) (the "intent and the effect of Amendment 73 are to disqualify congressional incumbents from further service"); *id.*, at 276, 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part) ("That name implies just what this amendment is: A practical limit on the terms of the members of the Congress"). However, as we note in the text, *infra*, at 831, we do not rely on the state court's finding on this point. See also *infra*, at 836.

write-in candidates have only a slight chance of victory.[45] But even if petitioners are correct that incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election. In our view, an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand. To argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded. More importantly, allowing States to evade the Qualifications Clauses by "dress[ing] eligibility to stand for Congress in ballot access clothing" trivializes the basic principles of our democracy that underlie those Clauses. Petitioners' argument treats the Qualifications Clauses not as the embodiment of a grand principle, but rather as empty formalism. "'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.'" *Gomillion* v. *Lightfoot*, 364 U. S. 339, 345 (1960), quoting *Frost & Frost Trucking Co.* v. *Railroad Comm'n of Cal.*, 271 U. S. 583, 594 (1926).

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[45] We noted in *Lubin* v. *Panish*, 415 U. S. 709 (1974), that "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot." *Id.*, at 719, n. 5; see also *Anderson* v. *Celebrezze*, 460 U. S. 780, 799, n. 26 (1983) ("We have previously noted that [a write-in] opportunity is not an adequate substitute for having the candidates name appear on the printed ballot"); *United States* v. *Classic*, 313 U. S. 299, 313 (1941) ("Even if . . . voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law . . . is such as to impose serious restrictions upon the choice of candidates by the voters"); *Burdick* v. *Takushi*, 504 U. S. 428, 437, n. 7 (1992) ("If the dissent were correct in suggesting that requiring primary voters to select a specific ballot impermissibly burdened the right to vote, it is clear under our decisions that the availability of a write-in option would not provide an adequate remedy").

Petitioners make the related argument that Amendment 73 merely regulates the "Manner" of elections, and that the amendment is therefore a permissible exercise of state power under Article I, § 4, cl. 1 (the Elections Clause), to regulate the "Times, Places and Manner" of elections.[46] We cannot agree.

A necessary consequence of petitioners' argument is that Congress itself would have the power to "make or alter" a measure such as Amendment 73. Art. I, § 4, cl. 1. See *Smiley* v. *Holm*, 285 U. S. 355, 366–367 (1932) ("[T]he Congress may supplement these state regulations or may substitute its own"). That the Framers would have approved of such a result is unfathomable. As our decision in *Powell* and our discussion above make clear, the Framers were particularly concerned that a grant to Congress of the authority to set its own qualifications would lead inevitably to congressional self-aggrandizement and the upsetting of the delicate constitutional balance. See *supra*, at 790–791, and n. 10, *supra*. Petitioners would have us believe, however, that even as the Framers carefully circumscribed congressional power to set qualifications, they intended to allow Congress to achieve the same result by simply formulating the regulation as a ballot access restriction under the Elections Clause. We refuse to adopt an interpretation of the Elections Clause that would so cavalierly disregard what the Framers intended to be a fundamental constitutional safeguard.

Moreover, petitioners' broad construction of the Elections Clause is fundamentally inconsistent with the Framers' view of that Clause. The Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candi-

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[46] Article I, § 4, cl. 1, provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

dates from federal office. During the Convention debates, for example, Madison illustrated the procedural focus of the Elections Clause by noting that it covered "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district." 2 Farrand 240. Similarly, during the ratification debates, proponents of the Constitution noted: "[T]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way." 4 Elliot's Debates 71 (Steele statement at North Carolina ratifying convention) (emphasis in original).[47]

Hamilton made a similar point in The Federalist No. 60, in which he defended the Constitution's grant to Congress of the power to override state regulations. Hamilton expressly distinguished the broad power to set qualifications from the limited authority under the Elections Clause, noting that

> "there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the national government. Its authority would be expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." The Federalist No. 60, at 371 (emphasis in original).

As Hamilton's statement suggests, the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate

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[47] See also "The Republican," Connecticut Courant (Hartford, Jan. 7, 1788), 1 Bailyn 710, 713 ("The constitution expressly provides that the choice shall be by the people, which cuts off both from the general and state Legislatures the power of so regulating the mode of election, as to deprive the people of a fair choice").

electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.

Our cases interpreting state power under the Elections Clause reflect the same understanding. The Elections Clause gives States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v. *Holm*, 285 U. S., at 366. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986). States are thus entitled to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788, n. 9 (1983). For example, in *Storer* v. *Brown*, 415 U. S. 724 (1974), the case on which petitioners place principal reliance, we upheld the validity of certain provisions of the California Elections Code. In so doing, we emphasized the States' interest in having orderly, fair, and honest elections "rather than chaos." *Id.*, at 730. We also recognized the "States' strong interest in maintaining the integrity of the political process by preventing interparty raiding," *id.*, at 731, and explained that the specific requirements applicable to independents were "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot," *id.*, at 733. In other cases, we have approved the States' interests in avoiding "voter confusion, ballot overcrowding, or the presence of frivolous candidacies," *Munro* v. *Socialist Workers Party*, 479 U. S. 189, 194–195 (1986), in "seeking to assure that elections are operated equitably and efficiently," *Burdick* v. *Takushi*, 504 U. S., at 433, and in "guard[ing] against irregularity and error in the tabulation of votes," *Roudebush* v. *Hartke*, 405 U. S. 15, 25 (1972). In short, we have approved of state regulations designed to ensure that

elections are "'fair and honest and . . . [that] some sort of order, rather than chaos, . . . accompan[ies] the democratic processes.'" *Burdick* v. *Takushi*, 504 U. S., at 433, quoting *Storer*, 415 U. S., at 730.

The provisions at issue in *Storer* and our other Elections Clause cases were thus constitutional because they regulated election *procedures* and did not even arguably impose any substantive qualification rendering a class of potential candidates ineligible for ballot position. They served the state interest in protecting the integrity and regularity of the election process, an interest independent of any attempt to evade the constitutional prohibition against the imposition of additional qualifications for service in Congress. And they did not involve measures that exclude candidates from the ballot without reference to the candidates' support in the electoral process. Our cases upholding state regulations of election procedures thus provide little support for the contention that a state-imposed ballot access restriction is constitutional when it is undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses.[48]

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[48] Nor does *Clements* v. *Fashing*, 457 U. S. 957 (1982), support petitioners. In *Clements*, the Court rejected First and Fourteenth Amendment challenges to Texas' so-called "resign-to-run" provision. That provision treated an elected state official's declaration of candidacy for another elected office as an automatic resignation from the office then held. We noted that the regulation was a permissible attempt to regulate state officeholders. See *id.*, at 972 ("Appellees are elected state officeholders who contest restrictions on partisan political activity") (emphasis deleted); *id.*, at 974, n. 1 (STEVENS, J., concurring in part and concurring in judgment) ("The fact that appellees hold state office is sufficient to justify a restriction on their ability to run for other office that is not imposed on the public generally"). As the Ninth Circuit recognized in upholding a similar resign-to-run statute from Arizona: "The burden on candidacy . . . is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress." *Joyner* v. *Mofford*, 706 F. 2d 1523, 1528 (1983); see also *Signorelli* v. *Evans*, 637 F. 2d

We do not understand the dissent to contest our primary thesis, namely, that if the qualifications for Congress are fixed in the Constitution, then a state-passed measure with the avowed purpose of imposing indirectly such an additional qualification violates the Constitution. The dissent, instead, raises two objections, challenging the assertion that the Arkansas amendment has the likely effect of creating a qualification, *post,* at 917–919, and suggesting that the true intent of Amendment 73 was not to evade the Qualifications Clauses but rather to simply "level the playing field," *post,* at 922. Neither of these objections has merit.

As to the first, it is simply irrelevant to our holding today. As we note above in n. 45, our prior cases strongly suggest that write-in candidates will have only a slim chance of success, and the Arkansas plurality agreed. However, we expressly do not rest on this Court's prior observations regarding write-in candidates. Instead, we hold that a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly. Thus, the dissent's discussion of the evidence concerning the possibility that a popular incumbent will win a write-in election is simply beside the point.

As to the second argument, we find wholly unpersuasive the dissent's suggestion that Amendment 73 was designed merely to "level the playing field." As we have noted, *supra,* at 829–830, it is obvious that the sole purpose of Amendment 73 was to limit the terms of elected officials, both state and federal, and that Amendment 73, therefore, may not stand.

853, 859 (CA2 1980) ("New York's purpose is to regulate the judicial office that [the candidate] holds, not the Congressional office he seeks"). Moreover, as now-Chief Judge Newman observed while upholding similar restrictions imposed by New York, such provisions "plac[e] no obstacle between [a candidate] and the ballot or his nomination or his election. He is free to run and the people are free to choose him." *Id.,* at 858.

V

The merits of term limits, or "rotation," have been the subject of debate since the formation of our Constitution, when the Framers unanimously rejected a proposal to add such limits to the Constitution. The cogent arguments on both sides of the question that were articulated during the process of ratification largely retain their force today. Over half the States have adopted measures that impose such limits on some offices either directly or indirectly, and the Nation as a whole, notably by constitutional amendment, has imposed a limit on the number of terms that the President may serve.[49] Term limits, like any other qualification for office, unquestionably restrict the ability of voters to vote for whom they wish. On the other hand, such limits may provide for the infusion of fresh ideas and new perspectives, and may decrease the likelihood that representatives will lose touch with their constituents. It is not our province to resolve this longstanding debate.

We are, however, firmly convinced that allowing the several States to adopt term limits for congressional service would effect a fundamental change in the constitutional framework. Any such change must come not by legislation adopted either by Congress or by an individual State, but rather—as have other important changes in the electoral process[50]—through the amendment procedures set forth in Article V. The Framers decided that the qualifications for service in the Congress of the United States be fixed in the Constitution and be uniform throughout the Nation. That decision reflects the Framers' understanding that Members of Congress are chosen by separate constituencies, but that

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[49] See U. S. Const., Amdt. 22 (1951) (limiting Presidents to two 4-year terms).

[50] See, *e. g.,* Amdt. 17 (1913) (direct elections of Senators); Amdt. 19 (1920) (extending suffrage to women); Amdt. 22 (1951) (Presidential term limits); Amdt. 24 (1964) (prohibition against poll taxes); Amdt. 26 (1971) (lowering age of voter eligibility to 18).

they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government. In the absence of a properly passed constitutional amendment, allowing individual States to craft their own qualifications for Congress would thus erode the structure envisioned by the Framers, a structure that was designed, in the words of the Preamble to our Constitution, to form a "more perfect Union."

The judgment is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

I join the opinion of the Court.

The majority and dissenting opinions demonstrate the intricacy of the question whether or not the Qualifications Clauses are exclusive. In my view, however, it is well settled that the whole people of the United States asserted their political identity and unity of purpose when they created the federal system. The dissent's course of reasoning suggesting otherwise might be construed to disparage the republican character of the National Government, and it seems appropriate to add these few remarks to explain why that course of argumentation runs counter to fundamental principles of federalism.

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the

nature of the two different governments created and confirmed by the Constitution.

A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it. It must be remembered that the National Government, too, is republican in essence and in theory. John Jay insisted on this point early in The Federalist Papers, in his comments on the government that preceded the one formed by the Constitution.

> "To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection. . . .
>
> "A strong sense of the value and blessings of union induced the people, at a very early period, to institute a federal government to preserve and perpetuate it. They formed it almost as soon as they had a political existence . . . ." The Federalist No. 2, pp. 38–39 (C. Rossiter ed. 1961) (hereinafter The Federalist).

Once the National Government was formed under our Constitution, the same republican principles continued to guide its operation and practice. As James Madison explained, the House of Representatives "derive[s] its powers from the people of America," and "the operation of the government on the people in their individual capacities" makes it "a national government," not merely a federal one. *Id.*, No. 39, at 244, 245 (emphasis deleted). The Court confirmed this principle in *McCulloch* v. *Maryland*, 4 Wheat. 316, 404–405 (1819), when it said: "The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." The same theory led us to observe as follows in *Ex parte Yarbrough*, 110 U. S. 651, 666 (1884): "In a republican government, like ours, . . . political

power is reposed in representatives of the entire body of the people."

In one sense it is true that "the people of each State retained their separate political identities," *post*, at 849, for the Constitution takes care both to preserve the States and to make use of their identities and structures at various points in organizing the federal union. It does not at all follow from this that the sole political identity of an American is with the State of his or her residence. It denies the dual character of the Federal Government which is its very foundation to assert that the people of the United States do not have a political identity as well, one independent of, though consistent with, their identity as citizens of the State of their residence. Cf. *post*, at 848–850. It must be recognized that "'[f]or all the great purposes for which the Federal government was formed, we are one people, with one common country.'" *Shapiro* v. *Thompson*, 394 U. S. 618, 630 (1969) (quoting *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting); see *Crandall* v. *Nevada*, 6 Wall. 35, 43 (1868) ("The people of these United States constitute one nation" and "have a government in which all of them are deeply interested").

It might be objected that because the States ratified the Constitution, the people can delegate power only through the States or by acting in their capacities as citizens of particular States. See *post*, at 846. But in *McCulloch* v. *Maryland*, the Court set forth its authoritative rejection of this idea:

> "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But

> the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments." 4 Wheat., at 403.

The political identity of the entire people of the Union is reinforced by the proposition, which I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States. *McCulloch* affirmed this proposition as well, when the Court rejected the suggestion that States could interfere with federal powers. "This was not intended by the American people. They did not design to make their government dependent on the States." *Id.*, at 432. The States have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere. See *id.*, at 430 (where there is an attempt at "usurpation of a power which the people of a single State cannot give," there can be no question whether the power "has been surrendered" by the people of a single State because "[t]he right never existed"). That the States may not invade the sphere of federal sovereignty is as incontestable, in my view, as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States. See *United States* v. *Lopez*, *ante*, p. 549.

Of course, because the Framers recognized that state power and identity were essential parts of the federal balance, see The Federalist No. 39, the Constitution is solicitous of the prerogatives of the States, even in an otherwise sovereign federal province. The Constitution uses state boundaries to fix the size of congressional delegations, Art. I, § 2, cl. 3, ensures that each State shall have at least one representative, *ibid.*, grants States certain powers over the times, places, and manner of federal elections (subject to congressional revision), Art. I, § 4, cl. 1, requires that when the President is elected by the House of Representatives, the delega-

tions from each State have one vote, Art. II, § 1, cl. 3, and Amdt. 12, and allows States to appoint electors for the President, Art. II, § 1, cl. 2. Nothing in the Constitution or The Federalist Papers, however, supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives. Indeed, even though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right. Addressing this principle in *Ex parte Yarbrough* the Court stated as follows: "[T]he right to vote for a member of Congress" is an "office . . . created by that Constitution, and by that alone. . . . It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State." 110 U. S., at 663–664. We made the same point in *United States* v. *Classic*, 313 U. S. 299, 315 (1941), when we said: "[T]he right of qualified voters within a state to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution" and "is secured against the action of individuals as well as of states."

The federal character of congressional elections flows from the political reality that our National Government is republican in form and that national citizenship has privileges and immunities protected from state abridgment by the force of the Constitution itself. Even before the passage of the Fourteenth Amendment, the latter proposition was given expression in *Crandall* v. *Nevada* where the Court recognized the right of the Federal Government to call "any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices," and further recognized that "this right cannot be made to depend upon the pleasure of a State over whose

territory they must pass to reach the point where these services must be rendered." 6 Wall., at 43. And without reference to the Privileges and Immunities Clause, the rights of national citizenship were upheld again in *United States* v. *Cruikshank*, 92 U. S. 542, 552 (1876), where the Court said: "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." Cf. *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 513 (1939) (opinion of Roberts, J., joined by Black, J., and joined in relevant part by Hughes, C. J.) ("Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom").

In the *Slaughter-House Cases*, 16 Wall. 36, 78–80 (1873), the Court was careful to hold that federal citizenship in and of itself suffices for the assertion of rights under the Constitution, rights that stem from sources other than the States. Though the *Slaughter-House Cases* interpreted the Privileges and Immunities Clause of the Fourteenth Amendment, its view of the origins of federal citizenship was not confined to that source. Referring to these rights of national dimension and origin the Court observed: "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id.*, at 79. Later cases only reinforced the idea that there are such incidents of national citizenship. See *Ex*

parte Yarbrough, *supra; Terral* v. *Burke Constr. Co.*, 257 U. S. 529 (1922); *United States* v. *Classic*, *supra; United States* v. *Guest*, 383 U. S. 745 (1966); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). Federal privileges and immunities may seem limited in their formulation by comparison with the expansive definition given to the privileges and immunities attributed to state citizenship, see *Slaughter-House Cases*, *supra*, at 78; *Hague*, *supra*, at 520 (opinion of Stone, J.), but that federal rights flow to the people of the United States by virtue of national citizenship is beyond dispute.

Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future. Quite apart from any First Amendment concerns, see *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968); *Anderson* v. *Celebrezze*, 460 U. S. 780, 786–788 (1983), neither the law nor federal theory allows a State to burden the exercise of federal rights in this manner. See *Terral* v. *Burke Constr. Co.*, *supra*, at 532; *Shapiro* v. *Thompson*, *supra*, at 629–631. Indeed, as one of the "right[s] of the citizen[s] of this great country, protected by implied guarantees of its Constitution," the Court identified the right "'to come to the seat of government . . . to share its offices, to engage in administering its functions.'" *Slaughter-House Cases*, *supra*, at 79 (quoting *Crandall* v. *Nevada*, 6 Wall., at 44). This observation serves to illustrate the extent of the State's attempted interference with the federal right to vote (and the derivative right to serve if elected by majority vote) in a congressional election, rights that do not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States.

It is maintained by our dissenting colleagues that the State of Arkansas seeks nothing more than to grant its peo-

ple surer control over the National Government, a control, it is said, that will be enhanced by the law at issue here. The arguments for term limitations (or ballot restrictions having the same effect) are not lacking in force; but the issue, as all of us must acknowledge, is not the efficacy of those measures but whether they have a legitimate source, given their origin in the enactments of a single State. There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere. Because the Arkansas enactment intrudes upon this federal domain, it exceeds the boundaries of the Constitution.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." See *ante*, at 783, 793, 795, 819. Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to "choose whom they please to govern them" by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

I dissent. Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.

I

Because the majority fundamentally misunderstands the notion of "reserved" powers, I start with some first principles. Contrary to the majority's suggestion, the people of the States need not point to any affirmative grant of power in the Constitution in order to prescribe qualifications for their representatives in Congress, or to authorize their elected state legislators to do so.

A

Our system of government rests on one overriding principle: All power stems from the consent of the people. To phrase the principle in this way, however, is to be imprecise about something important to the notion of "reserved" powers. The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.

The ratification procedure erected by Article VII makes this point clear. The Constitution took effect once it had been ratified by the people gathered in convention in nine different States. But the Constitution went into effect only "between the States so ratifying the same," Art. VII; it did not bind the people of North Carolina until they had accepted it. In Madison's words, the popular consent upon which the Constitution's authority rests was "given by the people, not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong." The Federalist No. 39, p. 243 (C. Rossiter ed. 1961) (hereinafter The Federalist). Accord, 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 94 (J. Elliot 2d ed. 1876) (hereinafter Elliot) (remarks of James Madison at the Virginia Convention).[1]

[1] The ringing initial words of the Constitution—"We the People of the United States"—convey something of the same idea. (In the Constitution, after all, "the United States" is consistently a plural noun. See

When they adopted the Federal Constitution, of course, the people of each State surrendered some of their authority to the United States (and hence to entities accountable to the people of other States as well as to themselves). They affirmatively deprived their States of certain powers, see, *e. g.*, Art. I, § 10, and they affirmatively conferred certain powers upon the Federal Government, see, *e. g.*, Art. I, § 8. Because the people of the several States are the only true source of power, however, the Federal Government enjoys no authority beyond what the Constitution confers: The Federal Government's powers are limited and enumerated. In the words of Justice Black: "The United States is entirely a creature of the Constitution. Its power and authority have no other source." *Reid* v. *Covert*, 354 U. S. 1, 5–6 (1957) (plurality opinion) (footnote omitted).

In each State, the remainder of the people's powers—"[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States," Amdt. 10—are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government. As far as

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Art. I, § 9, cl. 8; Art. II, § 1, cl. 7; Art. III, § 2, cl. 1; Art. III, § 3, cl. 1; cf. Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1455 (1987) (noting this fact, though reaching other conclusions).) The Preamble that the Philadelphia Convention approved before sending the Constitution to the Committee of Style is even clearer. It began: "We the people of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia . . . ." 2 Records of the Federal Convention of 1787, p. 565 (M. Farrand ed. 1911) (hereinafter Farrand). Scholars have suggested that the Committee of Style adopted the current language because it was not clear that all the States would actually ratify the Constitution. M. Farrand, The Framing of the Constitution of the United States 190–191 (1913). In this instance, at least, I agree with the majority that the Committee's edits did not work a substantive change in the Constitution. Cf. *ante*, at 792, n. 8.

the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.

These basic principles are enshrined in the Tenth Amendment, which declares that all powers neither delegated to the Federal Government nor prohibited to the States "are reserved to the States respectively, or to the people." With this careful last phrase, the Amendment avoids taking any position on the division of power between the state governments and the people of the States: It is up to the people of each State to determine which "reserved" powers their state government may exercise. But the Amendment does make clear that powers reside at the state level except where the Constitution removes them from that level. All powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State.

To be sure, when the Tenth Amendment uses the phrase "the people," it does not specify whether it is referring to the people of each State or the people of the Nation as a whole. But the latter interpretation would make the Amendment pointless: There would have been no reason to provide that where the Constitution is silent about whether a particular power resides at the state level, it might or might not do so. In addition, it would make no sense to speak of powers as being reserved to the undifferentiated people of the Nation as a whole, because the Constitution does not contemplate that those people will either exercise power or delegate it. The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation. Thus, the amendment provision of Article

V calls for amendments to be ratified not by a convention of the national people, but by conventions of the people in each State or by the state legislatures elected by those people. Likewise, the Constitution calls for Members of Congress to be chosen State by State, rather than in nationwide elections. Even the selection of the President—surely the most national of national figures—is accomplished by an electoral college made up of delegates chosen by the various States, and candidates can lose a Presidential election despite winning a majority of the votes cast in the Nation as a whole. See also Art. II, § 1, cl. 3 (providing that when no candidate secures a majority of electoral votes, the election of the President is thrown into the House of Representatives, where "the Votes shall be taken by States, the Representatives from each State having one Vote"); Amdt. 12 (same).

In short, the notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them. The people of each State obviously did trust their fate to the people of the several States when they consented to the Constitution; not only did they empower the governmental institutions of the United States, but they also agreed to be bound by constitutional amendments that they themselves refused to ratify. See Art. V (providing that proposed amendments shall take effect upon ratification by three-quarters of the States). At the same time, however, the people of each State retained their separate political identities. As Chief Justice Marshall put it, "[n]o political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass." *McCulloch* v. *Maryland*, 4 Wheat. 316, 403 (1819).[2]

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[2] The concurring opinion appears to draw precisely the opposite conclusion from the passage in *McCulloch* that contains this sentence. See *ante*, at 840–841. But while the concurring opinion seizes on Marshall's references to "the people," Marshall was merely using that phrase in contradistinction to "the State governments." Counsel for Maryland had

Any ambiguity in the Tenth Amendment's use of the phrase "the people" is cleared up by the body of the Constitution itself. Article I begins by providing that the Congress of the United States enjoys "[a]ll legislative Powers herein granted," § 1, and goes on to give a careful enumeration of Congress' powers, § 8. It then concludes by enumerating certain powers that are *prohibited* to the States. The import of this structure is the same as the import of the Tenth Amendment: If we are to invalidate Arkansas' Amendment 73, we must point to something in the Federal Constitution that deprives the people of Arkansas of the power to enact such measures.

B

The majority disagrees that it bears this burden. But its arguments are unpersuasive.

1

The majority begins by announcing an enormous and untenable limitation on the principle expressed by the Tenth Amendment. According to the majority, the States possess only those powers that the Constitution affirmatively grants to them or that they enjoyed before the Constitution was adopted; the Tenth Amendment "could only 'reserve' that

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noted that "the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective States. To suppose that the mere proposition of this fundamental law threw the American people into one aggregate mass, would be to assume what the instrument itself does not profess to establish." *McCulloch*, 4 Wheat., at 363 (argument of counsel). Marshall's opinion accepted this premise, even borrowing some of counsel's language. See *id.*, at 403. What Marshall rejected was counsel's conclusion that the Constitution therefore was merely "a compact between the States." See *id.*, at 363 (argument of counsel). As Marshall explained, the acts of "the people themselves" in the various ratifying conventions should not be confused with "the measures of the State governments." *Id.*, at 403; see also *id.*, at 404 (noting that no state government could control whether the people of that State decided to adopt the Constitution).

which existed before." *Ante*, at 802. From the fact that the States had not previously enjoyed any powers over the particular institutions of the Federal Government established by the Constitution,[3] the majority derives a rule precisely opposite to the one that the Amendment actually prescribes: "'[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them.'" *Ibid.* (quoting 1 J. Story, Commentaries on the Constitution of the United States § 627 (3d ed. 1858)).

The majority's essential logic is that the state governments could not "reserve" any powers that they did not control at the time the Constitution was drafted. But it was not the state governments that were doing the reserving. The Constitution derives its authority instead from the consent of *the people* of the States. Given the fundamental principle that all governmental powers stem from the people of the States, it would simply be incoherent to assert that the people of the States could not reserve any powers that they had not previously controlled.

The Tenth Amendment's use of the word "reserved" does not help the majority's position. If someone says that the power to use a particular facility is reserved to some group, he is not saying anything about whether that group has previously used the facility. He is merely saying that the peo-

[3] At the time of the framing, of course, a Federal Congress had been operating under the Articles of Confederation for some 10 years. The States unquestionably had enjoyed the power to establish qualifications for their delegates to this body, above and beyond the qualifications created by the Articles themselves. See Brief for Respondents Bobbie E. Hill et al. 39, n. 79 (conceding this point); see also, *e. g.*, Md. Const. of 1776, Art. XXVII (prescribing such qualifications), in 3 Federal and State Constitutions 1695–1696 (F. Thorpe ed. 1909) (hereinafter Thorpe); N. H. Const. of 1784, Pt. II (same), in 4 Thorpe 2467. It is surprising, then, that the concurring opinion seeks to buttress the majority's case by stressing the continuing applicability of "the same republican principles" that had prevailed under the Articles. See *ante*, at 839.

ple who control the facility have designated that group as the entity with authority to use it. The Tenth Amendment is similar: The people of the States, from whom all governmental powers stem, have specified that all powers not prohibited to the States by the Federal Constitution are reserved "to the States respectively, or to the people."

The majority is therefore quite wrong to conclude that the people of the States cannot authorize their state governments to exercise any powers that were unknown to the States when the Federal Constitution was drafted. Indeed, the majority's position frustrates the apparent purpose of the Amendment's final phrase. The Amendment does not preempt any limitations on state power found in the state constitutions, as it might have done if it simply had said that the powers not delegated to the Federal Government are reserved to the States. But the Amendment also does not prevent the people of the States from amending their state constitutions to remove limitations that were in effect when the Federal Constitution and the Bill of Rights were ratified.

In an effort to defend its position, the majority points to language in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549 (1985), which it takes to indicate that the Tenth Amendment covers only "the original powers of [state] sovereignty." *Ante*, at 802. But *Garcia* dealt with an entirely different issue: the extent to which principles of state sovereignty implicit in our federal system curtail Congress' authority to exercise its enumerated powers. When we are asked to decide whether a congressional statute that appears to have been authorized by Article I is nonetheless unconstitutional because it invades a protected sphere of state sovereignty, it may well be appropriate for us to inquire into what we have called the "traditional aspects of state sovereignty." See *National League of Cities* v. *Usery*, 426 U. S. 833, 841, 849 (1976); see also *New York* v. *United States*, 505 U. S. 144, 156–157 (1992). The question

raised by the present case, however, is not whether any principle of state sovereignty implicit in the Tenth Amendment bars congressional action that Article I appears to authorize, but rather whether Article I bars state action that it does not appear to forbid. The principle necessary to answer this question is express on the Tenth Amendment's face: Unless the Federal Constitution affirmatively prohibits an action by the States or the people, it raises no bar to such action.

The majority also seeks support for its view of the Tenth Amendment in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). See *ante*, at 802. But this effort is misplaced. *McCulloch* did make clear that a power need not be "expressly" delegated to the United States or prohibited to the States in order to fall outside the Tenth Amendment's reservation; delegations and prohibitions can also arise by necessary implication.[4] True to the text of the Tenth Amendment, however, *McCulloch* indicated that all powers as to which the Constitution does not speak (whether expressly or by necessary implication) are "reserved" to the state level. Thus, in its only discussion of the Tenth Amendment, *McCulloch* observed that the Amendment "leav[es] the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole [Constitution]." 4 Wheat., at 406. *McCulloch* did not qualify this observation by indicating that the question also turned on whether the States had enjoyed the power before the framing. To the contrary, *McCulloch* seemed to assume that the people had "conferred on the general government the power contained in the constitution, and on the States the whole residuum of power." *Id.*, at 410.

The structure of *McCulloch*'s analysis also refutes the majority's position. The question before the Court was

[4] Despite the majority's odd suggestion to the contrary, see *ante*, at 796–797, n. 12, I fully agree with this sensible position. See *supra*, at 848.

whether the State of Maryland could tax the Bank of the United States, which Congress had created in an effort to accomplish objects entrusted to it by the Constitution. Chief Justice Marshall's opinion began by upholding the federal statute incorporating the bank. *Id.*, at 400–425. It then held that the Constitution affirmatively prohibited Maryland's tax on the bank created by this statute. *Id.*, at 425–437. The Court relied principally on concepts that it deemed inherent in the Supremacy Clause of Article VI, which declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof, . . . shall be the supreme Law of the Land . . . ." In the Court's view, when a power has been "delegated to the United States by the Constitution," Amdt. 10, the Supremacy Clause forbids a State to "retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry [that power] into execution." *McCulloch*, 4 Wheat., at 436. Thus, the Court concluded that the very nature of state taxation on the bank's operations was "incompatible with, and repugnant to," the federal statute creating the bank. See *id.*, at 425.

For the past 175 years, *McCulloch* has been understood to rest on the proposition that the Constitution affirmatively barred Maryland from imposing its tax on the Bank's operations. See, *e. g.*, *Osborn* v. *Bank of United States*, 9 Wheat. 738, 859–868 (1824) (reaffirming *McCulloch*'s conclusion that by operation of the Supremacy Clause, the federal statute incorporating the bank impliedly pre-empted state laws attempting to tax the bank's operations); *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981) (citing *McCulloch* for the proposition that the Supremacy Clause deprives the States of the power to pass laws that conflict with federal statutes); see also *North Dakota* v. *United States*, 495 U. S. 423, 434 (1990) (plurality opinion) (citing *McCulloch* for the proposition that state laws may violate the Supremacy Clause when they "regulate the Government directly or discriminate against

it").[5] For the majority, however, *McCulloch* apparently turned on the fact that before the Constitution was adopted, the States had possessed no power to tax the instrumentalities of the governmental institutions that the Constitution created. This understanding of *McCulloch* makes most of Chief Justice Marshall's opinion irrelevant; according to the majority, there was no need to inquire into whether federal law deprived Maryland of the power in question, because the power could not fall into the category of "reserved" powers anyway.[6]

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[5] Though cited by the majority, see *ante*, at 802, *Crandall* v. *Nevada*, 6 Wall. 35 (1868), did not deviate from this accepted view of *McCulloch*. See *Crandall*, *supra*, at 48 (observing that *McCulloch* and a number of other cases "distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government").

[6] To support its decision to attribute such surplusage to *McCulloch*, the majority quotes Marshall's observation that his opinion "'does not deprive the States of any resources which they originally possessed,'" because the power to tax federal instrumentalities was not encompassed by the States' "'original right to tax.'" *Ante*, at 802 (quoting *McCulloch*, 4 Wheat., at 436, 430). In part, Marshall was simply refuting counsel's argument that it would constitute an "overwhelming invasion of State sovereignty" for Congress to establish a bank that operated within a State but that nonetheless was exempt from state taxes. See *id.*, at 337–339 (argument of counsel) (stressing that "the right to raise revenue" is "the highest attribute of sovereignty" and indeed amounts to "the right to exist"). While Marshall acknowledged that "this original right of taxation" was an "essential" attribute of state sovereignty that Congress could not constitutionally control or invade, he focused more precisely than counsel on "the nature and extent of this original right," *id.*, at 428, and concluded that it did not include the right "to tax the means employed by the government of the Union, for the execution of its powers." *Id.*, at 430. In this respect, then, the Court was referring to the States' "original" powers in much the same context as *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985): The Court was examining whether Congress' exercise of the "privilege of exempting its own measures from State taxation," *McCulloch*, *supra*, at 434, had invaded a protected sphere of state sovereignty.

Marshall did go on to argue that the power to tax the operations of the Bank of the United States simply was not susceptible to control by the

Despite the majority's citation of *Garcia* and *McCulloch*, the only true support for its view of the Tenth Amendment comes from Joseph Story's 1833 treatise on constitutional law. See 2 J. Story, Commentaries on the Constitution of the United States §§ 623–628. Justice Story was a brilliant and accomplished man, and one cannot casually dismiss his views. On the other hand, he was not a member of the Founding generation, and his Commentaries on the Constitution were written a half century after the framing. Rather than representing the original understanding of the Constitution, they represent only his own understanding. In a range of cases concerning the federal/state relation, moreover, this Court has deemed positions taken in Story's commentaries to be more nationalist than the Constitution warrants. Compare, *e. g.*, *id.*, §§ 1063–1069 (arguing that the Commerce Clause deprives the States of the power to regulate any commerce within Congress' reach), with *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299 (1852) (holding that Congress' Commerce Clause powers are not exclusive). See also 1 Life and Letters of Joseph Story 296 (W. Story ed. 1851) (extract of manuscript written by Story) ("I hold it to be a maxim, which should never be lost sight of by a great statesman, that the Government of the United States is

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people of a single State. See 4 Wheat., at 430. But that theory is perfectly consistent with my position. Marshall reasoned that the people of a single State may not tax the instrumentalities employed by the people of all the States through the National Government, because such taxation would effectively subject the people of the several States to the taxing power of a single State. See *id.*, at 428. This sort of argument proves that the people of a single State may not prescribe qualifications for the President of the United States; the selection of the President, like the operation of the Bank of the United States, is not up to the people of any single State. See *infra*, at 862. It does not follow, however, that the people of a single State may not prescribe qualifications for their own representatives in Congress.

intrinsically too weak, and the powers of the State Governments too strong"). In this case too, Story's position that the only powers reserved to the States are those that the States enjoyed before the framing conflicts with both the plain language of the Tenth Amendment and the underlying theory of the Constitution.

2

The majority also sketches out what may be an alternative (and narrower) argument. Again citing Story, the majority suggests that it would be inconsistent with the notion of "national sovereignty" for the States or the people of the States to have any reserved powers over the selection of Members of Congress. See *ante*, at 803, 805. The majority apparently reaches this conclusion in two steps. First, it asserts that because Congress as a whole is an institution of the National Government, the individual Members of Congress "owe primary allegiance not to the people of a State, but to the people of the Nation." See *ante*, at 803. Second, it concludes that because each Member of Congress has a nationwide constituency once he takes office, it would be inconsistent with the Framers' scheme to let a single State prescribe qualifications for him. See *ante*, at 803–804, 837–838.

Political scientists can debate about who commands the "primary allegiance" of Members of Congress once they reach Washington. From the framing to the present, however, the *selection* of the Representatives and Senators from each State has been left entirely to the people of that State or to their state legislature. See Art. I, § 2, cl. 1 (providing that Members of the House of Representatives are chosen "by the People of the several States"); Art. I, § 3, cl. 1 (originally providing that the Senators from each State are "chosen by the Legislature thereof"); Amdt. 17 (amending § 3 to provide that the Senators from each State are "elected by the people thereof"). The very name "congress" suggests a

coming together of representatives from distinct entities.[7] In keeping with the complexity of our federal system, once the representatives chosen by the people of each State assemble in Congress, they form a national body and are beyond the control of the individual States until the next election. But the selection of representatives in Congress is indisputably an act of the people of each State, not some abstract people of the Nation as a whole.

The concurring opinion suggests that this cannot be so, because it is the Federal Constitution that guarantees the right of the people of each State (so long as they are qualified electors under state law) to take part in choosing the Members of Congress from that State. See *ante*, at 842. But the presence of a federally guaranteed right hardly means that the selection of those representatives constitutes "the exercise of federal authority." See *ante*, at 841. When the people of Georgia pick their representatives in Congress, they are acting as the people of Georgia, not as the corporate agents for the undifferentiated people of the Nation as a whole. See *In re Green*, 134 U. S. 377, 379 (1890) ("Although [Presidential] electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress"). The concurring opinion protests that the exercise of "reserved" powers in the area of congressional elections would constitute "state interference with the most basic relation between the Na-

[7] See 1 S. Johnson, A Dictionary of the English Language 393 (4th ed. 1773) (defining "congress" as "[a]n appointed meeting for settlement of affairs between different nations: as, the *congress* of Cambray"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("an appointed meeting for settlement of affairs between different nations; the assembly which governs the United States of America").

tional Government and its citizens, the selection of legislative representatives." See *ante*, at 842. But when one strips away its abstractions, the concurring opinion is simply saying that the people of Arkansas cannot be permitted to inject themselves into the process by which they themselves select Arkansas' representatives in Congress.

The concurring opinion attempts to defend this surprising proposition by pointing out that Americans are "citizens of the United States" as well as "of the State wherein they reside," Amdt. 14, § 1, and that national citizenship (particularly after the ratification of the Fourteenth Amendment) "has privileges and immunities protected from state abridgment by the force of the Constitution itself," *ante*, at 842. These facts are indeed "beyond dispute," *ante*, at 844, but they do not contradict anything that I have said. Although the United States obviously is a Nation, and although it obviously has citizens, the Constitution does not call for Members of Congress to be elected by the undifferentiated national citizenry; indeed, it does not recognize any mechanism at all (such as a national referendum) for action by the undifferentiated people of the Nation as a whole. See *supra*, at 848–849. Even at the level of national politics, then, there always remains a meaningful distinction between someone who is a citizen of the United States and of Georgia and someone who is a citizen of the United States and of Massachusetts. The Georgia citizen who is unaware of this distinction will have it pointed out to him as soon as he tries to vote in a Massachusetts congressional election.

In short, while the majority is correct that the Framers expected the selection process to create a "direct link" between Members of the House of Representatives and the people, *ante*, at 803, the link was between the Representatives from each State and the people of that State; the people of Georgia have no say over whom the people of Massachusetts select to represent them in Congress. This arrange-

ment must baffle the majority,[8] whose understanding of Congress would surely fit more comfortably within a system of nationwide elections. But the fact remains that when it comes to the selection of Members of Congress, the people of each State have retained their independent political identity. As a result, there is absolutely nothing strange about the notion that the people of the States or their state legislatures possess "reserved" powers in this area.

The majority seeks support from the Constitution's specification that Members of Congress "shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." Art. I, § 6, cl. 1; see *ante*, at 804. But the fact that Members of Congress draw a federal salary once they have assembled hardly means that the people of the States lack reserved powers over the selection of their representatives. Indeed, the historical evidence about the compensation provision suggests that the States' reserved powers may even extend beyond the selection stage. The majority itself indicates that if the Constitution had made no provision for congressional compensation, this topic would have been "left to state legislatures." *Ante*, at 809; accord, 1 Farrand 215–216 (remarks of James Madison and George Mason); *id.*, at 219, n. *. Likewise, Madison specifically indicated that even with the compensation provision in place, the individual States still

[8] The majority even suggests that congressional elections do not really work in this way, because each House of Congress has the power to judge its Members' qualifications. See *ante*, at 804 (citing Art. I, § 5, cl. 1). But the power to act as "Judge" under Art. I, § 5, is merely the power to apply pre-existing qualifications to which the people of each State have consented. See *Powell* v. *McCormack*, 395 U. S. 486 (1969). Whether or not § 5 directs each House to judge state-law disqualifications as well as those contained in the Constitution, see *infra*, at 895, it is clear that neither House may exclude a representative from Massachusetts for failure to meet a qualification that the people of Massachusetts have not accepted.

enjoyed the reserved power to supplement the federal salary. 3 *id.*, at 315 (remarks at the Virginia ratifying convention).

As for the fact that a State has no reserved power to establish qualifications for the office of President, see *ante*, at 803–804, it surely need not follow that a State has no reserved power to establish qualifications for the Members of Congress who represent the people of that State. Because powers are reserved to the States "respectively," it is clear that no State may legislate for another State: Even though the Arkansas Legislature enjoys the reserved power to pass a minimum-wage law for Arkansas, it has no power to pass a minimum-wage law for Vermont. For the same reason, Arkansas may not decree that only Arkansas citizens are eligible to be President of the United States; the selection of the President is not up to Arkansas alone, and Arkansas can no more prescribe the qualifications for that office than it can set the qualifications for Members of Congress from Florida. But none of this suggests that Arkansas cannot set qualifications for Members of Congress from Arkansas.

In fact, the Constitution's treatment of Presidential elections actively contradicts the majority's position. While the individual States have no "reserved" power to set qualifications for the office of President, we have long understood that they do have the power (as far as the Federal Constitution is concerned) to set qualifications for their Presidential electors—the delegates that each State selects to represent it in the electoral college that actually chooses the Nation's chief executive. Even respondents do not dispute that the States may establish qualifications for their delegates to the electoral college, as long as those qualifications pass muster under other constitutional provisions (primarily the First and Fourteenth Amendments). See *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968); *McPherson* v. *Blacker*, 146 U. S. 1, 27–36 (1892). As the majority cannot argue that the Consti-

tution affirmatively grants this power,[9] the power must be one that is "reserved" to the States. It necessarily follows that the majority's understanding of the Tenth Amendment is incorrect, for the position of Presidential elector surely "'spring[s] out of the existence of the national government.'" See *ante*, at 802.

3

In a final effort to deny that the people of the States enjoy "reserved" powers over the selection of their representatives in Congress, the majority suggests that the Constitution expressly delegates to the States certain powers over congressional elections. See *ante*, at 805. Such delegations of power, the majority argues, would be superfluous if the people of the States enjoyed reserved powers in this area.

Only one constitutional provision—the Times, Places and Manner Clause of Article I, § 4—even arguably supports the majority's suggestion. It reads:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Contrary to the majority's assumption, however, this Clause does not delegate any authority to the States. Instead, it simply imposes a duty upon them. The majority gets it exactly right: By specifying that the state legislatures "shall" prescribe the details necessary to hold congressional elections, the Clause "expressly requires action by the States."

[9] The only provision that might conceivably do so is Article II, § 1, which recognizes the authority of state legislatures to specify the "Manner" in which a State appoints its Presidential electors. But if a qualifications law is a "Manner" regulation for purposes of this Clause, then it is also a "Manner" regulation for purposes of Article I, § 4—which would mean that the Constitution specifically recognizes the power of both the States and the Congress to set qualifications for Senators and Representatives.

See *ante*, at 804. This command meshes with one of the principal purposes of Congress' "make or alter" power: to ensure that the States hold congressional elections in the first place, so that Congress continues to exist. As one reporter summarized a speech made by John Jay at the New York ratifying convention:

> "[E]very government was imperfect, unless it had a power of preserving itself. Suppose that, by design or accident, the states should *neglect to appoint representatives;* certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union. [Jay] believed this was the design of the federal Convention." 2 Elliot 326 (emphasis in original).[10]

Constitutional provisions that impose affirmative duties on the States are hardly inconsistent with the notion of reserved powers.

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[10] Accord, *e. g.*, 2 Elliot 24 (remarks of Caleb Strong at the Massachusetts ratifying convention) ("[I]f the legislature of a state should refuse to make such regulations, the consequence will be, that the representatives will not be chosen, and the general government will be dissolved. In such case, can gentlemen say that a power to remedy the evil is not necessary to be lodged somewhere? And where can it be lodged but in Congress?"); 2 Documentary History of the Ratification of the Constitution 400 (M. Jensen ed. 1976) (notes of Anthony Wayne at the Pennsylvania ratifying convention) ("4th section occasioned by an eventual *invasion, insurrection*, etc."); The Federalist No. 59, at 363 (Hamilton) (observing that if not subject to any checks, the States "could at any moment annihilate [the Federal Government] by neglecting to provide for the choice of persons to administer its affairs").

These statements about the Clause's purposes also help refute the majority's claim that it was bizarre for the Framers to leave the States relatively free to enact qualifications for congressional office while simultaneously giving Congress "make or alter" power over the States' time, place, and manner regulations. See *infra*, at 896–898.

Of course, the second part of the Times, Places and Manner Clause does grant a power rather than impose a duty. As its contrasting uses of the words "shall" and "may" confirm, however, the Clause grants power exclusively to Congress, not to the States. If the Clause did not exist at all, the States would still be able to prescribe the times, places, and manner of holding congressional elections; the deletion of the provision would simply deprive Congress of the power to override these state regulations.

The majority also mentions Article II, § 1, cl. 2: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [Presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . ." But this Clause has nothing to do with congressional elections, and in any event it, too, imposes an affirmative obligation on the States. In fact, some such barebones provision was essential in order to coordinate the creation of the electoral college. As mentioned above, moreover, it is uncontested that the States enjoy the reserved power to specify qualifications for the Presidential electors who are chosen pursuant to this Clause. See *supra*, at 861–862.

Respondent Thornton seeks to buttress the majority's position with Article I, § 2, cl. 1, which provides:

> "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

According to respondent Thornton, this provision "grants States authority to prescribe the qualifications of [voters]" in congressional elections. Brief for Respondent Congressman Ray Thornton 4. If anything, however, the Clause *limits* the power that the States would otherwise enjoy. Though it does leave States with the ability to control who may vote

in congressional elections, it has the effect of restricting their authority to establish special requirements that do not apply in elections for the state legislature.

Our case law interpreting the Clause affirmatively supports the view that the States enjoy reserved powers over congressional elections. We have treated the Clause as a one-way ratchet: While the requirements for voting in congressional elections cannot be more onerous than the requirements for voting in elections for the most numerous branch of the state legislature, they can be less so. See *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 225–229 (1986). If this interpretation of the Clause is correct, it means that even with the Clause in place, States still have partial freedom to set special voting requirements for congressional elections. As this power is not granted in Article I, it must be among the "reserved" powers.

II

I take it to be established, then, that the people of Arkansas do enjoy "reserved" powers over the selection of their representatives in Congress. Purporting to exercise those reserved powers, they have agreed among themselves that the candidates covered by §3 of Amendment 73—those whom they have already elected to three or more terms in the House of Representatives or to two or more terms in the Senate—should not be eligible to appear on the ballot for reelection, but should nonetheless be returned to Congress if enough voters are sufficiently enthusiastic about their candidacy to write in their names. Whatever one might think of the wisdom of this arrangement, we may not override the decision of the people of Arkansas unless something in the Federal Constitution deprives them of the power to enact such measures.

The majority settles on "the Qualifications Clauses" as the constitutional provisions that Amendment 73 violates. See *ante*, at 806. Because I do not read those provisions to im-

pose any unstated prohibitions on the States, it is unnecessary for me to decide whether the majority is correct to identify Arkansas' ballot-access restriction with laws fixing true term limits or otherwise prescribing "qualifications" for congressional office. As I discuss in Part A below, the Qualifications Clauses are merely straightforward recitations of the minimum eligibility requirements that the Framers thought it essential for every Member of Congress to meet. They restrict state power only in that they prevent the States from *abolishing* all eligibility requirements for membership in Congress.

Because the text of the Qualifications Clauses does not support its position, the majority turns instead to its vision of the democratic principles that animated the Framers. But the majority's analysis goes to a question that is not before us: whether Congress has the power to prescribe qualifications for its own members. As I discuss in Part B, the democratic principles that contributed to the Framers' decision to withhold this power from Congress do not prove that the Framers also deprived the people of the States of their reserved authority to set eligibility requirements for their own representatives.

In Part C, I review the majority's more specific historical evidence. To the extent that they bear on this case, the records of the Philadelphia Convention affirmatively support my unwillingness to find hidden meaning in the Qualifications Clauses, while the surviving records from the ratification debates help neither side. As for the postratification period, five States supplemented the constitutional disqualifications in their very first election laws. The historical evidence thus refutes any notion that the Qualifications Clauses were generally understood to be exclusive. Yet the majority must establish just such an understanding in order to justify its position that the Clauses impose unstated prohibitions on the States and the people. In my view, the historical evidence is simply inadequate to warrant the majority's

conclusion that the Qualifications Clauses mean anything more than what they say.

A

The provisions that are generally known as the Qualifications Clauses read as follows:

> "No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Art. I, § 2, cl. 2.
>
> "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen." Art. I, § 3, cl. 3.

Later in Article I, the "Ineligibility Clause" imposes another nationwide disqualification from congressional office: "[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." § 6, cl. 2.

The majority is quite correct that the "negative phrasing" of these Clauses has little relevance. See *ante*, at 792, n. 8. The Qualifications Clauses would mean the same thing had they been enacted in the form that the Philadelphia Convention referred them to the Committee of Style:

> "Every Member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen of the United States for at least seven years before his election; and shall be, at the time of his election, an inhabitant of the State in which he shall be chosen." 2 Farrand 565.

See also *id.*, at 567 (same phrasing for Senate Qualifications Clause). But these different formulations—whether negative or affirmative—merely establish *minimum* qualifica-

tions. They are quite different from an *exclusive* formulation, such as the following:

> "Every Person who shall have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall, when elected, be an Inhabitant of that State in which he shall be chosen, shall be eligible to be a Representative."

At least on their face, then, the Qualifications Clauses do nothing to prohibit the people of a State from establishing additional eligibility requirements for their own representatives.

Joseph Story thought that such a prohibition was nonetheless implicit in the constitutional list of qualifications, because "[f]rom the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others." 1 Commentaries on the Constitution of the United States § 624 (1833); see also *ante*, at 793, n. 9. This argument rests on the maxim *expressio unius est exclusio alterius*. When the Framers decided which qualifications to include in the Constitution, they also decided not to include any other qualifications in the Constitution. In Story's view, it would conflict with this latter decision for the people of the individual States to decide, as a matter of state law, that they would like their own representatives in Congress to meet additional eligibility requirements.

To spell out the logic underlying this argument is to expose its weakness. Even if one were willing to ignore the distinction between requirements enshrined in the Constitution and other requirements that the Framers were content to leave within the reach of ordinary law, Story's application of the *expressio unius* maxim takes no account of federalism. At most, the specification of certain nationwide disqualifications in the Constitution implies the negation of other *nationwide* disqualifications; it does not imply that individual States or their people are barred from adopting their own

disqualifications on a state-by-state basis. Thus, the one delegate to the Philadelphia Convention who voiced anything approaching Story's argument said only that a recital of qualifications in the Constitution would imply that *Congress* lacked any qualification-setting power. See 2 Farrand 123 (remarks of John Dickinson); cf. *ante*, at 793, n. 9, and 815–816, n. 27.

The Qualifications Clauses do prevent the individual States from abolishing all eligibility requirements for Congress. This restriction on state power reflects the fact that when the people of one State send immature, disloyal, or unknowledgeable representatives to Congress, they jeopardize not only their own interests but also the interests of the people of other States. Because Congress wields power over all the States, the people of each State need some guarantee that the legislators elected by the people of other States will meet minimum standards of competence. The Qualifications Clauses provide that guarantee: They list the requirements that the Framers considered essential to protect the competence of the National Legislature.[11]

If the people of a State decide that they would like their representatives to possess additional qualifications, however, they have done nothing to frustrate the policy behind the Qualifications Clauses. Anyone who possesses all of the constitutional qualifications, plus some qualifications required by state law, still has all of the federal qualifications.

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[11] Thus, the age requirement was intended to ensure that Members of Congress were people of mature judgment and experience. See, *e. g.*, 1 Farrand 375 (remarks of George Mason at the Philadelphia Convention); 3 *id.*, at 147 (remarks of James McHenry before the Maryland House of Delegates). The citizenship requirement was intended both to ensure that Members of Congress were familiar with the country and that they were not unduly susceptible to foreign influence. See, *e. g.*, 2 *id.*, at 216 (remarks of George Mason). The inhabitancy requirement was intended to produce a National Legislature whose Members, collectively, had a local knowledge of all the States. See, *e. g.*, The Federalist No. 56 (Madison). The Ineligibility Clause was intended to guard against corruption. See, *e. g.*, 1 Farrand 381 (remarks of Alexander Hamilton).

Accordingly, the fact that the Constitution specifies certain qualifications that the Framers deemed necessary to protect the competence of the National Legislature does not imply that it strips the people of the individual States of the power to protect their own interests by adding other requirements for their own representatives.

The people of other States could legitimately complain if the people of Arkansas decide, in a particular election, to send a 6-year-old to Congress. But the Constitution gives the people of other States no basis to complain if the people of Arkansas elect a freshman representative in preference to a long-term incumbent. That being the case, it is hard to see why the rights of the people of other States have been violated when the people of Arkansas decide to enact a more general disqualification of long-term incumbents. Such a disqualification certainly is subject to scrutiny under other constitutional provisions, such as the First and Fourteenth Amendments. But as long as the candidate whom they send to Congress meets the constitutional age, citizenship, and inhabitancy requirements, the people of Arkansas have not violated the Qualifications Clauses.

This conclusion is buttressed by our reluctance to read constitutional provisions to preclude state power by negative implication. The very structure of the Constitution counsels such hesitation. After all, § 10 of Article I contains a brief list of *express* prohibitions on the States. Cf. *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 517–519 (1992) (STEVENS, J.) (applying the *expressio unius* maxim to conclude that Congress' inclusion of an express pre-emption clause in a federal statute implies that state laws beyond the reach of that clause are not pre-empted); *Nevada* v. *Hall*, 440 U. S. 410, 425 (1979) (STEVENS, J.) (suggesting that in light of the Tenth Amendment and the Constitution's express prohibitions on the States, "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers"). Many of the prohibitions listed in

§ 10, moreover, might have been thought to be implicit in other constitutional provisions or in the very nature of our federal system. Compare, *e. g.*, Art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"), and Art. I, § 8, cl. 5 ("The Congress shall have Power . . . [t]o coin Money"), with Art. I, § 10, cl. 1 ("No State shall enter into any Treaty" and "No State shall . . . coin Money"); see also Art. VI, cl. 2 (explicitly declaring that state law cannot override the Constitution). The fact that the Framers nonetheless made these prohibitions express confirms that one should not lightly read provisions like the Qualifications Clauses as implicit deprivations of state power. See generally *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243, 249 (1833).[12]

The majority responds that "a patchwork of state qualifications" would "undermin[e] the uniformity and the national character that the Framers envisioned and sought to ensure." *Ante*, at 822. Yet the Framers thought it perfectly consistent with the "national character" of Congress for the Senators and Representatives from each State to be chosen by the legislature or the people of that State. The majority never explains why Congress' fundamental character permits this state-centered system, but nonetheless prohibits

[12] The principle that the Constitution rests on the consent of the people of the States points in the same direction. Both the process of selecting delegates to the Philadelphia Convention and the ratification procedure erected by Article VII were designed to let the States and the people of the States protect their interests. Lest those protections be evaded, one should not be quick to read the Qualifications Clauses as imposing unstated prohibitions that pre-empt all state qualifications laws. Cf. L. Tribe, American Constitutional Law § 6–25, p. 480 (2d ed. 1988) (arguing that courts should hesitate to read federal statutes to pre-empt state law, because "to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* [v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985)] relied to protect states' interests"); *Gregory* v. *Ashcroft*, 501 U. S. 452, 464 (1991) (applying this argument).

the people of the States and their state legislatures from setting any eligibility requirements for the candidates who seek to represent them.

As for the majority's related assertion that the Framers intended qualification requirements to be uniform, this is a conclusion, not an argument. Indeed, it is a conclusion that the Qualifications Clauses themselves contradict. At the time of the framing, and for some years thereafter, the Clauses' citizenship requirements incorporated laws that varied from State to State. Thus, the Qualifications Clauses themselves made it possible that a person would be qualified to represent State *A* in Congress even though a similarly situated person would not be qualified to represent State *B*.

To understand this point requires some background. Before the Constitution was adopted, citizenship was controlled entirely by state law, and the different States established different criteria. See J. Kettner, Development of American Citizenship, 1608–1870, pp. 213–218 (1978). Even after the Constitution gave Congress the power to "establish an uniform Rule of Naturalization . . . throughout the United States," Art. I, § 8, cl. 4, Congress was under no obligation to do so, and the Framers surely expected state law to continue in full force unless and until Congress acted. Cf. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 196 (1819) (so interpreting the other part of § 8, cl. 4, which empowers Congress to establish "uniform Laws on the subject of Bankruptcies").[13] Accordingly, the constitutional requirement that

[13] Even when Congress enacted the first federal naturalization law in 1790, it left open the possibility that the individual States could establish more lenient standards of their own for admitting people to citizenship. While Hamilton had suggested that Congress' power to "establish an uniform Rule" logically precluded the States from deviating downward from the rule that Congress established, see The Federalist No. 32, at 199, the early cases on this question took the opposite view. See *Collet* v. *Collet*, 2 Dall. 294, 296 (CC Pa. 1792) (Wilson, Blair, and Peters, JJ.). States therefore continued to enact naturalization laws of their own until 1795,

Members of Congress be United States citizens meant different things in different States. The very first contested-election case in the House of Representatives, which involved the citizenship of a would-be Congressman from South Carolina, illustrates this principle. As Representative James Madison told his colleagues, "I take it to be a clear point, that we are to be guided, in our decision, by the laws and constitution of South Carolina, so far as they can guide us; and where the laws do not expressly guide us, we must be guided by principles of a general nature . . . ." Cases of Contested Elections in Congress 32 (M. Clarke & D. Hall eds. 1834) (reporting proceedings from May 22, 1789).

Even after Congress chose to exercise its power to prescribe a uniform route to naturalization, the durational element of the citizenship requirement in the Qualifications Clauses ensured that variances in state law would continue to matter. Thus, in 1794 the Senate refused to seat Albert Gallatin because, owing to the individual peculiarities of the laws of the two relevant States, he had not been a citizen for the required nine years. *Id.*, at 859–862, 867 (reporting proceedings from February 20 and 28, 1794).

Even if the Qualifications Clauses had not themselves incorporated nonuniform requirements, of course, there would still be no basis for the assertion of the plurality below that they mandate "uniformity in qualifications." See 316 Ark. 251, 265, 872 S. W. 2d 349, 356 (1994). The Clauses wholly omit the exclusivity provision that, according to both the plurality below and today's majority, was their central focus. In fact, neither the text nor the apparent purpose of the Qualifications Clauses does anything to refute Thomas Jefferson's elegant legal analysis:

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when Congress passed an exclusive naturalization law. See J. Kettner, Development of American Citizenship, 1608–1870, pp. 242–243 (1978).

> "Had the Constitution been silent, nobody can doubt but that the right to prescribe all the qualifications and disqualifications of those they would send to represent them, would have belonged to the State. So also the Constitution might have prescribed the whole, and excluded all others. It seems to have preferred the middle way. It has exercised the power in part, by declaring some disqualifications . . . . But it does not declare, itself, that the member shall not be a lunatic, a pauper, a convict of treason, of murder, of felony, or other infamous crime, or a non-resident of his district; nor does it prohibit to the State the power of declaring these, or any other disqualifications which its particular circumstances may call for; and these may be different in different States. Of course, then, by the tenth amendment, the power is reserved to the State." Letter to Joseph C. Cabell (Jan. 31, 1814), in 14 Writings of Thomas Jefferson 82–83 (A. Lipscomb ed. 1904).[14]

B

Although the Qualifications Clauses neither state nor imply the prohibition that it finds in them, the majority infers from the Framers' "democratic principles" that the Clauses must have been generally understood to preclude the people of the States and their state legislatures from prescribing any additional qualifications for their representatives in Congress. But the majority's evidence on this point establishes only two more modest propositions: (1) the Framers did not want the Federal Constitution itself to impose a

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[14] The majority notes Jefferson's concession that state power to supplement the Qualifications Clauses was "one of the doubtful questions on which honest men may differ with the purest of motives." See *ante*, at 813, n. 24; 14 Writings of Thomas Jefferson 83 (A. Lipscomb ed. 1904). But while Jefferson cautioned against impugning the motives of people who might disagree with his position, his use of the phrase "[o]f course" suggests that he himself did not entertain serious doubts of its correctness.

broad set of disqualifications for congressional office, and (2) the Framers did not want the Federal Congress to be able to supplement the few disqualifications that the Constitution does set forth. The logical conclusion is simply that the Framers did not want the people of the States and their state legislatures to be constrained by too many qualifications imposed at the national level. The evidence does not support the majority's more sweeping conclusion that the Framers intended to bar the people of the States and their state legislatures from adopting additional eligibility requirements to help narrow their own choices.

I agree with the majority that Congress has no power to prescribe qualifications for its own Members. This fact, however, does not show that the Qualifications Clauses contain a hidden exclusivity provision. The reason for Congress' incapacity is not that the Qualifications Clauses deprive Congress of the authority to set qualifications, but rather that nothing in the Constitution grants Congress this power. In the absence of such a grant, Congress may not act. But deciding whether the Constitution denies the qualification-setting power to the States and the people of the States requires a fundamentally different legal analysis.

Despite the majority's claims to the contrary, see *ante*, at 796–797, n. 12, this explanation for Congress' incapacity to supplement the Qualifications Clauses is perfectly consistent with the reasoning of *Powell* v. *McCormack*, 395 U. S. 486 (1969). *Powell* concerned the scope of Article I, § 5, which provides that "[e]ach House [of Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members." As the majority itself recognizes, "[t]he principal issue [in *Powell*] was whether the power granted to each House in Art. I, § 5, . . . includes the power to impose qualifications other than those set forth in the text of the Constitution." *Ante*, at 788. Contrary to the majority's suggestion, then, the critical question in *Powell* was whether § 5 conferred a qualification-setting power—not whether the Quali-

fications Clauses took it away. Compare *Powell*, *supra*, at 519 (describing the question before the Court as "what power the Constitution confers upon the House through Art. I, § 5"), and 536 (describing the Court's task as "determining the meaning of Art. I, § 5") with *ante*, at 789, and 792, n. 8 (suggesting that *Powell* held that the Qualifications Clauses "limit the power of the House to impose additional qualifications"). See also *Buckley* v. *Valeo*, 424 U. S. 1, 133 (1976) (taking my view of *Powell*).

Powell's analysis confirms this point. After summarizing a large quantity of historical material bearing on the original understanding of what it meant for a legislature to act as "the Judge" of the qualifications of its members, see 395 U. S., at 521–531, *Powell* went on to stress that the Philadelphia Convention specifically rejected proposals to grant Congress the power to pass laws prescribing additional qualifications for its Members, and that the Convention rejected these proposals on the very same day that it approved the precursor of § 5. See *id.*, at 533–536. Given this historical evidence, the *Powell* Court refused to read § 5 as empowering the House to prescribe such additional qualifications in its capacity as "Judge." And if nothing in the Constitution gave the House this power, it inevitably followed that the House could not exercise it. Despite the majority's claims, then, *Powell* itself rested on the proposition that the institutions of the Federal Government enjoy only the powers that are granted to them. See also *ante*, at 793, n. 9 (describing the Qualifications Clauses merely as an independent basis for the result reached in *Powell*).[15]

[15] The majority also errs in its interpretation of *Nixon* v. *United States*, 506 U. S. 224 (1993). See *ante*, at 796, n. 12. In dictum, *Nixon* did refer to "the fixed meaning of '[q]ualifications' set forth in Art. I, § 2." 506 U. S., at 237. But as both the surrounding context and the internal punctuation of this passage make clear, *Nixon* was referring to the meaning of the word "Qualifications" in § 5; that term, after all, does not even appear in the House Qualifications Clause of § 2. Thus, *Nixon* merely said that § 5 directs the House to judge the qualifications "set forth in Art. I, § 2," and not qualifications of its own invention. See also *infra*, at 895. There

The fact that the Framers did not grant a qualification-setting power to Congress does not imply that they wanted to bar its exercise at the state level. One reason why the Framers decided not to let Congress prescribe the qualifications of its own Members was that incumbents could have used this power to perpetuate themselves or their ilk in office. As Madison pointed out at the Philadelphia Convention, Members of Congress would have an obvious conflict of interest if they could determine who may run against them. 2 Farrand 250; see also *ante*, at 793–794, n. 10. But neither the people of the States nor the state legislatures would labor under the same conflict of interest when prescribing qualifications for Members of Congress, and so the Framers would have had to use a different calculus in determining whether to deprive them of this power.

As the majority argues, democratic principles also contributed to the Framers' decision to withhold the qualification-setting power from Congress. But the majority is wrong to suggest that the same principles must also have led the Framers to deny this power to the people of the States and the state legislatures. In particular, it simply is not true that "the source of the qualification is of little moment in assessing the qualification's restrictive impact." *Ante*, at 820. There is a world of difference between a self-imposed constraint and a constraint imposed from above.

Congressional power over qualifications would have enabled the representatives from some States, acting collectively in the National Legislature, to prevent the people of another State from electing their preferred candidates. The John Wilkes episode in 18th-century England illustrates the problems that might result. As the majority mentions, Wilkes' district repeatedly elected him to the House of Commons, only to have a majority of the representatives of other

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would have been no occasion for *Nixon* to extend *Powell:* The only point of its discussion was to explain why the question at issue in *Powell* was justiciable, while the question at issue in *Nixon* (which concerned impeachment) was not.

districts frustrate their will by voting to exclude him. See *ante*, at 790. Americans who remembered these events might well have wanted to prevent the National Legislature from fettering the choices of the people of any individual State (for the House of Representatives) or their state legislators (for the Senate).

Yet this is simply to say that qualifications should not be set at the national level for offices whose occupants are selected at the state level. The majority never identifies the democratic principles that would have been violated if a state legislature, in the days before the Constitution was amended to provide for the direct election of Senators, had imposed some limits of its own on the field of candidates that it would consider for appointment.[16] Likewise, the majority does not explain why democratic principles prohibit the people of a State from adopting additional eligibility requirements to help narrow their choices among candidates seeking to represent them in the House of Representatives. Indeed, the invocation of democratic principles to invalidate Amendment 73 seems particularly difficult in the present case, because Amendment 73 remains fully within the control of the people of Arkansas. If they wanted to repeal it (despite the 20-point margin by which they enacted it less than three years ago), they could do so by a simple majority vote. See Ark. Const., Amdt. 7.

The majority appears to believe that restrictions on eligibility for office are inherently undemocratic. But the Qualifications Clauses themselves prove that the Framers did not share this view; eligibility requirements to which the people of the States consent are perfectly consistent with the Fram-

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[16] Oregon, for instance, pioneered a system in which the state legislature bound itself to appoint the candidates chosen in a statewide vote of the people. See Hills, A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97, 108 (1991). The majority is in the uncomfortable position of suggesting that this system violated "democratic principles."

ers' scheme. In fact, we have described "the authority of the people of the States to determine the qualifications of their most important government officials" as "an authority that lies at the heart of representative government." *Gregory* v. *Ashcroft*, 501 U. S. 452, 463 (1991) (internal quotation marks omitted) (refusing to read federal law to preclude States from imposing a mandatory retirement age on state judges who are subject to periodic retention elections). When the people of a State themselves decide to restrict the field of candidates whom they are willing to send to Washington as their representatives, they simply have not violated the principle that "the people should choose whom they please to govern them." See 2 Elliot 257 (remarks of Alexander Hamilton at the New York Convention).

At one point, the majority suggests that the principle identified by Hamilton encompasses not only the electorate's right to choose, but also "the egalitarian concept that the opportunity to be elected [is] open to all." See *ante*, at 794; see also *ante*, at 819–820. To the extent that the second idea has any content independent of the first, the majority apparently would read the Qualifications Clauses to create a personal right to be a candidate for Congress, and then to set that right above the authority of the people of the States to prescribe eligibility requirements for public office. But we have never suggested that "the opportunity to be elected" is open even to those whom the voters have decided not to elect. On that rationale, a candidate might have a right to appear on the ballot in the general election even though he lost in the primary. But see *Storer* v. *Brown*, 415 U. S. 724, 726, n. 16 (1974); see also *Bullock* v. *Carter*, 405 U. S. 134, 142–143 (1972) (rejecting the proposition that there is any fundamental right to be a candidate, separate and apart from the electorate's right to vote). Thus, the majority ultimately concedes that its "egalitarian concept" derives entirely from the electorate's right to choose. See *ante*, at 794, n. 11; see also *ante*, at 819 (deriving the "egalitarian

ideal" from the proposition that the Qualifications Clauses do not unduly " 'fetter the judgment . . . of the people' " (quoting The Federalist No. 57, at 351)). If the latter is not violated, then neither is the former.

In seeking ratification of the Constitution, James Madison did assert that "[u]nder these reasonable limitations [set out in the House Qualifications Clause], the door of this part of the federal government is open to merit of every description . . . ." The Federalist No. 52, at 326. The majority stresses this assertion, and others to the same effect, in support of its "egalitarian concept." See *ante*, at 794, 819–820, and n. 30. But there is no reason to interpret these statements as anything more than claims that the Constitution itself imposes relatively few disqualifications for congressional office.[17] One should not lightly assume that Madi-

[17] For instance, the majority quotes Noah Webster's observation that under the Constitution, "the places of senators are wisely left open to all persons of suitable age and merit, and who have been citizens of the United States for nine years." See *ante*, at 820, n. 30 (citing "A Citizen of America" (Oct. 17, 1787), in 1 Debate on the Constitution 129, 142 (B. Bailyn ed. 1993) (hereinafter Bailyn)). But there is no reason to read Webster as denying the power of state legislatures to pass resolutions limiting the field of potential candidates that they would consider for appointment to the Senate. Indeed, it seems implausible that Webster would have been invoking the majority's vision of "democratic principles" in support of the constitutional provisions calling for Senators to be appointed by the various state legislatures rather than being elected directly by the people of the States.

Similarly, the majority quotes a newspaper piece written by John Stevens, Jr., to the people of New York. See *ante*, at 819–820. But Stevens gave the following explanation for his assertion that "[n]o man who has real merit . . . need despair" under the system erected by the Constitution: "He first distinguishes himself amongst his neighbours at township and county meeting; he is next sent to the State Legislature. In this theatre his abilities . . . are . . . displayed to the views of every man in the State: from hence his ascent to a seat in Congress becomes easy and sure." "Americanus," Daily Advertiser, Dec. 12, 1787, in 1 Bailyn 487, 492. As the States indisputably controlled eligibility requirements for membership in the various state legislatures, and indeed had established some disquali-

son and his colleagues, who were attempting to win support at the state level for the new Constitution, were proclaiming the inability of the people of the States or their state legislatures to prescribe any eligibility requirements for their own Representatives or Senators. Instead, they were merely responding to the charge that the Constitution was undemocratic and would lead to aristocracies in office. Cf. *ante*, at 791 (referring to "the antifederalist charge that the new Constitution favored the wealthy and well born"). The statement that the qualifications imposed in the Constitution are not unduly restrictive hardly implies that the Constitution withdrew the power of the people of each State to prescribe additional eligibility requirements for their own Representatives if they so desired.

In fact, the authority to narrow the field of candidates in this way may be part and parcel of the right to elect Members of Congress. That is, the right to choose may include the right to winnow. See Hills, A Defense of State Constitutional Limits on Federal Congressional Terms, 53 U. Pitt. L. Rev. 97, 107–109 (1991).

To appreciate this point, it is useful to consider the Constitution as it existed before the Seventeenth Amendment was adopted in 1913. The Framers' scheme called for the legislature of each State to choose the Senators from that State. Art. I, § 3, cl. 1. The majority offers no reason to believe that state legislatures could not adopt prospective rules to guide themselves in carrying out this responsibility; not only is there no express language in the Constitution barring legislatures from passing laws to narrow their choices, but there also is absolutely no basis for inferring such a prohibition. Imagine the worst-case scenario: a state legislature, wishing

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fications, I do not read Stevens to be saying that they were barred from doing the same thing with respect to Congress. Without addressing whether the people of the States may supplement the Qualifications Clauses, Stevens was merely praising the Constitution for imposing few such requirements of its own.

to punish one of the Senators from its State for his vote on some bill, enacts a qualifications law that the Senator does not satisfy. The Senator would still be able to serve out his term; the Constitution provides for Senators to be chosen for 6-year terms, Art. I, § 3, cl. 1, and a person who has been seated in Congress can be removed only if two-thirds of the Members of his House vote to expel him, § 5, cl. 2. While the Senator would be disqualified from seeking reappointment, under the Framers' Constitution the state legislature already enjoyed unfettered discretion to deny him reappointment anyway. Instead of passing a qualifications law, the legislature could simply have passed a resolution declaring its intention to appoint someone else the next time around. Thus, the legislature's power to adopt laws to narrow its own choices added nothing to its general appointment power.

While it is easier to coordinate a majority of state legislators than to coordinate a majority of qualified voters, the basic principle should be the same in both contexts. Just as the state legislature enjoyed virtually unfettered discretion over whom to appoint to the Senate under Art. I, § 3, so the qualified voters of the State enjoyed virtually unfettered discretion over whom to elect to the House of Representatives under Art. I, § 2. If there is no reason to believe that the Framers' Constitution barred state legislatures from adopting prospective rules to narrow their choices for Senator, then there is also no reason to believe that it barred the people of the States from adopting prospective rules to narrow their choices for Representative. In addition, there surely is no reason to believe that the Senate Qualifications Clause suddenly acquired an exclusivity provision in 1913, when the Seventeenth Amendment was adopted. Now that the people of the States are charged with choosing both Senators and Representatives, it follows that they may adopt eligibility requirements for Senators as well as for Representatives.

I would go further, for I see nothing in the Constitution that precludes the people of each State (if they so desire) from authorizing their elected state legislators to prescribe qualifications on their behalf. If the people of a State decide that they do not trust their state legislature with this power, they are free to amend their state constitution to withdraw it. This arrangement seems perfectly consistent with the Framers' scheme. From the time of the framing until after the Civil War, for example, the Federal Constitution did not bar state governments from abridging the freedom of speech or the freedom of the press, even when those freedoms were being exercised in connection with congressional elections. It was the state constitutions that determined whether state governments could silence the supporters of disfavored congressional candidates, just as it was the state constitutions that determined whether the States could persecute people who held disfavored religious beliefs or could expropriate property without providing just compensation. It would not be at all odd if the state constitutions also determined whether the state legislature could pass qualifications statutes.

But one need not agree with me that the people of each State may delegate their qualification-setting power in order to uphold Arkansas' Amendment 73. Amendment 73 is not the act of a state legislature; it is the act of the people of Arkansas, adopted at a direct election and inserted into the State Constitution. The majority never explains why giving effect to the people's decision would violate the "democratic principles" that undergird the Constitution. Instead, the majority's discussion of democratic principles is directed entirely to attacking eligibility requirements imposed on the people of a State by an entity other than themselves.

The majority protests that any distinction between the people of the States and the state legislatures is "untenable" and "astonishing." See *ante*, at 809, n. 19. In the limited area of congressional elections, however, the Framers them-

selves drew this distinction: They specifically provided for Senators to be chosen by the state legislatures and for Representatives to be chosen by the people. In the context of congressional elections, the Framers obviously saw a meaningful difference between direct action by the people of each State and action by their state legislatures.

Thus, even if one believed that the Framers intended to bar state legislatures from adopting qualifications laws that restrict the people's choices, it would not follow that the people themselves are precluded from agreeing upon eligibility requirements to help narrow their own choices. To be sure, if the Qualifications Clauses were exclusive, they would bar all additional qualifications, whether adopted by popular initiative or by statute. But the majority simply assumes that if state legislatures are barred from prescribing qualifications, it must be because the Qualifications Clauses are exclusive. It would strain the text of the Constitution far less to locate the bar in Article I, § 2, and the Seventeenth Amendment instead: One could plausibly maintain that qualification requirements imposed by state legislatures violate the constitutional provisions entrusting the selection of Members of Congress to the people of the States, even while one acknowledges that qualification requirements imposed by the people themselves are perfectly constitutional. The majority never justifies its conclusion that "democratic principles" require it to reject even this intermediate position.

C

In addition to its arguments about democratic principles, the majority asserts that more specific historical evidence supports its view that the Framers did not intend to permit supplementation of the Qualifications Clauses. But when one focuses on the distinction between congressional power to add qualifications for congressional office and the power of the people or their state legislatures to add such qualifications, one realizes that this assertion has little basis.

In particular, the detail with which the majority recites the historical evidence set forth in *Powell* v. *McCormack*, 395 U. S. 486 (1969), should not obscure the fact that this evidence has no bearing on the question now before the Court. As the majority ultimately concedes, see *ante*, at 792–793, 796, 798, it does not establish "the Framers' intent that the qualifications in the Constitution be fixed and exclusive," *ante*, at 790; it shows only that the Framers did not intend Congress to be able to enact qualifications laws.[18] If any-

[18] For instance, the majority quotes at length from the debate that arose in the Philadelphia Convention when the Committee of Detail proposed the following clause: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." See 2 Farrand 179, 248–251; *ante*, at 790–791. The defeat of this proposal—like the defeat of Gouverneur Morris' motion to drop the words "with regard to property" from the clause, so as to empower Congress to enact qualifications of any sort—simply reflects the Framers' decision not to grant *Congress* the power to supplement the constitutional qualifications. Considered out of context, some of James Madison's comments during the debate might be thought to go farther. See *ibid.* But the majority itself properly dispels this false impression. See *ante*, at 793, n. 10; see also *Powell* v. *McCormack*, 395 U. S., at 534.

Likewise, *Powell* drew support from Alexander Hamilton's comments in The Federalist No. 60, which the majority also quotes. See *ante*, at 791. But as the majority concedes, when Hamilton wrote that "[t]he qualifications of the persons who may choose or be chosen [for Congress] . . . are defined and fixed in the Constitution, and are unalterable by the legislature," he was merely restating his prior observation that the power to set qualifications "forms no part of the power to be conferred upon the *national* government." See The Federalist No. 60, at 371 (emphasis added). Indeed, only if "the legislature" to which Hamilton was referring is Congress can one make sense of his remark that the qualifications of voters as well as Congressmen are "fixed in the Constitution" and "unalterable by the legislature." Hamilton surely knew that the States or the people of the States control eligibility for the franchise. See Art. I, § 2, cl. 1.

The majority does omit the context necessary to understand one aspect of the historical evidence presented in *Powell*. The majority quotes *Powell*'s observation that "on the eve of the Constitutional Convention, English precedent stood for the proposition that 'the law of the land had regulated

thing, the solidity of the evidence supporting *Powell*'s view that Congress lacks the power to supplement the constitutional disqualifications merely highlights the weakness of the majority's evidence that the States and the people of the States also lack this power.

1

To the extent that the records from the Philadelphia Convention itself shed light on this case, they tend to hurt the majority's case. The only evidence that directly bears on the question now before the Court comes from the Committee of Detail, a five-member body that the Convention charged with the crucial task of drafting a Constitution to reflect the decisions that the Convention had reached during its first two months of work. A document that Max Farrand described as "[a]n early, perhaps the first, draft of the committee's work" survived among the papers of George Mason. 1 Farrand xxiii, n. 36. The draft is in the handwriting of

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the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'" 395 U. S., at 528 (quoting 16 Parliamentary History of England 589, 590 (1769)); see *ante*, at 790. The English rule seems of only marginal relevance: The pre-existing rule in America—that States could add qualifications for their representatives in Congress, see n. 3, *supra*, while Congress itself could not—is surely more important. But in any event, *Powell* did not claim that the English rule deemed parliamentary qualifications to be fixed in the country's (unwritten) constitution, beyond the reach of a properly enacted law. Instead, qualifications were "fixed" rather than "occasional" only in the sense that neither House of Parliament could "exclude members-elect for general misconduct not within standing qualifications." *Powell*, 395 U. S., at 528. The English rule, in other words, was simply that when sitting as the judge of its members' qualifications, each House of Parliament could do no more than administer the pre-existing laws that defined those qualifications, see *id.*, at 529, for "one House of Parliament cannot create a disability unknown to the law." T. Plucknett, Taswell-Langmead's English Constitutional History 585 (11th ed. 1960); cf. *INS* v. *Chadha*, 462 U. S. 919 (1983). This history was relevant to *Powell* (which dealt with the grounds on which one House of Congress could exclude a Member-elect), but it is not relevant to this case.

Edmund Randolph, the chairman of the Committee, with emendations in the hand of John Rutledge, another member of the Committee. As Professor Farrand noted, "[e]ach item in this document . . . is either checked off or crossed out, showing that it was used in the preparation of subsequent drafts." 2 *id.*, at 137, n. 6; see also W. Meigs, The Growth of the Constitution in the Federal Convention of 1787, pp. I–IX (1900) (providing a facsimile of the document).

The document is an extensive outline of the Constitution. Its treatment of the National Legislature is divided into two parts, one for the "House of Delegates" and one for the Senate. The Qualifications Clause for the House of Delegates originally read as follows: "The qualifications of a delegate shall be the age of twenty five years at least. and citizenship: *and any person possessing these qualifications may be elected except* [blank space]." *Id.*, at II (emphasis added). The drafter(s) of this language apparently contemplated that the Committee might want to insert some exceptions to the exclusivity provision. But rather than simply deleting the word "except"—as it might have done if it had decided to have no exceptions at all to the exclusivity provision—the Committee deleted the exclusivity provision itself. In the document that has come down to us, all the words after the colon are crossed out. *Ibid.*

The majority speculates that the exclusivity provision may have been deleted as superfluous. See *ante*, at 815–816, n. 27.[19] But the same draft that contained the exclusivity language in the House Qualifications Clause contained no

[19] The majority also argues that in any event, the views of the members of the Committee "tel[l] us little about the views of the Convention as a whole." *Ante*, at 815, n. 27. But our task is simply to determine whether at the time of the framing, the language of the Qualifications Clauses would have been commonly understood to contain an exclusivity provision. The surviving records suggest that the members of the Committee of Detail did not understand the final Qualifications Clauses to be exclusive, and the majority offers no reason to think that their understanding of the language was unusual for their time.

such language in the Senate Qualifications Clause. See 2 Farrand 141. Thus, the draft appears to reflect a deliberate judgment to distinguish between the House qualifications and the Senate qualifications, and to make only the former exclusive. If so, then the deletion of the exclusivity provision indicates that the Committee expected neither list of qualifications to be exclusive.

The majority responds that the absence of any exclusivity provision in the Committee's draft of the Senate Qualifications Clause merely reflected the fact that "senators, unlike Representatives, would not be chosen by popular election." *Ante*, at 815, n. 27. I am perfectly prepared to accept this explanation: The drafter(s) may well have thought that state legislatures should be prohibited from constricting the people's choices for the House of Representatives, but that no exclusivity provision was necessary on the Senate side because state legislatures would already have unfettered control over the appointment of Senators. To accept this explanation, however, is to acknowledge that the exclusivity provision in the Committee's draft of the House Qualifications Clause was not thought to be mere surplusage. It is also to acknowledge that the Senate Qualifications Clause in the Committee's draft—"the qualification of a senator shall be the age of 25 years at least: citizenship in the united states: and property to the amount of [blank space]," 2 Farrand 141—did not carry any implicit connotation of exclusivity. In short, the majority's own explanation for the difference between the two Qualifications Clauses in the Committee's draft is fundamentally at odds with the *expressio unius* argument on which the majority rests its holding.

2

Unable to glean from the Philadelphia Convention any direct evidence that helps its position, the majority seeks signs of the Framers' unstated intent in the Framers' comments about four *other* constitutional provisions. See *ante*, at 808–

811 (citing Art. I, § 2, cl. 1; § 4, cl. 1; § 5, cl. 1; and § 6, cl. 1). The majority infers from these provisions that the Framers wanted "to minimize the possibility of state interference with federal elections." *Ante*, at 808. But even if the majority's reading of its evidence were correct, the most that one could infer is that the Framers did not want state legislatures to be able to prescribe qualifications that would narrow the people's choices. See *supra*, at 883–888. However wary the Framers might have been of permitting state legislatures to exercise such power, there is absolutely no reason to believe that the Framers feared letting the people themselves exercise this power. Cf. The Federalist No. 52, at 326 (Madison) ("It cannot be feared that the people of the States will alter this [electoral-qualification] part of their constitutions in such a manner as to abridge the rights secured to them by the federal Constitution").

In any event, none of the provisions cited by the majority is inconsistent with state power to add qualifications for congressional office. First, the majority cites the constitutional requirement that congressional salaries be "ascertained by Law, and paid out of the Treasury of the United States." Art. I, § 6, cl. 1. Like the Qualifications Clauses themselves, however, the salary provision can be seen as simply another means of protecting the competence of the National Legislature. As reflected in the majority's own evidence, see *ante*, at 809–810; see also 1 Farrand 373 (remarks of James Madison), one of the recurring themes of the debate over this provision was that if congressional compensation were left up to the States, parsimonious States might reduce salaries so low that only incapable people would be willing to serve in Congress.

As the majority stresses, some delegates to the Philadelphia Convention did argue that leaving congressional compensation up to the various States would give Members of Congress "an improper dependence" upon the States. *Id.*, at 216 (remarks of James Madison); *ante*, at 809–810. These

delegates presumably did not want state legislatures to be able to tell the Members of Congress from their State, "Vote against Bill *A* or we will slash your salary"; such a power would approximate a power of recall, which the Framers denied to the States when they specified the terms of Members of Congress. The Framers may well have thought that state power over salary, like state power to recall, would be inconsistent with the notion that Congress was a national legislature once it assembled. But state power over initial eligibility requirements does not raise the same concerns: It was perfectly coherent for the Framers to leave selection matters to the state level while providing for Members of Congress to draw a federal salary once they took office. Thus, the Compensation Clause seems wholly irrelevant; contrary to the majority's suggestion, see *ante*, at 811, n. 21, it does not address elections at all.

Second, the majority gives passing mention to the Elector-Qualifications Clause of Article I, § 2, which specifies that in each State, the voters in House elections "shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature." But the records of the Philadelphia Convention provide no evidence for the majority's assertion that the purpose of this Clause was "to prevent discrimination against federal electors." See *ante*, at 808.[20]

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[20] The majority inaccurately reports James Madison's explanation of the Elector-Qualifications Clause in The Federalist No. 52. Madison neither mentioned nor addressed the consequences of "allowing States to differentiate between the qualifications for state and federal electors." See *ante*, at 808. Instead, he addressed the problems that would have arisen if the Constitution had assigned control over the qualifications of voters in House elections to the state legislatures rather than to the people of each State. It was such an arrangement that, in Madison's view, "would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone." The Federalist No. 52, at 326; cf. *ante*, at 808. The Elector-Qualifications Clause avoided this problem because the various state constitutions con-

In fact, the Clause may simply have been a natural concomitant of one of the Framers' most famous decisions. At the Convention, there was considerable debate about whether Members of the House of Representatives should be selected by the state legislatures or directly by the voters of each State. Taken as a whole, the first Clause of Article I, § 2—including the elector-qualifications provision—implements the Framers' decision. It specifies that the Representatives from each State are to be chosen by the State's voters (that is, the people eligible to participate in elections for the most numerous branch of the state legislature).

Third, the majority emphasizes that under Article I, § 5, "[e]ach House [of Congress] shall be the Judge of the Elections, Returns and Qualifications of its own Members." See *ante*, at 804, 811, 822. There was no recorded discussion of this provision in the Philadelphia Convention, and it appears simply to adopt the practice of England's Parliament. See n. 18, *supra*. According to the majority, however, § 5 implies

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trolled who could vote in elections for the most numerous branch of the state legislature, and no state government could alter these requirements unless the people of the State (through the state constitution) decided to let it do so. See The Federalist No. 52, at 326.

Though one obviously could uphold the action of the people of Arkansas without reaching this issue, Madison's comments should not be read to suggest that the Elector-Qualifications Clause bars the people of a State from delegating their control over voter qualifications to the state legislature. The Clause itself refutes this reading; if a state constitution permits the state legislature to set voter qualifications, and if eligibility for the franchise in the State therefore turns on statutory rather than constitutional law, federal electors in the State still must meet the same qualifications as electors for the most numerous branch of the state legislature. Madison could not possibly have disagreed with this understanding of the Clause. Instead, he was simply explaining why, when it came to voter qualifications for House elections, the Framers had not followed the model of Article I, § 3, cl. 1, and vested ultimate control with the state legislatures (regardless of what the people of a State might provide in their state constitutions).

that the Framers could not have intended state law ever to "provide the standard for judging a Member's eligibility." *Ante,* at 812.

My conclusion that States may prescribe eligibility requirements for their Members of Congress does not necessarily mean that the term "Qualifications," as used in Article I, § 5, includes such state-imposed requirements. One surely could read the term simply to refer back to the requirements that the Framers had just listed in the Qualifications Clauses, and not to encompass whatever requirements States might add on their own. See *Nixon* v. *United States,* 506 U. S. 224, 237 (1993) (dictum) (asserting that the context of § 5 demonstrates that "the word '[q]ualifications' . . . was of a precise, limited nature" and referred only to the qualifications previously "set forth in Art. I, § 2"). The Framers had deemed the constitutional qualifications essential to protect the competence of Congress, and hence the national interest. It is quite plausible that the Framers would have wanted each House to make sure that its Members possessed these qualifications, but would have left it to the States to enforce whatever qualifications were imposed at the state level to protect state interests.

But even if this understanding of § 5 is incorrect, I see nothing odd in the notion that a House of Congress might have to consider state law in judging the "Qualifications" of its Members. In fact, § 5 itself refutes the majority's argument. Because it generally is state law that determines what is necessary to win an election and whether any particular ballot is valid, each House of Congress clearly must look to state law in judging the "Elections" and "Returns" of its Members. It would hardly be strange if each House had to do precisely the same thing in judging "Qualifications." Indeed, even on the majority's understanding of the Constitution, at the time of the framing all "Qualifications" questions that turned on issues of citizenship would have been governed by state law. See *supra,* at 872–873.

More generally, there is no basis for the majority's assertion that the Framers would not have charged "federal tribunals" with the task of "judging . . . questions concerning rights which depend on state law." See *ante*, at 812. Cases involving questions of federal law hardly exhaust the categories of cases that the Framers authorized the federal courts to decide. See Art. III, § 2, cl. 1. The founding generation, moreover, seemed to assign relatively little importance to the constitutional grant of jurisdiction over "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority." *Ibid.* The First Congress never even implemented this jurisdictional grant at the trial level; it was not until 1875 that Congress "revolutionized the concept of the federal judiciary" by giving federal courts broad jurisdiction over suits arising under federal law. See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 962 (3d ed. 1988). By contrast, the founding generation thought it important to implement immediately the constitutional grant of diversity jurisdiction, in which the rules of decision generally come entirely from state law. See Judiciary Act of 1789, 1 Stat. 73, 78, 92; *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 77–80 (1938).

The fourth and final provision relied upon by the majority is the Clause giving Congress the power to override state regulations of "[t]he Times, Places and Manner of holding [congressional] Elections." Art. I, § 4, cl. 1. From the fact that the Framers gave Congress the power to "make or alter" these state rules of election procedure, the majority infers that the Framers would also have wanted Congress to enjoy override authority with respect to any matters of substance that were left to the States. See *ante*, at 810–811. As Congress enjoys no "make or alter" powers in this area, the majority concludes that the Framers must not have thought that state legislatures would be able to enact qualifications laws.

But the Framers provided for congressional override only where they trusted Congress more than the States. Even respondents acknowledge that "the primary reason" for the "make or alter" power was to enable Congress to ensure that States held elections in the first place. See Tr. of Oral Arg. 51; see also *supra,* at 863, and n. 10. The Framers did trust Congress more than the States when it came to preserving the Federal Government's own existence; to advance this interest, they had to give Congress the capacity to prescribe both the date and the mechanics of congressional elections. As discussed above, however, the Framers trusted the States more than Congress when it came to setting qualifications for Members of Congress. See *supra,* at 877. Indeed, the majority itself accepts this proposition. See *ante,* at 832 (acknowledging that the Framers were "particularly concerned" about congressional power to set qualifications).

To judge from comments made at the state ratifying conventions, Congress' "make or alter" power was designed to serve a coordination function in addition to ensuring that the States had at least rudimentary election laws. For instance, George Nicholas argued at the Virginia Convention that if regulation of the time of congressional elections had been left exclusively to the States, "there might have been as many times of choosing as there are States," and "such intervals might elapse between the first and last election, as to prevent there being a sufficient number to form a House." 9 Documentary History of the Ratification of the Constitution 920 (J. Kaminski and G. Saladino eds. 1990). For this reason too, if the National Legislature lacked the "make or alter" power, "it might happen that there should be no Congress[,] . . . and this might happen at a time when the most urgent business rendered their session necessary." *Ibid.;* cf. 2 Elliot 535 (remarks of Thomas McKean at the Pennsylvania ratifying convention) (defending § 4 on the ground that congressional elections should be "held on the same day throughout the United States, to prevent corruption or

undue influence"). Again, however, the desire to coordinate state election procedures did not require giving Congress power over qualifications laws.

The structure of the Constitution also undermines the majority's suggestion that it would have been bizarre for the Framers to give Congress supervisory authority over state time, place, and manner regulations but not over state qualifications laws. Although the Constitution does set forth a few nationwide disqualifications for the office of Presidential elector, see Art. II, § 1, cl. 2 ("no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector"), no one contends that these disqualifications implicitly prohibit the States from adding any other eligibility requirements; instead, Article II leaves the States free to establish qualifications for their delegates to the electoral college. See *supra*, at 861–862. Nothing in the Constitution, moreover, gives Congress any say over the additional eligibility requirements that the people of the States or their state legislatures may choose to set. Yet under Article II, "[t]he Congress may determine the Time of chusing the Electors . . . ." Art. II, § 1, cl. 4.

The majority thus creates an unwarranted divergence between Article I's provisions for the selection of Members of Congress and Article II's provisions for the selection of members of the electoral college. Properly understood, the treatment of congressional elections in Article I parallels the treatment of Presidential elections in Article II. Under Article I as under Article II, the States and the people of the States do enjoy the reserved power to establish substantive eligibility requirements for candidates, and Congress has no power to override these requirements. But just as Article II authorizes Congress to prescribe when the States must select their Presidential electors, so Article I gives Congress the ultimate authority over the times, places, and manner of holding congressional elections.

The majority's only response is that my reading of the Constitution would permit States to use their qualification-setting power to achieve the very result that Congress' "make or alter" power was designed to avoid. According to the majority, States could set qualifications so high that no candidate could meet them, and Congress would be powerless to do anything about it. *Ante*, at 811.

Even if the majority were correct that Congress could not nullify impossible qualifications, however, the Constitution itself proscribes such state laws. The majority surely would concede that under the Framers' Constitution, each state legislature had an affirmative duty to appoint two people to the Senate. See Art. I, §3, cl. 1 ("The Senate of the United States *shall* be composed of two Senators from each State, chosen by the Legislature thereof . . ." (emphasis added)); cf. Art. I, §3, cl. 2 ("if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies"). In exactly the same way that §3 requires the States to send people to the Senate, §2 also requires the States to send people to the House. See Art. I, §2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); cf. Art. I, §2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies").

The majority apparently is concerned that (on its reading of the "make or alter" power) Congress would not be able to enforce the constitutional proscription on impossible qualifications; enforcement would instead be relegated to the courts, the Executive Branch, or the political process. But this concern is equally applicable whether one adopts my view of the Qualifications Clauses or the majority's view. Both the majority and I agree that it is unconstitutional for

States to establish impossible qualifications for congressional office. Both the majority and I also agree that it is theoretically conceivable that a State might defy this proscription by erecting an impossible qualification. Whether Congress may use its "make or alter" power to override such laws turns entirely on how one reads the "make or alter" power; it has nothing to do with whether one believes that the Qualifications Clauses are exclusive.

It would not necessarily be unusual if the Framers had decided against using Congress' "make or alter" power to guard against state laws that disqualify everyone from service in the House. After all, although this power extended to the times and manner of selecting Senators as well as Representatives, it did not authorize Congress to pick the Senators from a State whose legislature defied its constitutional obligations and refused to appoint anyone. This does not mean that the States had no duty to appoint Senators, or that the States retained the power to destroy the Federal Government by the simple expedient of refusing to meet this duty. It merely means that the Framers did not place the remedy with Congress.[21]

But the flaws in the majority's argument go deeper. Contrary to the majority's basic premise, Congress *can* nullify state laws that establish impossible qualifications. If a State actually holds an election and only afterwards purports to disqualify the winner for failure to meet an impossible condition, Congress certainly would not be bound by the purported disqualification. It is up to each House of Congress to judge the "[q]ualifications" of its Members for itself. See Art. I, § 5, cl. 1. Even if this task includes the responsibility of judging qualifications imposed by state law, see *supra*, at 892–893, Congress obviously would have not only

[21] Likewise, the Constitution requires the States to appoint Presidential electors, Art. II, § 1, cl. 2, but it does not provide for any congressional override if the States refuse to do so (or if the States set impossibly high qualifications and then announce that no one meets them).

the power but the duty to treat the unconstitutional state law as a nullity. Thus, Congress could provide the appropriate remedy for the State's defiance, simply by seating the winner of the election.

It follows that the situation feared by the majority would arise only if the State refused to hold an election in the first place, on the ground that no candidate could meet the impossible qualification. But Congress unquestionably has the power to override such a refusal. Under the plain terms of § 4, Congress can make a regulation providing for the State to hold a congressional election at a particular time and place, and in a particular manner.[22]

3

In discussing the ratification period, the majority stresses two principal data. One of these pieces of evidence is no evidence at all—literally. The majority devotes considerable space to the fact that the recorded ratification debates do not contain any affirmative statement that the States can supplement the constitutional qualifications. See *ante*, at 812–815. For the majority, this void is "compelling" evidence that "unquestionably reflects the Framers' common understanding that States lacked that power." *Ante*, at 812, 814. The majority reasons that delegates at several of the ratifying conventions attacked the Constitution for failing to require Members of Congress to rotate out of office.[23] If

[22] Even if there is anything left of the majority's argument on this point, it would still have no bearing on whether the Framers intended to preclude *the people* of each State from supplementing the constitutional qualifications. Just as the Framers had no fear that the people of a State would destroy congressional elections by entirely disenfranchising themselves, see The Federalist No. 52, at 326, so the Framers surely had no fear that the people of the States would destroy congressional elections by entirely disqualifying all candidates.

[23] As the majority notes, see *ante*, at 837, and 812, n. 22, the Philadelphia Convention had dropped without discussion a portion of the original Randolph Resolutions calling for Members of the House of Representatives

supporters of ratification had believed that the individual States could supplement the constitutional qualifications, the majority argues, they would have blunted these attacks by pointing out that rotation requirements could still be added State by State. See *ante*, at 814.

But the majority's argument cuts both ways. The recorded ratification debates also contain no affirmative statement that the States *cannot* supplement the constitutional qualifications. While ratification was being debated, the existing rule in America was that the States could prescribe eligibility requirements for their delegates to Congress, see n. 3, *supra*, even though the Articles of Confederation gave Congress itself no power to impose such qualifications. If

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"to be incapable of re-election for the space of [blank space] after the expiration of their term of service." 1 Farrand 20. This provision, which at a minimum would have barred all Members of the House from serving consecutive terms, was abandoned without objection when the Convention voted to require House Members to stand for election every three years. See *id.*, at 214–217; see also *id.*, at 362 (opting for 2-year terms instead). Subsequently, indeed, some members of the Convention appeared to be unaware that a rotation requirement had ever been proposed. See 2 *id.*, at 120 (remarks of Gouverneur Morris).

The majority properly does not cite the omission of this nationwide rotation requirement as evidence that the Framers meant to preclude individual States from adopting rotation requirements of their own. Just as individual States could extend the vote to women before the adoption of the Nineteenth Amendment, could prohibit poll taxes before the adoption of the Twenty-fourth Amendment, and could lower the voting age before the adoption of the Twenty-sixth Amendment, so the Framers' decision not to impose a nationwide limit on congressional terms did not itself bar States from adopting limits of their own. See, *e. g.*, Ga. Const. of 1877, § 2–602 (adopted Aug. 3, 1943) (reducing voting age to 18 nearly three decades before the Twenty-sixth Amendment was proposed); *Harman* v. *Forssenius*, 380 U. S. 528, 539 (1965) (noting that by the time the Twenty-fourth Amendment was proposed, "only five States retained the poll tax as a voting requirement"); Congressional Research Service, The Constitution of the United States of America: Analysis and Interpretation 1571 (1973) (reporting that 11 States had adopted women's suffrage by the time the Nineteenth Amendment was proposed). Cf. *ante*, at 837, and n. 50.

the Federal Constitution had been understood to deprive the States of this significant power, one might well have expected its opponents to seize on this point in arguing against ratification.

The fact is that arguments based on the absence of recorded debate at the ratification conventions are suspect, because the surviving records of those debates are fragmentary. We have no records at all of the debates in several of the conventions, 3 Documentary History of the Ratification of the Constitution 7 (M. Jensen ed. 1978), and only spotty records from most of the others, see *ibid.;* 1 *id.*, at 34–35; 4 Elliot 342; Hutson, The Creation of the Constitution: The Integrity of the Documentary Record, 65 Texas L. Rev. 1, 21–23 (1986).

If one concedes that the absence of relevant records from the ratification debates is not strong evidence for either side, then the majority's only significant piece of evidence from the ratification period is The Federalist No. 52. Contrary to the majority's assertion, however, this essay simply does not talk about "the lack of state control over the qualifications of the elected," whether "explicitly" or otherwise. See *ante,* at 806.

It is true that The Federalist No. 52 contrasts the Constitution's treatment of the qualifications of voters in elections for the House of Representatives with its treatment of the qualifications of the Representatives themselves. As Madison noted, the Framers did not specify any uniform qualifications for the franchise in the Constitution; instead, they simply incorporated each State's rules about eligibility to vote in elections for the most numerous branch of the state legislature. By contrast, Madison continued, the Framers chose to impose some particular qualifications that all Members of the House had to satisfy. But while Madison did say that the qualifications of the elected were "more susceptible of uniformity" than the qualifications of electors, The Federalist No. 52, at 326, he did not say that the Constitution

prescribes anything but uniform minimum qualifications for congressmen. That, after all, is more than it does for congressional electors.

Nor do I see any reason to infer from The Federalist No. 52 that the Framers intended to deprive the States of the power to add to these minimum qualifications. Madison did note that the existing state constitutions defined the qualifications of "the elected"—a phrase that the essay used to refer to Members of Congress—"less carefully and properly" than they defined the qualifications of voters. But Madison could not possibly have been rebuking the States for setting unduly high qualifications for their representatives in Congress, because they actually had established only the sketchiest of qualifications. At the time that Madison wrote, the various state constitutions generally provided for the state legislature to appoint the State's delegates to the Federal Congress.[24] Four State Constitutions had added a term-limits provision that tracked the one in the Articles of Confederation,[25] and some of the Constitutions also specified that people who held certain salaried offices under the United States were ineligible to represent the State in Congress.[26] But only two State Constitutions had prescribed any other

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[24] See Del. Const. of 1776, Art. 11, in 1 Thorpe 564; Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; Mass. Const. of 1780, Pt. 2, Ch. IV, in 3 Thorpe 1906; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; N. Y. Const. of 1777, Art. XXX, in 5 Thorpe 2634–2635; N. C. Const. of 1776, Form of Government, Art. XXXVII, in 5 Thorpe 2793; Pa. Const. of 1776, Frame of Government, § 11, in 5 Thorpe 3085; S. C. Const. of 1778, Art. XXII, in 6 Thorpe 3253; Va. Const. of 1776, in 7 Thorpe 3817.

[25] Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; N. C. Const. of 1776, Art. XXXVII, in 5 Thorpe 2793; Pa. Const. of 1776, Frame of Government, § 11, in 5 Thorpe 3085.

[26] Md. Const. of 1776, Form of Government, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467; Pa. Const. of 1776, Frame of Government, § 11, in 5 Thorpe 3085.

qualifications for delegates to Congress.[27] In this context, when Madison wrote that the state constitutions defined the qualifications of Members of Congress "less carefully and properly" than they defined the qualifications of voters, he could only have meant that the existing state qualifications did not do enough to safeguard Congress' competence: The state constitutions had not adopted the age, citizenship, and inhabitancy requirements that the Framers considered essential. Madison's comments readily explain why the Framers did not merely incorporate the state qualifications for Congress. But they do not imply that the Framers intended to withdraw from the States the power to supplement the list of qualifications contained in the Federal Constitution.[28]

Though The Federalist No. 52 did not address this question, one might wonder why the Qualifications Clauses did not simply incorporate the existing qualifications for members of the state legislatures (as opposed to delegates to Congress). Again, however, the Framers' failure to do so cannot be taken as an implicit criticism of the States for setting unduly high entrance barriers. To the contrary, the age and citizenship qualifications set out in the Federal Constitution are considerably higher than the corresponding qualifications contained in the state constitutions that were then in force. At the time, no state constitution required members of the lower house of the state legislature to be more than 21 years old, and only two required members of the upper house to be 30. See N. H. Const. of 1784, Pt. II, in 4 Thorpe 2460; S. C. Const. of 1778, Art. XII, in 6 Thorpe 3250. Many

[27] See Md. Const. of 1776, Art. XXVII, in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II, in 4 Thorpe 2467.

[28] The majority suggests that I have overlooked Madison's observation that subject to the "reasonable limitations" spelled out in the House Qualifications Clause, the Constitution left the House's door "open to merit of every description." See *ante*, at 807–808, n. 18; see also *ante*, at 808 (quoting a similar passage from The Federalist No. 57). As discussed above, however, such statements do not advance the majority's case. See *supra*, at 880–881.

States, moreover, permitted naturalized aliens to take seats in the state legislature within one or two years of becoming citizens. See Kettner, Development of American Citizenship, at 214–219.

The majority responds that at the time of the framing, most States imposed property qualifications on members of the state legislature. See *ante*, at 807–808, n. 18. But the fact that the Framers did not believe that a uniform minimum property requirement was necessary to protect the competence of Congress surely need not mean that the Framers intended to preclude States from setting their own property qualifications.

In fact, the constitutional text supports the contrary inference. As the majority observes, see *ibid.*, and *ante*, at 825, n. 35, at the time of the framing some States also imposed religious qualifications on state legislators. The Framers evidently did not want States to impose such qualifications on federal legislators, for the Constitution specifically provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Art. VI, cl. 3. Both the context[29] and the plain language of the Clause show that it bars the States as well as the Federal Government from imposing religious disqualifications on federal offices. But the only reason for extending the Clause to the States would be to protect Senators and Representatives from state-imposed religious qualifications; I know of no one else who holds a "public Trust under the United States" yet who might be subject to state disqualifications. If the *expressio unius* maxim cuts in any direction in this case, then, it undermines the majority's position: The Framers' prohibition on state-imposed religious disqual-

[29] The immediately preceding portion of the Clause requires not only "[t]he Senators and Representatives before mentioned" but also "the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States," to take an "Oath or Affirmation" to support the Constitution. Art. VI, cl. 3.

ifications for Members of Congress suggests that other types of state-imposed disqualifications are permissible. See Rotunda, Rethinking Term Limits for Federal Legislators in Light of the Structure of the Constitution, 73 Ore. L. Rev. 561, 574 (1994).

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More than a century ago, this Court was asked to invalidate a Michigan election law because it called for Presidential electors to be elected on a district-by-district basis rather than being chosen by "the State" as a whole. See Art. II, § 1, cl. 2. Conceding that the Constitution might be ambiguous on this score, the Court asserted that "where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction[s] are entitled to the greatest weight." *McPherson* v. *Blacker*, 146 U. S., at 27. The Court then described the district-based selection processes used in 2 of the 10 States that participated in the first Presidential election in 1788, 3 of the 15 States that participated in 1792, and 5 of the 16 States that participated in 1796. *Id.*, at 29–31. Though acknowledging that in subsequent years "most of the States adopted the general ticket system," *id.*, at 32, the Court nonetheless found this history "decisive" proof of the constitutionality of the district method, *id.*, at 36. Thus, the Court resolved its doubts in favor of the state law, "the contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken . . . ." *Id.*, at 27.

Here, too, state practice immediately after the ratification of the Constitution refutes the majority's suggestion that the Qualifications Clauses were commonly understood as being exclusive. Five States supplemented the constitutional disqualifications in their very first election laws, and the surviving records suggest that the legislatures of these States considered and rejected the interpretation of the Constitution that the majority adopts today.

As the majority concedes, the first Virginia election law erected a property qualification for Virginia's contingent in the Federal House of Representatives. See Virginia Election Law (Nov. 20, 1788), in 2 Documentary History of the First Federal Elections, 1788–1790, pp. 293, 294 (G. DenBoer ed. 1984) (hereinafter First Federal Elections) (restricting possible candidates to "freeholder[s]"). What is more, while the Constitution merely requires representatives to be inhabitants of their State, the legislatures of five of the seven States that divided themselves into districts for House elections [30] added that representatives also had to be inhabitants of the district that elected them. Three of these States adopted durational residency requirements too, insisting that representatives have resided within their districts for at least a year (or, in one case, three years) before being elected.[31]

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[30] Despite the majority's emphasis on the Framers' supposed desire for uniformity in congressional elections, even the majority does not dispute that the Framers wanted to let States decide for themselves whether to use district elections in selecting Members of the House of Representatives. The Framers fully expected that in some States each Member of the House would be chosen by the people of the whole State, while in other States each Member would be directly accountable only to the people of a single district. See, *e. g.*, 14 Papers of Thomas Jefferson 3 (J. Boyd ed. 1958) (letter from Madison to Jefferson, Oct. 8, 1788).

[31] See Georgia Election Law (Jan. 23, 1789) (restricting representatives from each district to "resident[s] of three years standing in the district"), in 2 First Federal Elections 456, 457; Maryland Election Law (Dec. 22, 1788) (simple district residency requirement), in 2 First Federal Elections 136, 138; Massachusetts Election Resolutions (Nov. 20, 1788) (same), in 1 First Federal Elections 508, 509 (M. Jensen & R. Becker eds. 1976); North Carolina Election Law (Dec. 16, 1789) (requiring the person elected from each district to have been "a Resident or Inhabitant of that Division for which he is elected, during the Space or Term of one Year before, and at the Time of Election"), in 4 First Federal Elections 347; Virginia Election Law (Nov. 20, 1788) (requiring each candidate to have been "a bona fide resident for twelve months within such District"), in 2 First Federal Elections 293, 294. Upon being admitted to the Union in 1796, Tennessee also required its Members in the Federal House of Representatives to have

In an attempt to neutralize the significance of the district residency requirements, respondent Hill asserts that "there is no evidence that any state legislature focused, when it created these requirements, on the fact that it was adding to the constitutional qualifications." Brief for Respondents Bobbie E. Hill et al. 20. But this claim is simply false.

In Massachusetts, for instance, the legislature charged a committee with drafting a report on election methods. The fourth article of the resulting report called for the State to be divided into eight districts that would each elect one representative, but did not require that the representatives be residents of the districts that elected them. Joint Committee Report (Nov. 4, 1788), in 1 First Federal Elections 481. When the members of the State House of Representatives discussed this report, those who proposed adding a district residency requirement were met with the claim that the Federal Constitution barred the legislature from specifying additional qualifications. See Massachusetts Centinel (Nov. 8, 1788) (reporting proceedings), in 1 First Federal Elections 489. After "considerable debate," the House approved the committee's version of the fourth article by a vote of 89 to 72. *Ibid.* But the State Senate approved a district residency amendment, 1 First Federal Elections 502, and the House then voted to retain it, *id.*, at 504.

Although we have no record of the legislative debates over Virginia's election law, a letter written by one of the members of the House of Delegates during the relevant period indicates that in that State, too, the legislature considered the possible constitutional objection to additional disqualifications. In that letter, Edward Carrington (an opponent of the district residency requirement) expressed his view that the requirement "may exceed the powers of the Assembly,"

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been Tennessee residents for three years and district residents for one year before their election. Act of Apr. 20, 1796, ch. 10, in Laws of the State of Tennessee 81 (1803).

but acknowledged that there was "no prospect of its being struck out" because Federalists as well as Anti-Federalists at least professed to "think it right." 2 *id.*, at 367 (letter from Carrington to Madison, Nov. 9–10, 1788). Carrington was correct about the views of his colleagues: By a vote of 80 to 32, the House of Delegates rejected a motion to delete the added qualifications, while a similar motion in the State Senate lost by a vote of 12 to 3. *Id.*, at 287, 293.[32]

The surviving records from Maryland and Georgia are less informative, but they, too, show that the legislatures of those States gave special attention to the district residency requirements that they enacted.[33] Out of the five original

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[32] After the Virginia Legislature had enacted this bill, some of James Madison's friends suggested that he might find it harder to win election in his own district than in certain other areas of the State. They believed that if Madison won the popular vote in one of those other districts, the House of Representatives could seat him on the theory that States cannot add to the constitutional qualifications. See 11 Papers of James Madison 378–379 (R. Rutland & C. Hobson eds. 1977) (letter from Carrington to Madison, Dec. 2, 1788). Other advisers, however, warned that the people of Virginia might not share this understanding of the Constitution. As Alexander White wrote in a letter to Madison:

"Some Gentlemen suppose you may be elected in other Districts, and that Congress would disregard the Act which requires Residence in a particular District. I will not undertake to decide that question, but this I know, such a determination would afford much ground of clamour, and enable the opposers of the Government to inflame the Minds of the People beyond anything which has yet happened." *Id.*, at 380 (Dec. 4, 1788).

Madison himself apparently never endorsed the idea that he should test the district residency requirement. Instead, he ran from his own district (where he overcame a stiff challenge from another future President, James Monroe).

[33] The records show that Maryland's House of Delegates put the district residency requirement to a separate vote and approved it by a margin of 41 to 24. 2 First Federal Elections 129–130 (summarizing proceedings from Dec. 3, 1788). A subsequent effort to jettison the requirement lost by a vote of 39 to 28. *Id.*, at 132–133 (summarizing proceedings from Dec. 10, 1788). Language in Maryland's second election law confirms that

States that adopted district residency requirements, in fact, only in North Carolina were the records so poor that it is impossible to draw any inferences about whether the legislature gave careful attention to the implications of the requirement.[34]

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the state legislature knew that it was supplementing the Qualifications Clauses. The Act of December 10, 1790, stipulated that each candidate must "b[e] a resident of his district at the time of the election, and hav[e] resided therein twelve calendar months immediately before, and [be] otherways qualified according to the constitution of the United States." 1790 Laws of Maryland, ch. XVI, art. VIII.

In Georgia, too, the State House of Assembly called special attention to the district residency requirement. Shortly before Georgia held its first federal elections, the House adopted a resolution to stress that if the top votegetter in any district had not been "an actual resident of three years standing" in that district, then "such person shall not be considered as eligible nor shall he be commissioned." 2 First Federal Elections 459 (resolution of Feb. 4, 1789).

[34] Even the experience in New York and South Carolina—the only States that opted for district elections without requiring district residency—does not support the majority's position. While the records from South Carolina are sketchy, those from New York affirmatively undermine the majority's suggestion that the Qualifications Clauses were commonly understood to be exclusive. When the topic was first broached in the State Assembly, the assemblymen defeated a district residency proposal amid comments that "to add any other qualification [to those listed in the Constitution] would be unconstitutional." 3 First Federal Elections 232 (Dec. 18, 1788). But the State Senate took a different view, adding a district residency requirement when it considered the election bill. *Id.*, at 320. The Assembly then approved the requirement by a vote of 36 to 12, *id.*, at 325–326 (Jan. 19, 1789), but reconsidered the requirement the following day (apparently with more assemblymen in attendance). After a sophisticated debate on the constitutional question, with some assemblymen arguing that the district residency requirement was unconstitutional and others responding that the Constitution merely erected minimum qualifications, the Assembly divided evenly over the requirement: 28 voted in favor of it and 28 voted against it. *Id.*, at 328–335 (Jan. 20, 1789). The chairman broke the tie with a vote against the requirement. *Id.*, at 335. Still, there clearly was no consensus in the New York Assembly. What is more, some of the votes against the district residency requirement may well have been cast by assemblymen who simply opposed the requirement

The majority asserts that "state practice with respect to residency requirements does not necessarily indicate that States believed that they had a broad power to add restrictions," because the States "may simply have viewed district residency requirements as the necessary analog to state residency requirements." *Ante*, at 827, n. 41. This argument fails even on its own terms. If the States had considered district residency requirements necessary for the success of a district election system, but had agreed with the majority that the Constitution prohibited them from supplementing the constitutional list of qualifications, then they simply would have rejected the district system and used statewide elections. After all, the majority deems district residency requirements just as unconstitutional as other added qualifications. See *ante*, at 799.

The majority's argument also fails to account for the durational element of the residency requirements adopted in Georgia, North Carolina, and Virginia (and soon thereafter in Tennessee). These States obliged Congressmen not only to be district residents when elected but also to have been district residents for at least a year before then. See n. 31, *supra*.

Finally, the majority's argument cannot explain the election schemes of Maryland and Georgia. Though these States did divide themselves into congressional districts, they allowed every voter to vote for one candidate from each

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on policy grounds, as an undue restriction on the people's ability to elect nonresidents if they wanted to do so. In any event, the New York Senate obviously considered the requirement constitutional.

There is evidence that some members of the Pennsylvania Legislature considered the Qualifications Clauses to be exclusive. See 1 *id.*, at 282–288. Of course, they also believed that §2 of Article I—which calls for Members of the Federal House of Representatives to be "chosen . . . by the People of the several States"—forbade Pennsylvania to elect its representatives by districts. See *id.*, at 283. The legislatures of the five States that adopted district residency requirements, who had the Pennsylvania example before them, disagreed with the Pennsylvania legislators.

district. See Georgia Election Law (Jan. 23, 1789), in 2 First Federal Elections 456, 457; Maryland Election Law (Dec. 22, 1788), in 2 First Federal Elections 136, 138. In other words, Maryland and Georgia imposed district residency requirements despite permitting every voter in the State to vote for every representative from the State. Neither of these States could possibly have seen district residency requirements as the "necessary analog" to anything; they imposed these requirements solely for their own sake.

The majority nonetheless suggests that the initial election laws adopted by the States actually support its position because the States did not enact very many disqualifications. See *ante*, at 826–827, n. 41. In this context, the majority alludes to the fact that no State imposed a religious qualification on federal legislators, even though New Hampshire continued to require state legislators to be Protestants and North Carolina imposed a similar requirement on people holding places of trust in the State's "civil department." See *ante*, at 826–827, n. 41, and 825, n. 35. But the majority concedes that "Article VI of the Federal Constitution . . . prohibited States from imposing similar qualifications on federal legislators." *Ante*, at 825, n. 35. As discussed above, the constitutional treatment of religious qualifications tends to undermine rather than support the majority's case. See *supra*, at 903–904.

The majority also points out that no State required its own federal representatives to rotate out of office after serving one or more terms. *Ante*, at 826. At the time of the framing, however, such requirements were increasingly disfavored on policy grounds. The advantages of incumbency were substantially fewer then than now, and turnover in office was naturally quite high. The perceived advantages of term limits were therefore smaller than they are today. But the perceived disadvantages were just as great: Term limits prevented the States or the people of the States from keeping good legislators in office, even if they wanted to do so.

See G. Wood, Creation of the American Republic, 1776–1787, p. 439 (1969).

It is true that under the Articles of Confederation, four States had imposed term limits on their delegates to Congress. See *ante,* at 826. But three of these provisions added nothing to the limits in the Articles themselves, see Md. Const. of 1776, Form of Government, Art. XXVII (echoing Article of Confederation V), in 3 Thorpe 1695; N. H. Const. of 1784, Pt. II (same), in 4 Thorpe 2467; N. C. Const. of 1776, Art. XXXVII (similar), in 5 Thorpe 2793, and the other one contained only a minor variation on the provision in the Articles, see Pa. Const. of 1776, Frame of Government, § 11, in 5 Thorpe 3085. Indeed, though the majority says that "many States imposed term limits on state officers," *ante,* at 825–826, it appears that at the time of the framing only Pennsylvania imposed any restriction on the reelection of members of the state legislature, and Pennsylvania deleted this restriction when it adopted a new Constitution in 1790. Compare Pa. Const. of 1776, Frame of Government, § 8, in 5 Thorpe 3084, with Pa. Const. of 1790, in 5 Thorpe 3092–3103; cf. Va. Const. of 1776, Form of Government (perhaps imposing term limits on members of the upper house of the state legislature), in 7 Thorpe 3816. It seems likely, then, that the failure of any State to impose term limits on its senators and representatives simply reflected policy-based decisions against such restrictions.

The majority counters that the delegates at three state ratifying conventions—in Virginia, New York, and North Carolina—"proposed amendments that would have required rotation." *Ante,* at 813; cf. *ante,* at 826, and n. 40. But the amendments proposed by both the North Carolina Convention and the Virginia Convention would have imposed term limits only on the President, not on Members of Congress. See 4 Elliot 245 (North Carolina) ("[N]o person shall be capable of being President of the United States for more than eight years in any term of fifteen years"); 3 *id.,* at 660

(Virginia) (similar). If the majority is correct that these conventions also "voiced support for term limits for Members of Congress," see *ante*, at 826,[35] then the evidence from these conventions supports my position rather than the majority's: the conventions deemed it necessary for the Constitution itself to impose term limits on the President (because no State could do that on its own), but they did not think it necessary for the Constitution to impose term limits on Members of Congress. This understanding at the Virginia and North Carolina conventions meshes with the election laws adopted by both States, which reflected the view that States could supplement the Qualifications Clauses. See *supra*, at 905, and n. 31, 909.[36]

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[35] The majority correctly notes that each convention, in addition to proposing a list of specific "Amendments to the Constitution," proposed a "Declaration of Rights" to be appended to the Constitution. In both States, this "Declaration" contained the general exhortation that members of both the Legislative and Executive Branches "should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections." 4 Elliot 243; 3 *id.*, at 657–658. But both Declarations went on to state that at these elections, the previous occupants of the office in question should "be eligible or ineligible [for reelection], as the rules of the constitution of government and the laws shall direct." 4 *id.*, at 243; 3 *id.*, at 658. Accordingly, it is hard to describe either Declaration as a "proposed . . . constitutional amendment supporting term limits for Members of Congress." See *ante*, at 826, n. 40.

[36] As for New York, the State's ratifying convention did propose amending the Federal Constitution to provide "[t]hat no person be eligible as a senator for more than six years in any term of twelve years." 1 Elliot 329–330. The majority finds it significant that when this suggestion fell on deaf ears, New Yorkers did not amend their State Constitution to impose this restriction on their state legislature's appointment authority. Before the Seventeenth Amendment was adopted, however, the Federal Constitution vested the choice of Senators in the state legislatures rather than the people. See Art. I, § 3, cl. 1. At least without a delegation of this authority from the legislature, cf. *supra*, at 878–882, and n. 16, the people of New York may well have thought that they could no more amend

If the majority can draw no support from state treatment of religious qualifications and rotation requirements, we are left only with state treatment of property qualifications. It is true that nine of the State Constitutions in effect at the time of the framing required members of the lower house of the state legislature to possess some property, see *ante*, at 823–824, n. 33, and that four of these Constitutions were revised shortly after the framing but continued to impose such requirements, see *ante*, at 824–825, and n. 35. Only one State, by contrast, established a property qualification for the Federal House of Representatives. But the fact that more States did not adopt congressional property qualifications does not mean that the Qualifications Clauses were commonly understood to be exclusive; there are a host of other explanations for the relative liberality of state election laws.[37] And whatever the explanation, the fact remains that

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the State Constitution to narrow the legislature's choices for Senator than they could amend the State Constitution to take the appointment of Senators entirely away from the legislature. It obviously would not follow that they doubted their ability to amend the State Constitution to impose constraints on their own choice of Representatives. The ratifying convention's proposal thus sheds absolutely no light on whether New Yorkers considered the Qualifications Clauses to be exclusive.

[37] Property qualifications may simply have seemed unnecessary. For instance, it surely was far more likely that a pauper would secure one of the 202 seats in the South Carolina House of Representatives than that he would secure one of South Carolina's five seats in the United States House of Representatives. Compare S. C. Const. of 1778, Art. XIII, in 6 Thorpe 3251, with U. S. Const., Art. I, § 2, cl. 3; cf. S. C. Const. of 1790, Art. I, § 3 (providing for a 122-seat State House of Representatives), in 6 Thorpe 3258. It may be significant, then, that the one State that saw fit to enact a congressional property qualification was also the State that had the largest congressional delegation. See U. S. Const., Art. I, § 2, cl. 3 (allocating 10 seats to Virginia). In addition, people of the day expected that "[t]he representatives of each State [in the federal House] . . . will probably in all cases have been members . . . of the State legislature." The Federalist No. 56, at 348 (Madison); see also n. 17, *supra* (quoting article by John Stevens, Jr.). Because most States had property re-

five of the election laws enacted immediately after ratification of the Constitution imposed additional qualifications that would clearly be unconstitutional under today's holding. This history of state practice—which is every bit as strong as the history we deemed "decisive" in *McPherson* v. *Blacker*, 146 U. S., at 36—refutes the majority's position that the Qualifications Clauses were generally understood to include an unstated exclusivity provision.

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The same is true of the final category of historical evidence discussed by the majority: controversies in the House and the Senate over seating candidates who were duly elected but who arguably failed to satisfy qualifications imposed by state law.

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quirements for their state legislators, there may have been little perceived need for a separate property qualification for their Members of Congress.

Even States that wanted to create such a qualification, and that considered it within their constitutional authority to do so, might have been deterred by the possibility that the Federal House of Representatives would take a different view. As I have shown, there certainly was no general understanding that the Qualifications Clauses included an unstated exclusivity provision. But people of the day did consider this to be "one of the doubtful questions on which honest men may differ with the purest motives." 14 Writings of Thomas Jefferson, at 83 (letter to Joseph C. Cabell, Jan. 31, 1814); see n. 14, *supra.* If some States feared that the "honest men" in the House might throw out the results of an election because of a qualifications law, they might well have thought that any policy benefits of such laws were outweighed by the risk that they would temporarily be deprived of representation in Congress. Alternatively, they may simply have wanted to stay away from difficult constitutional questions. Cf. *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Thus, despite concluding that the States do enjoy the power to prescribe qualifications, Thomas Jefferson questioned whether the advantages of added qualifications were sufficient to justify enacting a law whose constitutionality could be disputed. See 14 Writings of Thomas Jefferson, at 84.

As the majority concedes, "'congressional practice has been erratic'" and is of limited relevance anyway. *Ante*, at 819 (quoting *Powell* v. *McCormack*, 395 U. S., at 545). Actions taken by a single House of Congress in 1887 or in 1964 shed little light on the original understanding of the Constitution. Presumably for that reason, the majority puts its chief emphasis on the 1807 debate in the House of Representatives about whether to seat Maryland's William McCreery. See *ante*, at 816–818. I agree with the majority that this debate might lend some support to the majority's position if it had transpired as reported in *Powell* v. *McCormack*. See *ante*, at 816–817. But the Court's discussion—both in *Powell* and today—is misleading.

A Maryland statute dating from 1802 had created a district entitled to send two representatives to the House, one of whom had to be a resident of Baltimore County and the other of whom had to be a resident of Baltimore City. McCreery was elected to the Ninth Congress as a resident of Baltimore City. After his reelection to the Tenth Congress, however, his qualifications were challenged on the ground that because he divided his time between his summer estate in Baltimore County and his residence in Washington, D. C., he was no longer a resident of Baltimore City at all.

As the majority notes, a report of the House Committee of Elections recommended that McCreery be seated on the ground that state legislatures have no authority to add to the qualifications set forth in the Constitution. See 17 Annals of Cong. 871 (1807); *ante*, at 816–817. But the committee's submission of this initial report sparked a heated debate that spanned four days, with many speeches on both sides of the issue. See 17 Annals of Cong. 871–919, 927–947 (reporting proceedings from Nov. 12, 13, 16, and 18, 1807). Finally, a large majority of the House voted to recommit the report to the Committee of Elections. *Id.*, at 950 (Nov. 19, 1807). The committee thereupon deleted all references to the

constitutional issue and issued a revised report that focused entirely on the factual question whether McCreery satisfied the state residency requirement. *Id.*, at 1059–1061 (Dec. 7, 1807). After receiving the new report, the House seated McCreery with a resolution simply saying: "*Resolved*, That William McCreery is entitled to his seat in this House." *Id.*, at 1237 (Dec. 24, 1807). By overwhelming majorities, the House rejected both a proposal to specify that McCreery possessed "the qualifications required by the law of Maryland," *ibid.*, and a proposal to declare only that he was "duly qualified, agreeably to the constitution of the United States," *id.*, at 1231. Far from supporting the majority's position, the McCreery episode merely demonstrates that the 10th House of Representatives was deeply divided over whether state legislatures may add to the qualifications set forth in the Constitution.[38]

The majority needs more than that. The prohibition that today's majority enforces is found nowhere in the text of the Qualifications Clauses. In the absence of evidence that the Clauses nonetheless were generally understood at the time of the framing to imply such a prohibition, we may not use the Clauses to invalidate the decisions of a State or its people.

III

It is radical enough for the majority to hold that the Constitution implicitly precludes the people of the States from prescribing any eligibility requirements for the congres-

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[38] Though obliquely acknowledging this fact, the majority thinks it relevant that some subsequent commentators have mistakenly accepted the gloss put on the McCreery case by two editors in 1834. See *ante*, at 817–818 (citing treatises, each of which relies upon Cases of Contested Elections in Congress (M. Clarke & D. Hall eds. 1834)). But surely we need not accept an inaccurate view of history merely because it has appeared in print. The majority also cites Thomas Jefferson's hazy recollection of the McCreery case, see *ante*, at 817, without acknowledging Jefferson's conclusion that the States were free to supplement the Qualifications Clauses. See *supra*, at 873–874.

sional candidates who seek their votes. This holding, after all, does not stop with negating the term limits that many States have seen fit to impose on their Senators and Representatives.[39] Today's decision also means that no State may disqualify congressional candidates whom a court has found to be mentally incompetent, see, *e. g.*, Fla. Stat. §§ 97.041(2), 99.021(1)(a) (1991), who are currently in prison, see, *e. g.*, Ill. Comp. Stat. Ann., ch. 10, §§ 5/3–5, 5/7–10, 5/10–5 (1993 and West Supp. 1995), or who have past vote-fraud convictions, see, *e. g.*, Ga. Code Ann. §§ 21–2–2(25), 21–2–8 (1993 and Supp. 1994). Likewise, after today's decision, the people of each State must leave open the possibility that they will trust someone with their vote in Congress even though they do not trust him with *a* vote in the election for Congress. See, *e. g.*, R. I. Gen. Laws § 17–14–1.2 (1988) (restricting candidacy to people "qualified to vote").

In order to invalidate § 3 of Amendment 73, however, the majority must go further. The bulk of the majority's analysis—like Part II of my dissent—addresses the issues that would be raised if Arkansas had prescribed "genuine, unadulterated, undiluted term limits." See Rotunda, 73 Ore. L. Rev., at 570. But as the parties have agreed, Amendment 73 does not actually create this kind of disqualification. See

[39] Going into the November 1994 elections, eight States had adopted "pure" term limits of one sort or another. See Colo. Const., Art. XVIII, § 9a; Mich. Const., Art. II, § 10; Mo. Const., Art. III, § 45(a); Mont. Const., Art. IV, § 8; Ohio Const., Art. V, § 8; Ore. Const., Art. II, § 20; S. D. Const., Art. III, § 32; Utah Code Ann. § 20A–10–301. Eight other States had enacted "ballot access" provisions triggered by long-term incumbency or multiple prior terms in Congress. See Ariz. Const., Art. VII, § 18; Ark. Const., Amdt. 73, § 3; Calif. Elec. Code Ann. § 25003 (West Supp. 1994); Fla. Const., Art. VI, §§ 4(b)(5), (6); N. D. Cent. Code § 16.1–01–13.1 (Supp. 1993); Okla. Const., Art. II, § 12A; Wash. Rev. Code §§ 29.68.015, 29.68.016 (1994); Wyo. Stat. § 22–5–104 (Supp. 1994). In the 1994 elections, six more States—Alaska, Idaho, Maine, Massachusetts, Nebraska, and Nevada—enacted term-limit or ballot-access measures, bringing to 22 the total number of States with such provisions. See Pear, The 1994 Elections, N. Y. Times, Nov. 10, 1994, p. B7, col. 4. In 21 of these States, the measures have been enacted by direct vote of the people.

Tr. of Oral Arg. 53–54; cf. *ante,* at 828. It does not say that covered candidates may not serve any more terms in Congress if reelected, and it does not indirectly achieve the same result by barring those candidates from seeking reelection. It says only that if they are to win reelection, they must do so by write-in votes.

One might think that this is a distinction without a difference. As the majority notes, "[t]he uncontested data submitted to the Arkansas Supreme Court" show that write-in candidates have won only six congressional elections in this century. *Ante,* at 830, n. 43. But while the data's accuracy is indeed "uncontested," petitioners filed an equally uncontested affidavit challenging the data's relevance. As political science professor James S. Fay swore to the Arkansas Supreme Court, "[m]ost write-in candidacies in the past have been waged by fringe candidates, with little public support and extremely low name identification." App. 201. To the best of Professor Fay's knowledge, in modern times only two incumbent Congressmen have ever sought reelection as write-in candidates. One of them was Dale Alford of Arkansas, who had first entered the House of Representatives by winning 51% of the vote as a write-in candidate in 1958; Alford then waged a write-in campaign for reelection in 1960, winning a landslide 83% of the vote against an opponent who enjoyed a place on the ballot. *Id.*, at 201–202. The other incumbent write-in candidate was Philip J. Philbin of Massachusetts, who—despite losing his party primary and thus his spot on the ballot—won 27% of the vote in his unsuccessful write-in candidacy. See *id.*, at 203. According to Professor Fay, these results—coupled with other examples of successful write-in campaigns, such as Ross Perot's victory in North Dakota's 1992 Democratic Presidential primary—"demonstrate that when a write-in candidate is well-known and well-funded, it is quite possible for him or her to win an election." *Ibid.*

The majority responds that whether "the Arkansas amendment has the likely effect of creating a qualification" is "simply irrelevant to our holding today." *Ante*, at 836. But the majority—which, after all, bases its holding on the asserted exclusivity of the Qualifications Clauses—never adequately explains how it can take this position and still reach its conclusion.

One possible explanation for why the actual effect of the Arkansas amendment might be irrelevant is that the Arkansas Supreme Court has already issued a binding determination of fact on this point. Thus, the majority notes that "the state court" has advised us that "there is nothing more than a faint glimmer of possibility that the excluded candidate will win." *Ante*, at 830. But the majority is referring to a mere plurality opinion, signed by only three of the seven justices who decided the case below. One of the two justices who concurred in the plurality's holding that Amendment 73 violates the Qualifications Clauses did write that "as a practical matter, the amendment would place term limits on service in the Congress," but he immediately followed this comment with the concession that write-in candidacies are not entirely hopeless; his point was simply that "as a practical matter, write-in candidates are at a distinct disadvantage." 316 Ark., at 276; 872 S. W. 2d, at 364 (Dudley, J., concurring in part and dissenting in part). As a result, the majority may rely upon the state court only for the proposition that Amendment 73 makes the specified candidates "distinct[ly]" worse off than they would be in its absence— an unassailable proposition that petitioners have conceded.

In the current posture of these cases, indeed, it would have been extremely irregular for the Arkansas Supreme Court to have gone any further. Disputed questions of fact, in Arkansas as elsewhere, generally are resolved at trial rather than on appeal from the entry of summary judgment. See

Ark. Rule Civ. Proc. 56.[40] Accordingly, the majority explicitly disclaims any reliance on the state court's purported finding about the effect of Amendment 73. See *ante*, at 830, n. 44.

Instead, the majority emphasizes another purported conclusion of the Arkansas Supreme Court. As the majority notes, the plurality below asserted that "[t]he intent" of Amendment 73 was "to disqualify congressional incumbents from further service." 316 Ark., at 266, 872 S. W. 2d, at 357. According to the majority, "[w]e must, of course, accept the state court's view of the purpose of its own law: We are thus authoritatively informed that the sole purpose of § 3 of Amendment 73 was to attempt to achieve a result that is forbidden by the Federal Constitution." *Ante*, at 829.

I am not sure why the intent behind a law should affect our analysis under the Qualifications Clauses. If a law does not in fact add to the constitutional qualifications, the mistaken expectations of the people who enacted it would not seem to affect whether it violates the alleged exclusivity of those Clauses. But in any event, the majority is wrong about what "the state court" has told us. Even the plurality

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[40] Even if one were inclined to believe that the Arkansas Supreme Court had departed from the usual practice and had purported to make a binding determination on a disputed issue of fact, we would not be foreclosed from examining the basis for that determination. To be sure, on direct review of a state court's judgment, we will not "conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings." *Hernandez* v. *New York*, 500 U. S. 352, 369 (1991) (plurality opinion). But that is only to say that we will review state-court findings under the "clear error" standard. *Ibid.;* accord, *id.*, at 372 (O'CONNOR, J., concurring in judgment); cf. *id.*, at 379 (STEVENS, J., dissenting) (identifying no standard of review, but arguing that the state court's decision should be reversed because its underlying factual findings were erroneous). In certain areas, indeed, this Court apparently gives quite little deference to the initial factfinder, but rather "exercise[s] its own independent judgment" about the factual conclusions that should be drawn from the record. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 501, and n. 17 (1984) (STEVENS, J.).

below did not flatly assert that the desire to "disqualify" congressional incumbents was the *sole* purpose behind § 3 of Amendment 73. More important, neither of the justices who concurred in the plurality's holding said anything at all about the intent behind Amendment 73. As a result, we cannot attribute any findings on this issue to the Arkansas Supreme Court.

The majority suggests that this does not matter, because Amendment 73 itself says that it has the purpose of "evading the requirements of the Qualifications Clauses." See *ante*, at 831 (referring to the "avowed purpose" of Amendment 73). The majority bases this assertion on the amendment's preamble, which speaks of "limit[ing] the terms of elected officials." See *ante*, at 830. But this statement may be referring only to §§ 1 and 2 of Amendment 73, which impose true term limits on state officeholders. Even if the statement refers to § 3 as well, it may simply reflect the limiting effects that the drafters of the preamble expected to flow from what they perceived as the restoration of electoral competition to congressional races. See *infra*, at 924. In any event, inquiries into legislative intent are even more difficult than usual when the legislative body whose unified intent must be determined consists of 825,162 Arkansas voters.

The majority nonetheless thinks it clear that the goal of § 3 is "to prevent the election of incumbents." See *ante*, at 830, 836. In reaching this conclusion at the summary-judgment stage, however, the majority has given short shrift to petitioners' contrary claim. Petitioners do not deny that § 3 of Amendment 73 intentionally handicaps a class of candidates, in the sense that it decreases their pre-existing electoral chances. But petitioners do deny that § 3 is intended to (or will in fact) "prevent" the covered candidates from winning reelection, or "disqualify" them from further service. One of petitioners' central arguments is that congressionally conferred advantages have artificially inflated the pre-existing electoral chances of the covered candidates, and

that Amendment 73 is merely designed to level the playing field on which challengers compete with them.

To understand this argument requires some background. Current federal law (enacted, of course, by congressional incumbents) confers numerous advantages on incumbents, and these advantages are widely thought to make it "significantly more difficult" for challengers to defeat them. Cf. *ante*, at 831. For instance, federal law gives incumbents enormous advantages in building name recognition and good will in their home districts. See, *e. g.*, 39 U. S. C. § 3210 (permitting Members of Congress to send "franked" mail free of charge); 2 U. S. C. §§ 61–1, 72a, 332 (permitting Members to have sizable taxpayer-funded staffs); 2 U. S. C. § 123b (establishing the House Recording Studio and the Senate Recording and Photographic Studios).[41] At the same time that incumbent Members of Congress enjoy these in-kind benefits, Congress imposes spending and contribution limits in congressional campaigns that "can prevent challengers from spending more . . . to overcome their disadvantage in name recognition." App. to Brief for State of Washington as *Amicus Curiae* A–4 (statement of former 10-term Representative William E. Frenzel, referring to 2 U. S. C. § 441a). Many observers believe that the campaign-finance laws also give incumbents an "enormous fund-raising edge" over their challengers by giving a large financing role to entities with incentives to curry favor with incumbents. Wertheimer & Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1133 (1994). In

[41] Former Representative William E. Frenzel describes the House Recording Studio as a sophisticated operation used "to prepare tapes of speeches and messages to voters." Frenzel explains: "Taxpayers pay for the facilities, the personnel that run them, the production costs, and the costs of distributing, by mail or otherwise, the tapes that members supply (from their taxpayer-funded expense accounts). These messages are widely disseminated by broadcasters, who can use them to fill air time at no cost to themselves." App. to Brief for State of Washington as *Amicus Curiae* A–5 to A–6.

addition, the internal rules of Congress put a substantial premium on seniority, with the result that each Member's already plentiful opportunities to distribute benefits to his constituents increase with the length of his tenure. In this manner, Congress effectively "fines" the electorate for voting against incumbents. Hills, 53 U. Pitt. L. Rev., at 144–145.

Cynics see no accident in any of this. As former Representative Frenzel puts it: "The practice . . . is for incumbents to devise institutional structures and systems that favor incumbents." App. to Brief for State of Washington as *Amicus Curiae* A–3. In fact, despite his service from 1971 to 1989 on the House Administration Committee (which has jurisdiction over election laws), Representative Frenzel can identify no instance in which Congress "changed election laws in such a way as to lessen the chances of re-election for incumbents, or to improve the election opportunities for challengers." *Ibid.*

At the same time that incumbents enjoy the electoral advantages that they have conferred upon themselves, they also enjoy astonishingly high reelection rates. As Lloyd Cutler reported in 1989, "over the past thirty years a weighted average of ninety percent of all House and Senate incumbents of both parties who ran for reelection were reelected, even at times when their own party lost control of the Presidency itself." Cutler, Now is the Time for All Good Men . . . , 30 Wm. & Mary L. Rev. 387, 395; see also Kristol, Term Limitations: Breaking Up the Iron Triangle, 16 Harv. J. L. & Pub. Policy 95, 97, and n. 11 (1993) (reporting that in the 100th Congress, as many Representatives died as were defeated at the polls). Even in the November 1994 elections, which are widely considered to have effected the most sweeping change in Congress in recent memory, 90% of the incumbents who sought reelection to the House were successful, and nearly half of the losers were completing only their first terms. Reply Brief for Petitioners U. S. Term Limits, Inc., et al. 4, n. 5. Only 2 of the 26 Senate incumbents seeking reelection were defeated, see *ibid.*, and one of

them had been elected for the first time in a special election only a few years earlier.

The voters of Arkansas evidently believe that incumbents would not enjoy such overwhelming success if electoral contests were truly fair—that is, if the government did not put its thumb on either side of the scale. The majority offers no reason to question the accuracy of this belief. Given this context, petitioners portray § 3 of Amendment 73 as an effort at the state level to offset the electoral advantages that congressional incumbents have conferred upon themselves at the federal level.

To be sure, the offset is only rough and approximate; no one knows exactly how large an electoral benefit comes with having been a long-term Member of Congress, and no one knows exactly how large an electoral disadvantage comes from forcing a well-funded candidate with high name recognition to run a write-in campaign. But the majority does not base its holding on the premise that Arkansas has struck the wrong balance. Instead, the majority holds that the Qualifications Clauses preclude Arkansas from trying to strike any balance at all; the majority simply says that "an amendment with the avowed purpose and obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand." *Ante*, at 831. Thus, the majority apparently would reach the same result even if one could demonstrate at trial that the electoral advantage conferred by Amendment 73 upon challengers precisely counterbalances the electoral advantages conferred by federal law upon long-term Members of Congress.

For me, this suggests only two possibilities. Either the majority's holding is wrong and Amendment 73 does not violate the Qualifications Clauses, or (assuming the accuracy of petitioners' factual claims) the electoral system that exists without Amendment 73 is no less unconstitutional than the electoral system that exists with Amendment 73.

I do not mean to suggest that States have unbridled power to handicap particular classes of candidates, even when those candidates enjoy federally conferred advantages that may threaten to skew the electoral process. But laws that allegedly have the purpose and effect of handicapping a particular class of candidates traditionally are reviewed under the First and Fourteenth Amendments rather than the Qualifications Clauses. Compare *Storer* v. *Brown*, 415 U. S., at 728–736 (undertaking a lengthy First and Fourteenth Amendment analysis of a California rule that denied ballot access to any independent candidate for Congress who had not severed his ties to a political party at least one year prior to the immediately preceding primary election, or 17 months before the general election), with *id.*, at 746, n. 16 (dismissing as "wholly without merit" the notion that this rule might violate the Qualifications Clauses). Term-limit measures have tended to survive such review without difficulty. See, *e. g.*, *Moore* v. *McCartney*, 425 U. S. 946 (1976) (dismissing an appeal from *State ex rel. Maloney* v. *McCartney*, 159 W. Va. 513, 223 S. E. 2d 607, on the ground that limits on the terms of state officeholders do not even raise a substantial federal question under the First and Fourteenth Amendments).

To analyze such laws under the Qualifications Clauses may open up whole new vistas for courts. If it is true that "the current congressional campaign finance system . . . has created an electoral system so stacked against challengers that in many elections voters have no real choices," Wertheimer & Manes, 94 Colum. L. Rev., at 1133, are the Federal Election Campaign Act Amendments of 1974 unconstitutional under (of all things) the Qualifications Clauses? Cf. *Buckley* v. *Valeo*, 424 U. S. 1 (1976) (upholding the current system against First Amendment challenge). If it can be shown that nonminorities are at a significant disadvantage when they seek election in districts dominated by minority voters, would the intentional creation of "majority-minority

districts" violate the Qualifications Clauses even if it were to survive scrutiny under the Fourteenth Amendment? Cf. *Shaw* v. *Reno*, 509 U. S. 630, 649 (1993) ("[W]e express no view as to whether [the intentional creation of such districts] always gives rise to an equal protection claim"); *id.*, at 677 (STEVENS, J., dissenting) (arguing that States may draw district lines for the "sole purpose" of helping blacks or members of certain other groups win election to Congress). More generally, if "[d]istrict lines are rarely neutral phenomena" and if "districting inevitably has and is intended to have substantial political consequences," *Gaffney* v. *Cummings*, 412 U. S. 735, 753 (1973), will plausible Qualifications Clause challenges greet virtually every redistricting decision? Cf. *id.*, at 754 (noting our general refusal to use the Equal Protection Clause to "attemp[t] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States"); see also *Burns* v. *Richardson*, 384 U. S. 73, 89, n. 16 (1966) (finding nothing invidious in the practice of drawing district lines in a way that helps current incumbents by avoiding contests between them).

The majority's opinion may not go so far, although it does not itself suggest any principled stopping point. No matter how narrowly construed, however, today's decision reads the Qualifications Clauses to impose substantial implicit prohibitions on the States and the people of the States. I would not draw such an expansive negative inference from the fact that the Constitution requires Members of Congress to be a certain age, to be inhabitants of the States that they represent, and to have been United States citizens for a specified period. Rather, I would read the Qualifications Clauses to do no more than what they say. I respectfully dissent.

Syllabus

WILSON *v.* ARKANSAS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 94–5707. Argued March 28, 1995—Decided May 22, 1995

Petitioner was convicted on state-law drug charges after the Arkansas trial court denied her evidence-suppression motion, in which she asserted that the search of her home was invalid because, *inter alia*, the police had violated the common-law principle requiring them to announce their presence and authority before entering. The State Supreme Court affirmed, rejecting petitioner's argument that the common-law "knock and announce" principle is required by the Fourth Amendment.

Held: The common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry. Pp. 931–937.

(a) An officer's unannounced entry into a home might, in some circumstances, be unreasonable under the Amendment. In evaluating the scope of the constitutional right to be secure in one's house, this Court has looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. Given the longstanding common-law endorsement of the practice of announcement, and the wealth of founding-era commentaries, constitutional provisions, statutes, and cases espousing or supporting the knock and announce principle, this Court has little doubt that the Amendment's Framers thought that whether officers announced their presence and authority before entering a dwelling was among the factors to be considered in assessing a search's reasonableness. Nevertheless, the common-law principle was never stated as an inflexible rule requiring announcement under all circumstances. Countervailing law enforcement interests—including, *e. g.*, the threat of physical harm to police, the fact that an officer is pursuing a recently escaped arrestee, and the existence of reason to believe that evidence would likely be destroyed if advance notice were given—may establish the reasonableness of an unannounced entry. For now, this Court leaves to the lower courts the task of determining such relevant countervailing factors. Pp. 934–936.

(b) Respondent's asserted reasons for affirming the judgment below—that the police reasonably believed that a prior announcement would have placed them in peril and would have produced an unreasonable risk that petitioner would destroy easily disposable narcotics evidence—may well provide the necessary justification for the unannounced entry in this case. The case is remanded to allow the state

Syllabus

courts to make the reasonableness determination in the first instance. P. 937.

317 Ark. 548, 878 S. W. 2d 755, reversed and remanded.

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

John Wesley Hall, Jr., argued the cause and filed briefs for petitioner.

Winston Bryant, Attorney General of Arkansas, argued the cause for respondent. With him on the briefs were *Kent G. Holt*, *Vada Berger*, and *David R. Raupp*, Assistant Attorneys General, and *Andrew D. Leipold*.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days*, *Assistant Attorney General Harris*, *Paul A. Engelmayer*, and *Deborah Watson*.*

**Tracey Maclin*, *Steven R. Shapiro*, and *Ephraim Margolin* filed a brief for the American Civil Liberties Union et al. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Daniel E. Lungren*, Attorney General of California, *Richard Rochman*, Assistant Attorney General, and *Eleni M. Constantine*, and by the Attorneys General for their respective jurisdictions as follows: *Jeff Sessions* of Alabama, *Grant Woods* of Arizona, *Gale A. Norton* of Colorado, *M. Jane Brady* of Delaware, *Robert A. Butterworth* of Florida, *Margery S. Bronster* of Hawaii, *Alan G. Lance* of Idaho, *Jim Ryan* of Illinois, *Tom Miller* of Iowa, *Carla J. Stovall* of Kansas, *Chris Gorman* of Kentucky, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Frank J. Kelley* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. "Jay" Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Deborah T. Poritz* of New Jersey, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty Montgomery* of Ohio, *Theodore R. Kulongoski* of Oregon, *Jeffrey B. Pine* of Rhode Island, *Charlie Condon* of South Carolina, *Mark Bennett* of South Dakota, *Dan Morales* of Texas, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, and *James S. Gilmore III* of Virginia; for Wayne County, Michigan, by *John D. O'Hair* and *Timothy A. Baughman;* and for Americans for Effective Law Enforcement, Inc., et al. by *Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, *Richard M. Weintraub*, *Robert L. Deschamps*, and *Bernard J. Farber*.

JUSTICE THOMAS delivered the opinion of the Court.

At the time of the framing, the common law of search and seizure recognized a law enforcement officer's authority to break open the doors of a dwelling, but generally indicated that he first ought to announce his presence and authority. In this case, we hold that this common-law "knock and announce" principle forms a part of the reasonableness inquiry under the Fourth Amendment.

I

During November and December 1992, petitioner Sharlene Wilson made a series of narcotics sales to an informant acting at the direction of the Arkansas State Police. In late November, the informant purchased marijuana and methamphetamine at the home that petitioner shared with Bryson Jacobs. On December 30, the informant telephoned petitioner at her home and arranged to meet her at a local store to buy some marijuana. According to testimony presented below, petitioner produced a semiautomatic pistol at this meeting and waved it in the informant's face, threatening to kill her if she turned out to be working for the police. Petitioner then sold the informant a bag of marijuana.

The next day, police officers applied for and obtained warrants to search petitioner's home and to arrest both petitioner and Jacobs. Affidavits filed in support of the warrants set forth the details of the narcotics transactions and stated that Jacobs had previously been convicted of arson and firebombing. The search was conducted later that afternoon. Police officers found the main door to petitioner's home open. While opening an unlocked screen door and entering the residence, they identified themselves as police officers and stated that they had a warrant. Once inside the home, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. They also found petitioner in the bathroom, flushing marijuana down the toilet. Petitioner and Jacobs were arrested and

charged with delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia, and possession of marijuana.

Before trial, petitioner filed a motion to suppress the evidence seized during the search. Petitioner asserted that the search was invalid on various grounds, including that the officers had failed to "knock and announce" before entering her home. The trial court summarily denied the suppression motion. After a jury trial, petitioner was convicted of all charges and sentenced to 32 years in prison.

The Arkansas Supreme Court affirmed petitioner's conviction on appeal. 317 Ark. 548, 878 S. W. 2d 755 (1994). The court noted that "the officers entered the home *while they were identifying themselves*," but it rejected petitioner's argument that "the Fourth Amendment requires officers to knock and announce prior to entering the residence." *Id.*, at 553, 878 S. W. 2d, at 758 (emphasis added). Finding "no authority for [petitioner's] theory that the knock and announce principle is required by the Fourth Amendment," the court concluded that neither Arkansas law nor the Fourth Amendment required suppression of the evidence. *Ibid.*

We granted certiorari to resolve the conflict among the lower courts as to whether the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry.[1] 513 U. S. 1014 (1995). We hold that it does, and accordingly reverse and remand.

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[1] See, *e. g.*, *People* v. *Gonzalez*, 211 Cal. App. 3d 1043, 1048, 259 Cal. Rptr. 846, 848 (1989) ("Announcement and demand for entry at the time of service of a search warrant [are] part of Fourth Amendment reasonableness"); *People* v. *Saechao*, 129 Ill. 2d 522, 531, 544 N. E. 2d 745, 749 (1989) ("[T]he presence or absence of such an announcement is an important consideration in determining whether subsequent entry to arrest or search is constitutionally reasonable") (internal quotation marks omitted); *Commonwealth* v. *Goggin*, 412 Mass. 200, 202, 587 N. E. 2d 785, 787 (1992) ("Our knock and announce rule is one of common law which is not constitutionally compelled").

II

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." In evaluating the scope of this right, we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. See *California* v. *Hodari D.*, 499 U. S. 621, 624 (1991); *United States* v. *Watson*, 423 U. S. 411, 418–420 (1976); *Carroll* v. *United States*, 267 U. S. 132, 149 (1925). "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," *New Jersey* v. *T. L. O.*, 469 U. S. 325, 337 (1985), our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment. An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering.

Although the common law generally protected a man's house as "his castle of defence and asylum," 3 W. Blackstone, Commentaries *288 (hereinafter Blackstone), common-law courts long have held that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter." *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K. B. 1603). To this rule, however, common-law courts appended an important qualification:

> "But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no

> default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it . . . ." *Ibid.*, 77 Eng. Rep., at 195–196.

See also *Case of Richard Curtis*, Fost. 135, 137, 168 Eng. Rep. 67, 68 (Crown 1757) ("[N]o precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . ."); *Lee* v. *Gansell*, Lofft 374, 381–382, 98 Eng. Rep. 700, 705 (K. B. 1774) ("[A]s to the outer door, the law is now clearly taken" that it is privileged; but the door may be broken "when the due notification and demand has been made and refused").[2]

Several prominent founding-era commentators agreed on this basic principle. According to Sir Matthew Hale, the "constant practice" at common law was that "the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuses to open the door." See 1 M. Hale, Pleas of the Crown *582. William Hawkins propounded a similar principle: "the law doth never allow" an officer to break open the door of a dwelling "but in cases of necessity," that is, unless he "first signify to those in the house the cause of his coming, and request them to give him admittance." 2 W. Hawkins, Pleas of the Crown, ch. 14, § 1, p. 138 (6th ed. 1787).

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[2] This "knock and announce" principle appears to predate even *Semayne's Case*, which is usually cited as the judicial source of the common-law standard. *Semayne's Case* itself indicates that the doctrine may be traced to a statute enacted in 1275, and that at that time the statute was "but an affirmance of the common law." 5 Co. Rep., at 91b, 77 Eng. Rep., at 196 (referring to 3 Edw. I, ch. 17, in 1 Statutes at Large from Magna Carta to Hen. 6 (O. Ruffhead ed. 1769) (providing that if any person takes the beasts of another and causes them "to be driven into a Castle or Fortress," if the sheriff makes "solem[n] deman[d]" for deliverance of the beasts, and if the person "did not cause the Beasts to be delivered incontinent," the King "shall cause the said Castle or Fortress to be beaten down without Recovery")).

Sir William Blackstone stated simply that the sheriff may "justify breaking open doors, if the possession be not quietly delivered." 3 Blackstone *412.

The common-law knock and announce principle was woven quickly into the fabric of early American law. Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law, see, *e. g.*, N. J. Const. of 1776, § 22, in 5 Federal and State Constitutions 2598 (F. Thorpe ed. 1909) ("[T]he common law of England . . . shall still remain in force, until [it] shall be altered by a future law of the Legislature"); N. Y. Const. of 1777, Art. 35, in *id.*, at 2635 ("[S]uch parts of the common law of England . . . as . . . did form the law of [New York on April 19, 1775] shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"); Ordinances of May 1776, ch. 5, § 6, in 9 Statutes at Large of Virginia 127 (W. Hening ed. 1821) ("[T]he common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony"), and a few States had enacted statutes specifically embracing the common-law view that the breaking of the door of a dwelling was permitted once admittance was refused, see, *e. g.*, Act of Nov. 8, 1782, ch. 15, ¶ 6, in Acts and Laws of Massachusetts 193 (1782); Act of Apr. 13, 1782, ch. 39, § 3, in 1 Laws of the State of New York 480 (1886); Act of June 24, 1782, ch. 317, § 18, in Acts of the General Assembly of New-Jersey (1784) (reprinted in The First Laws of the State of New Jersey 293–294 (J. Cushing comp. 1981)); Act of Dec. 23, 1780, ch. 925, § 5, in 10 Statutes at Large of Pennsylvania 255 (J. Mitchell & H. Flanders comp. 1904). Early American courts similarly embraced the common-law knock and announce principle. See, *e. g.*, *Walker* v. *Fox*, 32 Ky. 404, 405 (1834); *Burton* v. *Wilkinson*, 18 Vt. 186, 189 (1846); *Howe* v. *Butterfield*, 58 Mass. 302, 305 (1849). See generally Blakey, The

Rule of Announcement and Unlawful Entry, 112 U. Pa. L. Rev. 499, 504–508 (1964) (collecting cases).

Our own cases have acknowledged that the common-law principle of announcement is "embedded in Anglo-American law," *Miller* v. *United States*, 357 U. S. 301, 313 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment.[3] We now so hold. Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

This is not to say, of course, that every entry must be preceded by an announcement. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests. As even petitioner concedes, the common-law principle of announcement was never stated as an inflexible rule requiring announcement under all circumstances. See *Ker* v. *California*, 374 U. S. 23, 38 (1963) (plurality opinion) ("[I]t has been recognized from the early common law that . . . breaking is permissible in executing an arrest under certain circumstances"); see also, *e. g.*,

[3] In *Miller*, our discussion focused on the statutory requirement of announcement found in 18 U. S. C. § 3109 (1958 ed.), not on the constitutional requirement of reasonableness. See 357 U. S., at 306, 308, 313. See also *Sabbath* v. *United States*, 391 U. S. 585, 591, n. 8 (1968) (suggesting that both the "common law" rule of announcement and entry and its "exceptions" were codified in § 3109); *Ker* v. *California*, 374 U. S. 23, 40–41 (1963) (plurality opinion) (reasoning that an unannounced entry was reasonable under the "exigent circumstances" of that case, without addressing the antecedent question whether the lack of announcement might render a search unreasonable under other circumstances).

White & Wiltsheire, 2 Rolle 137, 138, 81 Eng. Rep. 709, 710 (K. B. 1619) (upholding the sheriff's breaking of the door of the plaintiff's dwelling after the sheriff's bailiffs had been imprisoned in plaintiff's dwelling while they attempted an earlier execution of the seizure); *Pugh* v. *Griffith*, 7 Ad. & E. 827, 840–841, 112 Eng. Rep. 681, 686 (K. B. 1838) (holding that "the necessity of a demand . . . is obviated, because there was nobody on whom a demand could be made" and noting that *White & Wiltsheire* leaves open the possibility that there may be "other occasions where the outer door may be broken" without prior demand).

Indeed, at the time of the framing, the common-law admonition that an officer "ought to signify the cause of his coming," *Semayne's Case*, 5 Co. Rep., at 91b, 77 Eng. Rep., at 195, had not been extended conclusively to the context of felony arrests. See Blakey, *supra*, at 503 ("The full scope of the application of the rule in criminal cases . . . was never judicially settled"); *Launock* v. *Brown*, 2 B. & Ald. 592, 593, 106 Eng. Rep. 482, 483 (K. B. 1819) ("It is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of his house"); W. Murfree, Law of Sheriffs and Other Ministerial Officers § 1163, p. 631 (1st ed. 1884) ("[A]lthough there has been some doubt on the question, the better opinion seems to be that, in cases of felony, no demand of admittance is necessary, especially as, in many cases, the delay incident to it would enable the prisoner to escape"). The common-law principle gradually was applied to cases involving felonies, but at the same time the courts continued to recognize that under certain circumstances the presumption in favor of announcement necessarily would give way to contrary considerations.

Thus, because the common-law rule was justified in part by the belief that announcement generally would avoid "the destruction or breaking of any house . . . by which great

damage and inconvenience might ensue," *Semayne's Case*, *supra*, at 91b, 77 Eng. Rep., at 196, courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence. See, *e. g.*, *Read* v. *Case*, 4 Conn. 166, 170 (1822) (plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of the rule requiring notice"); *Mahomed* v. *The Queen*, 4 Moore 239, 247, 13 Eng. Rep. 293, 296 (P. C. 1843) ("While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary"). Similarly, courts held that an officer may dispense with announcement in cases where a prisoner escapes from him and retreats to his dwelling. See, *e. g.*, *ibid.*; *Allen* v. *Martin*, 10 Wend. 300, 304 (N. Y. Sup. Ct. 1833). Proof of "demand and refusal" was deemed unnecessary in such cases because it would be a "senseless ceremony" to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him. *Id.*, at 304. Finally, courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given. See *Ker*, *supra*, at 40–41 (plurality opinion); *People* v. *Maddox*, 46 Cal. 2d 301, 305–306, 294 P. 2d 6, 9 (1956).

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

III

Respondent contends that the judgment below should be affirmed because the unannounced entry in this case was justified for two reasons. First, respondent argues that police officers reasonably believed that a prior announcement would have placed them in peril, given their knowledge that petitioner had threatened a government informant with a semiautomatic weapon and that Mr. Jacobs had previously been convicted of arson and firebombing. Second, respondent suggests that prior announcement would have produced an unreasonable risk that petitioner would destroy easily disposable narcotics evidence.

These considerations may well provide the necessary justification for the unannounced entry in this case. Because the Arkansas Supreme Court did not address their sufficiency, however, we remand to allow the state courts to make any necessary findings of fact and to make the determination of reasonableness in the first instance. The judgment of the Arkansas Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.[4]

It is so ordered.

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[4] Respondent and its *amici* also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. Analogizing to the "independent source" doctrine applied in *Segura* v. *United States*, 468 U. S. 796, 805, 813–816 (1984), and the "inevitable discovery" rule adopted in *Nix* v. *Williams*, 467 U. S. 431, 440–448 (1984), respondent and its *amici* argue that any evidence seized after an unreasonable, unannounced entry is causally disconnected from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments.

Syllabus

FIRST OPTIONS OF CHICAGO, INC. *v.* KAPLAN ET AL.

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

No. 94–560. Argued March 22, 1995—Decided May 22, 1995

This case arose out of disputes centered on a "workout" agreement, embodied in four documents, which governs the "working out" of debts owed by respondents—Manuel Kaplan, his wife, and his wholly owned investment company, MK Investments, Inc. (MKI)—to petitioner First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange. When First Options' demands for payment went unsatisfied, it sought arbitration by a stock exchange panel. MKI, which had signed the only workout document containing an arbitration agreement, submitted to arbitration, but the Kaplans, who had not signed that document, filed objections with the panel, denying that their disagreement with First Options was arbitrable. The arbitrators decided that they had the power to rule on the dispute's merits and ruled in First Options' favor. The District Court confirmed the award, but the Court of Appeals reversed. In finding that the dispute was not arbitrable, the Court of Appeals said that courts should independently decide whether an arbitration panel has jurisdiction over a dispute, and that it would apply ordinary standards of review when considering the District Court's denial of respondents' motion to vacate the arbitration award.

Held:

1. The arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts. Pp. 942–947.

(a) The answer to the narrow question whether the arbitrators or the courts have the primary power to decide whether the parties agreed to arbitrate a dispute's merits is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, *e. g.*, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, *ante*, at 52, so the question "who has the primary power to decide arbitrability" turns upon whether the parties agreed to submit that question to arbitration. If so, then the court should defer to the arbitrator's arbitrability decision. If not, then the court should decide the question independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties. Pp. 942–943.

Syllabus

(b) The Kaplans did not agree to arbitrate arbitrability. Courts generally should apply ordinary state-law principles governing contract formation in deciding whether such an agreement exists. However, courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. See, *e. g.*, *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649. First Options cannot show a clear agreement on the part of the Kaplans. The Kaplans' objections to the arbitrators' jurisdiction indicate that they did not want the arbitrators to have binding authority over them. This conclusion is supported by (1) an obvious explanation for their presence before the arbitrators (*i. e.*, Mr. Kaplan's wholly owned firm was arbitrating workout agreement matters); and (2) Third Circuit law, which suggested that they might argue arbitrability to the arbitrators without losing their right to independent court review. First Options' counterarguments are unpersuasive. Pp. 943–947.

2. Courts of appeals should apply ordinary standards when reviewing district court decisions upholding arbitration awards, *i. e.*, accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo;* they should not, in those circumstances, apply a special "abuse of discretion" standard. It is undesirable to make the law more complicated by proliferating special review standards without good reason. More importantly, a court of appeals' reviewing attitude toward a district court decision should depend upon the respective institutional advantages of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result. Nothing in the Arbitration Act supports First Options' claim that a court of appeals should use a different standard when conducting review of certain district court decisions. Pp. 947–949.

3. The factbound question whether the Court of Appeals erred in its ultimate conclusion that the dispute was not arbitrable is beyond the scope of the questions this Court agreed to review. P. 949.

19 F. 3d 1503, affirmed.

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

James D. Holzhauer argued the cause for petitioner. With him on the briefs were *Timothy S. Bishop, Stephen P. Bedell, Timothy G. McDermott,* and *Kenneth E. Wile.*

John G. Roberts, Jr., argued the cause for respondents. With him on the brief for respondent Manuel Kaplan were *Donald L. Perelman, Richard A. Koffman,* and *David G.*

Leitch. Gary A. Rosen filed a brief for respondent Carol Kaplan.*

JUSTICE BREYER delivered the opinion of the Court.

In this case we consider two questions about how courts should review certain matters under the federal Arbitration Act, 9 U. S. C. § 1 *et seq.* (1988 ed. and Supp. V): (1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and (2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award.

I

The case concerns several related disputes between, on one side, First Options of Chicago, Inc., a firm that clears stock trades on the Philadelphia Stock Exchange, and, on the other side, three parties: Manuel Kaplan; his wife, Carol Kaplan; and his wholly owned investment company, MK Investments, Inc. (MKI), whose trading account First Options cleared. The disputes center on a "workout" agreement, embodied in four separate documents, which governs the "working out" of debts to First Options that MKI and the Kaplans incurred as a result of the October 1987 stock market crash. In 1989, after entering into the agreement, MKI lost an additional $1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange.

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*Briefs of *amici curiae* urging reversal were filed for the National Futures Association et al. by *Daniel J. Roth;* and for the Philadelphia Stock Exchange, Inc., et al. by *Lydia Gavalis.*

Gerald F. Rath, Steven W. Hansen, and *Stuart J. Kaswell* filed a brief for the Securities Industry Association as *amicus curiae.*

MKI, having signed the only workout document (out of four) that contained an arbitration clause, accepted arbitration. The Kaplans, however, who had not personally signed that document, denied that their disagreement with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute, and did so in favor of First Options. The Kaplans then asked the Federal District Court to vacate the arbitration award, see 9 U. S. C. § 10 (1988 ed., Supp. V), and First Options requested its confirmation, see § 9. The court confirmed the award. Nonetheless, on appeal the Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable; and it reversed the District Court's confirmation of the award against them. 19 F. 3d 1503 (1994).

We granted certiorari to consider two questions regarding the standards that the Court of Appeals used to review the determination that the Kaplans' dispute with First Options was arbitrable. 513 U. S. 1040 (1994). First, the Court of Appeals said that courts "should *independently* decide whether an arbitration panel has jurisdiction over the merits of any particular dispute." 19 F. 3d, at 1509 (emphasis added). First Options asked us to decide whether this is so (*i. e.*, whether courts, in "reviewing the arbitrators' decision on arbitrability," should "apply a *de novo* standard of review or the more deferential standard applied to arbitrators' decisions on the merits") when the objecting party "submitted the issue to the arbitrators for decision." Pet. for Cert. i. Second, the Court of Appeals stated that it would review a district court's denial of a motion to vacate a commercial arbitration award (and the correlative grant of a motion to confirm it) "*de novo.*" 19 F. 3d, at 1509. First Options argues that the Court of Appeals instead should have applied an "abuse of discretion" standard. See *Robbins* v. *Day*, 954 F. 2d 679, 681–682 (CA11 1992).

II

The first question—the standard of review applied to an arbitrator's decision about arbitrability—is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter.* Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, *e. g.*, 9 U. S. C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko* v. *Swan*, 346 U. S. 427, 436–437 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989). Hence, who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.

We believe the answer to the "who" question (*i. e.*, the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, see, *e. g.*, *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, *ante*, at 57; *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986) (parties may agree to arbitrate arbitrability); *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 583, n. 7 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, *e. g.*, 9 U. S. C. § 10. If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration. See, *e. g.*, *AT&T Technologies*, *supra*, at 649; *Mastrobuono*, *ante*, at 57–58, and n. 9; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U. S. 265, 271 (1995); *Mitsubishi Motors Corp.*, *supra*, at 625–626.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless,

that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here.

When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. See, *e. g.*, *Mastrobuono*, *ante*, at 62–63, and n. 9; *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 475–476 (1989); *Perry* v. *Thomas*, 482 U. S. 483, 492–493, n. 9 (1987); G. Wilner, 1 Domke on Commercial Arbitration § 4:04, p. 15 (rev. ed. Supp. 1993) (hereinafter Domke). The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. See, *e. g.*, *Estate of Jesmer* v. *Rohlev*, 241 Ill. App. 3d 798, 803, 609 N. E. 2d 816, 820 (1993) (law of the State whose law governs the workout agreement); *Burkett* v. *Allstate Ins. Co.*, 368 Pa. 600, 608, 534 A. 2d 819, 823–824 (1987) (law of the State where the Kaplans objected to arbitrability). See generally *Mitsubishi Motors*, *supra*, at 626.

This Court, however, has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. *AT&T Technologies*, *supra*, at 649; see *Warrior & Gulf*, *supra*, at 583, n. 7. In this manner the law treats silence or ambiguity about the question "*who* (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "*whether* a particular merits-related dispute is arbitrable be-

cause it is within the scope of a valid arbitration agreement"—for in respect to this latter question the law reverses the presumption. See *Mitsubishi Motors*, *supra*, at 626 ("'[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'") (quoting *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983)); *Warrior & Gulf*, *supra*, at 582–583.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, *e. g.*, *Mitsubishi Motors*, *supra*, at 626, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. See Domke § 12.02, p. 156 (issues will be deemed arbitrable unless "it is clear that the arbitration clause has not included" them). On the other hand, the former question—the "who (primarily) should decide arbitrability" question—is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508–1509 (1959), cited in *Warrior & Gulf*, 363 U. S., at 583, n. 7. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. *Ibid.* See generally *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–220 (1985) (Arbitration Act's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

On the record before us, First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide (*i. e.*, to arbitrate) the question of arbitrability. First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrators' jurisdiction. But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, *i. e.*, a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did *not* want the arbitrators to have binding authority over them. This conclusion draws added support from (1) an obvious explanation for the Kaplans' presence before the arbitrators (*i. e.*, that MKI, Mr. Kaplan's wholly owned firm, was arbitrating workout agreement matters); and (2) Third Circuit law that suggested that the Kaplans might argue arbitrability to the arbitrators without losing their right to independent court review, *Teamsters* v. *Western Pennsylvania Motor Carriers Assn.*, 574 F. 2d 783, 786–788 (1978); see 19 F. 3d, at 1512, n. 13.

First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (*e. g.*, by trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, see 9 U. S. C. § 4); (2) that permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes; and (3) that the Arbitration Act therefore requires a presumption that the Kaplans agreed to be bound by the arbitrators' decision, not the contrary. The first of these points, however, while true, simply does not say anything about whether the Kaplans intended to be bound by the arbitrators' decision. The second point, too, is inconclu-

sive, for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process. And, the third point is legally erroneous, for there is no strong arbitration-related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, *Dean Witter Reynolds*, *supra*, at 219–220, but to ensure that commercial arbitration agreements, like other contracts, "'are enforced according to their terms,'" *Mastrobuono*, *ante*, at 54 (quoting *Volt Information Sciences*, 489 U. S., at 479), and according to the intentions of the parties, *Mitsubishi Motors*, 473 U. S., at 626. See *Allied-Bruce*, 513 U. S., at 271. That policy favors the Kaplans, not First Options.

We conclude that, because the Kaplans did not clearly agree to submit the question of arbitrability to arbitration, the Court of Appeals was correct in finding that the arbitrability of the Kaplan/First Options dispute was subject to independent review by the courts.

III

We turn next to the standard a court of appeals should apply when reviewing a district court decision that refuses to vacate, see 9 U. S. C. § 10 (1988 ed., Supp. V), or confirms, see § 9, an arbitration award. Although the Third Circuit sometimes used the words "*de novo*" to describe this standard, its opinion makes clear that it simply believes (as do all Circuits but one) that there is no *special* standard governing its review of a district court's decision in these circumstances. Rather, review of, for example, a district court decision confirming an arbitration award on the ground that the parties agreed to submit their dispute to arbitration should proceed like review of any other district court decision find-

ing an agreement between parties, *e. g.*, accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo.* See 19 F. 3d, at 1509.

One Court of Appeals, the Eleventh Circuit, has said something different. Because of federal policy favoring arbitration, that court says that it applies a specially lenient "abuse of discretion" standard (even as to questions of law) when reviewing district court decisions that confirm (but not those that set aside) arbitration awards. See, *e. g.*, *Robbins* v. *Day*, 954 F. 2d, at 681–682. First Options asks us to hold that the Eleventh Circuit's view is correct.

We believe, however, that the majority of Circuits is right in saying that courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards. For one thing, it is undesirable to make the law more complicated by proliferating review standards without good reasons. More importantly, the reviewing attitude that a court of appeals takes toward a district court decision should depend upon "the respective institutional advantages of trial and appellate courts," not upon what standard of review will more likely produce a particular substantive result. *Salve Regina College* v. *Russell*, 499 U. S. 225, 231–233 (1991). The law, for example, tells all courts (trial and appellate) to give administrative agencies a degree of legal leeway when they review certain interpretations of the law that those agencies have made. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984). But no one, to our knowledge, has suggested that this policy of giving leeway to agencies means that a court of appeals should give *extra* leeway to a district court decision that upholds an agency. Similarly, courts grant arbitrators considerable leeway when reviewing most arbitration decisions; but that fact does not mean that appellate courts should give *extra* leeway to district courts that uphold arbitrators. First Options argues that the Arbitration Act is special because the Act, in one

section, allows courts of appeals to conduct interlocutory review of certain antiarbitration district court rulings (*e. g.*, orders enjoining arbitrations), but not those upholding arbitration (*e. g.*, orders refusing to enjoin arbitrations). 9 U. S. C. § 16 (1988 ed., Supp. V). But that portion of the Act governs the timing of review; it is therefore too weak a support for the distinct claim that the court of appeals should use a different *standard* when reviewing certain district court decisions. The Act says nothing about standards of review.

We conclude that the Court of Appeals used the proper standards for reviewing the District Court's arbitrability determinations.

IV

Finally, First Options argues that, even if we rule against it on the standard-of-review questions, we nonetheless should hold that the Court of Appeals erred in its ultimate conclusion that the merits of the Kaplan/First Options dispute were not arbitrable. This factbound issue is beyond the scope of the questions we agreed to review.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 949 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 3 THROUGH MAY 25, 1995

MARCH 3, 1995

Miscellaneous Order

No. A–643 (94–8262). LACKEY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

MARCH 6, 1995

Certiorari Granted—Vacated and Remanded

No. 94–379. ANHEUSER-BUSCH COS., INC., ET AL. *v.* SUMMIT COFFEE CO. ET AL. Ct. App. Tex., 5th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gustafson* v. *Alloyd Co.*, 513 U. S. 561 (1995). Reported below: 858 S. W. 2d 928.

Miscellaneous Orders

No. ——. MOORE, GUARDIAN AD LITEM *v.* AETNA CASUALTY & SURETY CO., INC. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–543. PLY *v.* WASHINGTON. Application for bond, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–610 (94–8080). HEARN *v.* WELLINGTON LEASING CO. ET AL. C. A. 2d Cir. Application for stay of eviction, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. D–1486. IN RE DISBARMENT OF COLLINS. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1487. IN RE DISBARMENT OF OJI. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1489. IN RE DISBARMENT OF ISRAEL. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1492. IN RE DISBARMENT OF WOHLFARTH. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1507. IN RE DISBARMENT OF BAIN. David Lee Bain, of San Diego, Cal., 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 21, 1995 [513 U. S. 1143], is hereby discharged.

No. D–1519. IN RE DISBARMENT OF HIGH. It is ordered that John Emerson High, of West Chester, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1520. IN RE DISBARMENT OF DISCIPIO. It is ordered that Francis M. Discipio, 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. 121, Orig. LOUISIANA *v.* MISSISSIPPI ET AL. Exceptions of Louisiana to the Report of the Special Master set for argument in due course. [For earlier order herein, see, *e. g.,* 513 U. S. 997.]

No. 93–1170. UNITED STATES ET AL. *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL., 513 U. S. 454. Each side shall bear its own costs in this case. See this Court's Rule 43.2.

No. 94–558. UNITED STATES *v.* HAYS ET AL.; and

No. 94–627. LOUISIANA ET AL. *v.* HAYS ET AL. D. C. W. D. La. [Probable jurisdiction noted, 513 U. S. 1056.] Motion of the Solicitor General for divided argument granted.

No. 94–631. MILLER ET AL. *v.* JOHNSON ET AL.;

No. 94–797. ABRAMS ET AL. *v.* JOHNSON ET AL.; and

No. 94–929. UNITED STATES *v.* JOHNSON ET AL. D. C. S. D. Ga. [Probable jurisdiction noted, 513 U. S. 1071.] Motions of Georgia Association of Black Elected Officials and National Voting Rights Institute for leave to file briefs as *amici curiae* granted.

No. 94–749. HURLEY ET AL. *v.* IRISH-AMERICAN GAY, LESBIAN & BISEXUAL GROUP OF BOSTON ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 513 U. S. 1071.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 94–7852. WILLIAMS ET UX. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 27, 1995, 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.

No. 94–8044. IN RE AGRIO. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 93–1638. MORGAN *v.* SWINT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1435 and 11 F. 3d 1030.

No. 94–830. USX CORP., FKA UNITED STATES STEEL CORP. *v.* UNITED STATES; and

No. 94–831. PHILLIPS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 19 F. 3d 1565.

No. 94–849. MCDADE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 28 F. 3d 283.

No. 94–870. GARCIA *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 24 F. 3d 966.

No. 94–1060. CLARK EQUIPMENT CO. ET AL. *v.* HABECKER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HABECKER, DECEASED, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 36 F. 3d 278.

No. 94–1074. PRYTZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 35 F. 3d 557.

No. 94–1077. HUNZIKER ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 519 N. W. 2d 367.

No. 94–1200. WILLIAMS *v.* CITY OF GRANITE SHOALS, TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 94–1207. MANDANICI *v.* TOWN OF MONROE. App. Ct. Conn. Certiorari denied. Reported below: 34 Conn. App. 915, 642 A. 2d 759.

No. 94–1209. KAMIN ET AL. *v.* T. L. C. SERVICES, INC. Commw. Ct. Pa. Certiorari denied. Reported below: 162 Pa. Commw. 547, 639 A. 2d 926.

No. 94–1210. HORN'S POULTRY, INC. *v.* NORWEST TRANSPORTATION, INC. C. A. 7th Cir. Certiorari denied. Reported below: 23 F. 3d 1151.

No. 94–1212. CAMP *v.* RUFFIN, DBA HARPER TRUCKS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 37.

No. 94–1214. CHAN ET AL. *v.* SOCIETY EXPEDITIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1398.

No. 94–1217. BAKER ET AL. *v.* ILLINOIS DEPARTMENT OF REVENUE ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 260 Ill. App. 3d 1123, 675 N. E. 2d 664.

No. 94–1219. WAGSHAL *v.* FOSTER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 28 F. 3d 1249.

No. 94–1220. BP CHEMICALS (HITCO), INC. *v.* GAYLORD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 94–1221. CITY AND COUNTY OF DENVER, COLORADO *v.* CONCRETE WORKS OF COLORADO, INC. C. A. 10th Cir. Certiorari denied. Reported below: 36 F. 3d 1513.

No. 94–1222. TILSON *v.* FORREST CITY POLICE DEPARTMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 28 F. 3d 802.

No. 94–1228. SALAZAR *v.* WHINK PRODUCTS CO. Ct. App. Colo. Certiorari denied. Reported below: 881 P. 2d 431.

No. 94–1236. MATIAS ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 38 F. 3d 609.

No. 94–1249. DRUG EMPORIUM, INC. *v.* PARFUMS GIVENCHY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 38 F. 3d 477.

No. 94–1250. BOLINSKE *v.* NORTH DAKOTA STATE FAIR ASSN. Sup. Ct. N. D. Certiorari denied. Reported below: 522 N. W. 2d 426.

No. 94–1306. ESTATE OF RAVETTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1393.

No. 94–1324. SLUYS ET AL. *v.* GRANT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1503.

No. 94–1325. JACKSON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 33 F. 3d 866.

No. 94–1338. BOLIVAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 36 F. 3d 1099.

No. 94–1349. PEEVY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 F. 3d 641.

No. 94–6289. NEELLEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 642 So. 2d 494.

No. 94–6720. KOKORALEIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 159 Ill. 2d 325, 637 N. E. 2d 1015.

No. 94–6785. KIKUMURA *v.* TURNER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 28 F. 3d 592.

No. 94–6896. CARTER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 537 Pa. 233, 643 A. 2d 61.

No. 94–6935. DUKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 559.

No. 94–7205. CUNNINGHAM *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 320 Ore. 47, 880 P. 2d 431.

No. 94–7209. SHERROD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 33 F. 3d 723.

No. 94–7330. GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 887 S. W. 2d 846.

No. 94–7530. GRIFFIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 639 So. 2d 966.

No. 94–7595. SMITH *v.* WIDNALL, SECRETARY OF THE AIR FORCE. C. A. 11th Cir. Certiorari denied.

No. 94–7603. FOX *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 880 P. 2d 383.

No. 94–7610. McCaleb *v.* Jones, Warden, et al. C. A. 5th Cir. Certiorari denied.

No. 94–7619. Brown *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 645 So. 2d 464.

No. 94–7620. Williams *v.* Metropolitan Transit Authority et al. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 633.

No. 94–7622. Rattler *v.* Department of Veterans Affairs. C. A. D. C. Cir. Certiorari denied.

No. 94–7625. Etemad *v.* California Department of Water Resources Control Board et al. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1186.

No. 94–7626. Arensberg *v.* Brown, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 36 F. 3d 1111.

No. 94–7627. Northington *v.* Court of Appeals of Michigan et al. Sup. Ct. Mich. Certiorari denied.

No. 94–7635. Latine *v.* Mann, Superintendent, Shawangunk Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 25 F. 3d 1162.

No. 94–7641. Dix *v.* Love, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 94–7642. Almendarez *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 266 Ill. App. 3d 639, 639 N. E. 2d 619.

No. 94–7645. Fellman *v.* Poole, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 58.

No. 94–7646. Carroll *v.* North Carolina. Gen. Ct. Justice, Super. Ct. Div., Robeson County, N. C. Certiorari denied.

No. 94–7649. Simione *v.* Gillis, Superintendent, State Correctional Institution at Coal Township, et al. C. A. 3d Cir. Certiorari denied.

No. 94–7651. SHEA *v.* PIERCETON TRUCKING CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1507.

No. 94–7663. JOHNSON *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7725. LANE *v.* UNIVERSAL CITY STUDIOS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1072.

No. 94–7732. HOENIG *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 94–7786. SHELTON *v.* RANEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7804. POSADA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 324.

No. 94–7819. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1179.

No. 94–7823. MCCANN *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 2d Cir. Certiorari denied. Reported below: 35 F. 3d 553.

No. 94–7850. GOLDMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 41 F. 3d 785.

No. 94–7855. BROWN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–7859. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 30 F. 3d 140.

No. 94–7860. OVALLE-MARQUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 36 F. 3d 212.

No. 94–7863. BRAXTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1178.

No. 94–7867. LEE *v.* MURPHY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 311.

No. 94–7871. SWANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1190.

No. 94–7874. LARDELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–7875. OKIYAMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1189.

No. 94–7882. MARZULLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 94–7884. HOGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 38 F. 3d 1148.

No. 94–7885. HUGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–7886. GONZALEZ-RINCON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 36 F. 3d 859.

No. 94–7894. MORTENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 562.

No. 94–7897. GIDDINGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 1091.

No. 94–7907. ARREGUINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1188.

No. 94–7910. CALDWELL *v.* UNITED STATES; and
No. 94–7933. YUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 37 F. 3d 1564.

No. 94–7918. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–7919. CZARNY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1189.

No. 94–7921. ROSE *v.* MORTON, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–7922. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 630.

No. 94–7923. ARANGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 389.

No. 94–7925. BONHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 573.

No. 94–7926. KOFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 417.

No. 94–7928. STANTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1511.

No. 94–7929. SIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 633.

No. 94–7932. LLOYD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 36 F. 3d 761.

No. 94–7934. ZUKINTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1183.

No. 94–7935. GROESSEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 384.

No. 94–7940. FERGUSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–7941. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 389.

No. 94–7946. REEVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1190.

No. 94–7947. PENA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1497.

No. 94–7949. WHITE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 637.

No. 94–7952. BUTLER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 646 A. 2d 331.

No. 94–7954. MARTINEZ-HERRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 29 F. 3d 640.

No. 94–7955. MCGEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 385.

No. 94–7962. BARNES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 575.

No. 94–7963. BOYD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–7964. BROADUS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1178.

No. 94–7969. MARKLING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1511.

No. 94–7970. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 43 F. 3d 712.

No. 94–7973. ACOSTA-LAO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1407.

No. 94–7979. FRANK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–7982. TORO-NINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1464.

No. 94–7983. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 385.

No. 94–8012. CARTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 642, 640 N. E. 2d 811.

No. 94–732. ALABAMA *v.* BONNER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 26 F. 3d 1081.

No. 94–1283. QUALLS *v.* REGIONAL TRANSPORTATION DISTRICT ET AL.; and QUALLS ET AL. *v.* REGIONAL TRANSPORTATION DISTRICT ET AL. C. A. 10th Cir. Motion of respondents for award of damages and double costs granted, and respondents are awarded a total of $500 to be paid by petitioners to counsel for respondents on or before March 27, 1995. Certiorari denied.

No. 94–7971. NEVCHERLIAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 39 F. 3d 1228.

Rehearing Denied

No. 94–5352. MOORE *v.* PENNSYLVANIA, 513 U. S. 1114;
No. 94–6795. BRADVICA *v.* JONES, WARDEN, 513 U. S. 1092;
No. 94–6888. JUELS *v.* DEUTSCHE BANK AG, 513 U. S. 1096;
No. 94–6949. GILMORE *v.* GREGG ET AL., 513 U. S. 1130;
No. 94–6982. SCHAFFER *v.* BEVEVINO ET AL., 513 U. S. 1116;
No. 94–6987. HALL ET AL. *v.* LOCAL UNION 1183, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, 513 U. S. 1116;

No. 94–6992. PIZZO *v.* WHITLEY, WARDEN, ET AL., 513 U. S. 1116;

No. 94–6993. MIZKUN *v.* WIDNALL, SECRETARY OF THE AIR FORCE, ET AL., 513 U. S. 1099; and

No. 94–7043. BAEZ *v.* DOUGLAS COUNTY COMMISSION ET AL., 513 U. S. 1117. Petitions for rehearing denied.

No. 94–6177. RIDINGS *v.* UNITED STATES, 513 U. S. 976. Motion for leave to file petition for rehearing denied.

MARCH 9, 1995

Dismissal Under Rule 46

No. 94–1251. FARRON *v.* DUN & BRADSTREET, INC. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 36 F. 3d 95.

MARCH 17, 1995

Certiorari Denied

No. 94–8465 (A–660). WILLIAMS *v.* GRAMLEY, WARDEN, ET AL. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 50 F. 3d 1356 and 1358.

MARCH 20, 1995

Certiorari Granted—Vacated and Remanded

No. 93–1907. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MOTHER FRANCES HOSPITAL OF TYLER, TEXAS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Shalala* v. *Guernsey Memorial Hospital*, *ante*, p. 87. Reported below: 15 F. 3d 423.

Certiorari Granted—Reversed. (See No. 94–898, *ante*, p. 115.)

Miscellaneous Orders

No. ——. BILZERIAN *v.* SECURITIES AND EXCHANGE COMMISSION;

No. ——. WILL *v.* WILL;

No. ——-——. HESS *v.* LANDER COLLEGE, AKA LANDER UNIVERSITY;

No. ——-——. JOHNSON *v.* UNITED STATES; and

No. ——-——. GREENE *v.* DREXEL BURNHAM LAMBERT. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ——-——. MINES *v.* TEXAS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–499. SOLIMINE *v.* UNITED STATES DISTRICT COURT. D. C. Mass. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–1491. IN RE DISBARMENT OF KUKLA. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1495. IN RE DISBARMENT OF HUMPHREYS. Disbarment entered. [For earlier order herein, see 513 U. S. 1074.]

No. D–1496. IN RE DISBARMENT OF HOTZE. T. Wilson Hotze, of Richmond, Va., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 17, 1995 [513 U. S. 1108], is hereby discharged.

No. D–1497. IN RE DISBARMENT OF SKINNER. Disbarment entered. [For earlier order herein, see 513 U. S. 1124.]

No. D–1498. IN RE DISBARMENT OF WHITE. Disbarment entered. [For earlier order herein, see 513 U. S. 1124.]

No. D–1521. IN RE DISBARMENT OF WILSON. It is ordered that Robert J. Wilson, of Ardmore, Okla., 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–1522. IN RE DISBARMENT OF MITCHELL. It is ordered that Nicholas P. Mitchell, of Greenville, 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–1523. IN RE DISBARMENT OF RUBIN. It is ordered that Richard J. Rubin, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1524. IN RE DISBARMENT OF CARSON. It is ordered that Patricia A. Carson, of San Francisco, Cal., 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–1525. IN RE DISBARMENT OF HANDY. It is ordered that Gary R. Handy, of San Diego, 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–1526. IN RE DISBARMENT OF RUTLEDGE. It is ordered that William Eugene Rutledge, of Birmingham, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion of the City of New York for leave to intervene as a party defendant referred to the Special Master. [For earlier order herein, see, *e. g.*, 513 U. S. 924.]

No. 94–455. JOHNSON ET AL. *v.* JONES. C. A. 7th Cir. [Certiorari granted, 513 U. S. 1071.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–771. OKLAHOMA TAX COMMISSION *v.* CHICKASAW NATION. C. A. 10th Cir. [Certiorari granted, 513 U. S. 1071.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–631. MILLER ET AL. *v.* JOHNSON ET AL.;
No. 94–797. ABRAMS ET AL. *v.* JOHNSON ET AL.; and
No. 94–929. UNITED STATES *v.* JOHNSON ET AL. D. C. S. D. Ga. [Probable jurisdiction noted, 513 U. S. 1071.] Motion of Mexican American Legal Defense & Educational Fund et al. for

leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for divided argument denied. Motion of appellants Lucious Abrams, Jr., et al. for divided argument and for additional time for oral argument denied. Motion of appellants Zell Miller et al. for divided argument granted to be divided as follows: appellants Zell Miller et al., 20 minutes; and United States, 10 minutes. Request for additional time for oral argument denied.

No. 94–820. METROPOLITAN STEVEDORE CO. *v.* RAMBO ET AL. C. A. 9th Cir. [Certiorari granted, 513 U. S. 1106.] Motion of the Solicitor General for divided argument granted.

No. 94–834. NORTH STAR STEEL CO. *v.* THOMAS ET AL.; and
No. 94–835. CROWN CORK & SEAL CO., INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC. C. A. 3d Cir. [Certiorari granted, 513 U. S. 1072.] Motion of petitioner Crown Cork & Seal Co., Inc., for divided argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–7524. TOSKI *v.* MCDONNELL ET AL. C. A. 11th Cir.; and
No. 94–7734. O'HARA *v.* SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Cal. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 10, 1995, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

No. 94–8154. IN RE TRICE. Petition for writ of habeas corpus denied.

No. 94–7582. IN RE ENGLEFIELD;
No. 94–7840. IN RE HERRON; and
No. 94–8067. IN RE UBOH. Petitions for writs of mandamus denied.

Certiorari Denied

No. 94–889. IBJ SCHRODER BANK & TRUST CO., TRUSTEE, ET AL. *v.* RESOLUTION TRUST CORPORATION, CONSERVATOR FOR FRANKLIN SAVINGS ASSN. C. A. 2d Cir. Certiorari denied. Reported below: 26 F. 3d 370.

No. 94–921. TRI-STATE STEEL CONSTRUCTION CO., INC., ET AL. *v.* REICH, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 26 F. 3d 173.

No. 94–936. MONTANA SULPHUR & CHEMICAL CO. *v.* REICH, SECRETARY OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 32 F. 3d 440.

No. 94–982. O'NEILL ET AL. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 32 F. 3d 785.

No. 94–990. LIVING WILL CENTER ET AL. *v.* NBC SUBSIDIARY (KCNC–TV), INC., ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 879 P. 2d 6.

No. 94–1053. LEVINE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 27 F. 3d 594.

No. 94–1055. SYSCO CORP. *v.* TONE BROTHERS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 28 F. 3d 1192.

No. 94–1057. HAZEL ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 33 F. 3d 53.

No. 94–1090. PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 28 F. 3d 1544.

No. 94–1093. NORTHEAST UTILITIES SERVICE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 35 F. 3d 621.

No. 94–1104. BW PARKWAY ASSOCIATES PARTNERSHIP *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 36 F. 3d 1116.

No. 94–1109. DEL CRANE MEDICAL CORP. *v.* CALIFORNIA DEPARTMENT OF HEALTH SERVICES. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 94–1112. WORKMAN *v.* JORDAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 32 F. 3d 475.

No. 94–1114. KIRKPATRICK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 4th 988, 874 P. 2d 248.

No. 94–1122. St. Francis Medical Center *v.* Shalala, Secretary of Health and Human Services, et al. C. A. 3d Cir. Certiorari denied. Reported below: 32 F. 3d 805.

No. 94–1127. Voge *v.* Dalton, Secretary of the Navy. C. A. 4th Cir. Certiorari denied. Reported below: 35 F. 3d 558.

No. 94–1128. Florida Cellular Mobil Communications Corp. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 28 F. 3d 191.

No. 94–1146. Walsh *v.* Southwest Flagler Associates, Ltd. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 641 So. 2d 81.

No. 94–1151. Footman et al. *v.* United States et al. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 636.

No. 94–1161. Ysleta del Sur Pueblo *v.* Texas et al.; and
No. 94–1310. Texas et al. *v.* Ysleta del Sur Pueblo. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 1325.

No. 94–1203. Rinier et al. *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 273 N. J. Super. 135, 641 A. 2d 276.

No. 94–1227. Verrichia et al. *v.* Pennsylvania Department of Revenue et al. Commw. Ct. Pa. Certiorari denied. Reported below: 162 Pa. Commw. 610, 639 A. 2d 957.

No. 94–1229. Caulfield *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 33 F. 3d 991.

No. 94–1233. Blaze Construction Co., Inc. *v.* New Mexico Taxation and Revenue Department. Sup. Ct. N. M. Certiorari denied. Reported below: 118 N. M. 647, 884 P. 2d 803.

No. 94–1234. United Capitol Insurance Co. *v.* Nichols & Associates Tryon Properties, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 1093.

No. 94–1235. Midland Central Appraisal District *v.* Midland Industrial Service Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 164.

No. 94–1238. TURNER *v.* JABE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 35 F. 3d 872.

No. 94–1243. RADLOFF ET UX. *v.* FIRST AMERICAN NATIONAL BANK OF ST. CLOUD, N. A., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 1502.

No. 94–1252. DAVIS *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 34 F. 3d 417.

No. 94–1253. SHARP *v.* SHARP; and SHARP *v.* CONNELLY. Ct. App. Wash. Certiorari denied. Reported below: 72 Wash. App. 1038 (second case).

No. 94–1255. SEXTON *v.* CITY OF TWINSBURG. Ct. App. Ohio, Summit County. Certiorari denied.

No. 94–1256. CITY OF EDGERTON ET AL. *v.* GENERAL CASUALTY COMPANY OF WISCONSIN ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 184 Wis. 2d 750, 517 N. W. 2d 463.

No. 94–1262. PAUL *v.* FARMLAND INDUSTRIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 1274.

No. 94–1263. METZGER *v.* WEST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 39 F. 3d 320.

No. 94–1266. THIBODO ET AL. *v.* BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 914.

No. 94–1270. JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF GASTON, DECEASED *v.* DALLAS INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 198.

No. 94–1271. CARLISLE, AS NEXT FRIEND OF CARLISLE *v.* MUNNA. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 94–1272. CITY OF RICHMOND ET AL. *v.* FULLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 36 F. 3d 65.

No. 94–1273. MOORE ET AL. *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 650 So. 2d 958.

No. 94–1277. McKenna *v.* District Court of New Mexico, Second Judicial District. Sup. Ct. N. M. Certiorari denied. Reported below: 118 N. M. 402, 881 P. 2d 1387.

No. 94–1280. Willman *v.* Heartland Hospital East et al. C. A. 8th Cir. Certiorari denied. Reported below: 34 F. 3d 605.

No. 94–1281. Crow Tribe of Indians *v.* Campbell Farming Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 31 F. 3d 768.

No. 94–1285. Garmon *v.* Alabama State Bar. Sup. Ct. Ala. Certiorari denied. Reported below: 665 So. 2d 1032.

No. 94–1286. Plumbers & Steamfitters Local 490 Severance and Retirement Fund et al. *v.* Appleton, Trustee for the Liquidation of First Ohio Securities Co., et al. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1181.

No. 94–1288. Hiram Walker & Sons, Inc. *v.* Eller & Co., Inc. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1370.

No. 94–1290. Clark *v.* Groose et al. C. A. 8th Cir. Certiorari denied. Reported below: 36 F. 3d 770.

No. 94–1294. Everett, Individually and as Executor of the Estate of Everett, Deceased, et al. *v.* Continental Bank, N. A. C. A. 4th Cir. Certiorari denied. Reported below: 35 F. 3d 555.

No. 94–1301. Hood *v.* Herald. Ct. App. Ohio, Summit County. Certiorari denied.

No. 94–1303. Hoover *v.* National Transportation Safety Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 43 F. 3d 712.

No. 94–1312. Henderson et al. *v.* Oregon Department of Agriculture et al. Ct. App. Ore. Certiorari denied. Reported below: 128 Ore. App. 169, 875 P. 2d 487.

No. 94–1315. Bennett *v.* Arkansas. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 848.

No. 94–1322. Colon *v.* Apex Marine Corp., c/o Westchester Shipping Co., Inc., et al. C. A. 1st Cir. Certiorari denied. Reported below: 35 F. 3d 16.

No. 94–1323. BRYAN ET AL. *v.* JAMES E. HOLMES REGIONAL MEDICAL CENTER, AKA HOLMES REGIONAL MEDICAL CENTER, INC. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1318.

No. 94–1358. LINTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1511.

No. 94–1362. ESTATE OF RAVETTI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 38 F. 3d 1218.

No. 94–1369. FERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 26 F. 3d 1533.

No. 94–1382. JACOB *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1191.

No. 94–1434. CAMOSCIO *v.* POKASKI ET AL. C. A. 1st Cir. Certiorari denied.

No. 94–6675. SANCHEZ-MONTOYA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 30 F. 3d 1168.

No. 94–6707. M. R. ET AL. *v.* COX ET AL. Ct. App. Okla. Certiorari denied. Reported below: 881 P. 2d 108.

No. 94–6933. AGUILAR-HIGUERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1074.

No. 94–6940. FOSTER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 639 So. 2d 1263.

No. 94–7025. SHORES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 33 F. 3d 438.

No. 94–7099. BEAUCHAMP *v.* MURPHY, SUPERINTENDENT, OLD COLONY CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 37 F. 3d 700.

No. 94–7111. AYALA *v.* UNITED STATES; CASTREJON-ORTIZ *v.* UNITED STATES; HERNANDEZ-RENTERIA *v.* UNITED STATES; MORENO-ARGUETA *v.* UNITED STATES; CORTES-CEBRERA *v.* UNITED STATES; CASTRO-SANCHEZ *v.* UNITED STATES; ALVARADO-MALDONADO *v.* UNITED STATES; RUIZ-ALVAREZ *v.* UNITED STATES; LEDESMA-CASTILLO *v.* UNITED STATES; MO-

RALES *v.* UNITED STATES; PRIETO-ARAUZA *v.* UNITED STATES; CERVANTES-PARRA *v.* UNITED STATES; LINARES *v.* UNITED STATES; RODRIGUEZ-ESQUIVEL *v.* UNITED STATES; ALBA-ESQUEDA *v.* UNITED STATES; and LOPEZ-DELAROSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 423 (1st case); 29 F. 3d 635 (2d case); 36 F. 3d 1103 (4th case); 28 F. 3d 108 (5th case); 29 F. 3d 635 (6th case); 37 F. 3d 1506 (7th case); 37 F. 3d 1507 (8th case); 29 F. 3d 636 (9th case); 28 F. 3d 109 (10th case); 29 F. 3d 636 (11th case); 38 F. 3d 1218 (12th case); 29 F. 3d 636 (13th case); 29 F. 3d 637 (14th case); 28 F. 3d 108 (15th case); 39 F. 3d 1189 (16th case).

No. 94–7313. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 632.

No. 94–7315. CASEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7324. INGLE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 336 N. C. 617, 445 S. E. 2d 880.

No. 94–7329. GARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 32 F. 3d 1305.

No. 94–7342. MOUNTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 35 F. 3d 1208.

No. 94–7357. STALEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 887 S. W. 2d 885.

No. 94–7359. PHILLIPS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 94–7388. HARPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 631.

No. 94–7394. HICKS *v.* THOMAS, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 94–7403. BREWER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7434. ULLYSES-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 28 F. 3d 932.

No. 94–7436. MCCRIGHT *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 94–7455. FUDGE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 7 Cal. 4th 1075, 875 P. 2d 36.

No. 94–7513. O'CONNOR *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 27 F. 3d 357.

No. 94–7621. JACKSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 94–7629. BLACK *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 550, 448 S. E. 2d 357.

No. 94–7631. TORRES GARCIA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 887 S. W. 2d 862.

No. 94–7664. CHRISTIAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 324.

No. 94–7666. CONDINO *v.* COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 58.

No. 94–7669. WOODARD *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7670. PAIGE *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–7672. PRICE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 337 N. C. 756, 448 S. E. 2d 827.

No. 94–7678. ARMSTRONG *v.* YOUNG. C. A. 7th Cir. Certiorari denied. Reported below: 34 F. 3d 421.

No. 94–7681. THOMPSON *v.* RASBERRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 1493.

No. 94–7682. VILLAREAL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 645 So. 2d 456.

No. 94–7683. GOMEZ *v.* OREGON STATE BOARD OF PAROLE. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1551.

No. 94–7684. GRANVIEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7686. GREENE *v.* MCFADDEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 28 F. 3d 106.

No. 94–7687. FIELDS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 94–7691. SORENS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 632.

No. 94–7692. QUINONES *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 94–7693. RITCHEY *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 632 N. E. 2d 386.

No. 94–7694. WAKEFIELD *v.* BOROUGH OF NORTH PLAINFIELD ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–7698. JOHNSON *v.* BLALOCK ET AL. C. A. 11th Cir. Certiorari denied.

No. 94–7699. LOOMIS *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 94–7703. MCQUEEN *v.* MATA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 385.

No. 94–7704. WEINSTEIN *v.* LASOVER ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–7710. CONRAD *v.* TODD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 95.

No. 94–7723. DILLBECK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 643 So. 2d 1027.

No. 94–7724. JUDD *v.* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS. C. A. 10th Cir. Certiorari denied.

No. 94–7730. HARPER *v.* HATCHER TRAILER PARK. Ct. App. Ga. Certiorari denied.

No. 94–7733. ADAMS *v.* RICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 40 F. 3d 72.

No. 94–7735. ROBINSON *v.* CITY OF SYLVANIA, OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 150, 637 N. E. 2d 897.

No. 94–7736. PRICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 13 F. 3d 711.

No. 94–7738. WYATT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 641 So. 2d 355.

No. 94–7739. OMUSO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 10th Cir. Certiorari denied. Reported below: 28 F. 3d 113.

No. 94–7742. WEBB *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 325, 638 N. E. 2d 1023.

No. 94–7752. STEELE *v.* CHICAGO POLICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied.

No. 94–7753. SIMS *v.* LEFEVRE, SUPERINTENDENT, FRANKLIN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 94–7754. SEAGLE *v.* MERKEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 33 F. 3d 52.

No. 94–7755. SIGMON *v.* BISHOP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 34 F. 3d 1066.

No. 94–7760. JOHNSON *v.* KAMMINGA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 34 F. 3d 466.

No. 94–7764. LLOYD *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 94–7768. KING *v.* COOKE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 26 F. 3d 720.

No. 94–7774. MCNACK *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 94–7776. BOUSCHER *v.* PIERCE COUNTY, WASHINGTON, ET AL.; and BOUSCHER *v.* OREGON ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–7777. FERGUSON *v.* DOMOVICH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH. C. A. 3d Cir. Certiorari denied.

No. 94–7782. GARCIA *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 1193.

No. 94–7788. HARRIS *v.* ROCHA, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 94–7790. DANIEL *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 1501.

No. 94–7791. CAMPOS *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 1501.

No. 94–7794. BURKE *v.* SZABO, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 326.

No. 94–7796. CASTRO *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 880 P. 2d 387.

No. 94–7799. HOLSTON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 40 F. 3d 1244.

No. 94–7801. HARRIS *v.* LAWLER. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1400.

No. 94–7802. DANIELS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 650 So. 2d 544.

No. 94–7803. JAMES *v.* WHITLEY, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 642 So. 2d 1306.

No. 94–7808. WILKINS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 26 Cal. App. 4th 1089, 31 Cal. Rptr. 2d 764.

No. 94–7811. POE *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 204.

No. 94–7812. LOVALL *v.* BIANCHI, JUDGE, DISTRICT COURT OF TEXAS, HARRIS COUNTY. Sup. Ct. Tex. Certiorari denied.

No. 94–7813. LEPISCOPO *v.* THOMAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 38 F. 3d 1128.

No. 94–7814. NICKENS *v.* MELTON. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 183.

No. 94–7815. MOITY *v.* FARM CREDIT BANK OF TEXAS. 16th Jud. Dist. Ct., St. Martin Parish, La. Certiorari denied.

No. 94–7818. KICZENSKI *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7821. LAMBERT *v.* PASQUOTANK COUNTY DEPARTMENT OF SOCIAL SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1177.

No. 94–7822. LOVALL *v.* PARK PLAZA HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied.

No. 94–7824. JONES *v.* SANDAHL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 35 F. 3d 568.

No. 94–7825. MCDONALD *v.* POLK COUNTY, GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 213 Ga. App. XXVII.

No. 94–7826. GIBBS *v.* OKLAHOMA DEPARTMENT OF REHABILITATION SERVICES. Ct. App. Okla. Certiorari denied.

No. 94–7827. SAVINSKI *v.* WISCONSIN DEPARTMENT OF CORRECTIONS. Ct. App. Wis. Certiorari denied. Reported below: 187 Wis. 2d 291, 523 N. W. 2d 208.

No. 94–7830. WHITE *v.* LOCAL 166, UNITED PLANT GUARD WORKERS OF AMERICA. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 94–7832. GIBBS *v.* OKLAHOMA DEPARTMENT OF REHABILITATION SERVICES. Ct. App. Okla. Certiorari denied.

No. 94–7833. GIBBS *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 38 F. 3d 1220.

No. 94–7834. GREGORY *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 73 Wash. App. 1053.

No. 94–7839. JAMES *v.* MCBRIDE, SUPERINTENDENT, WESTVILLE CORRECTIONAL CENTER. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1510.

No. 94–7844. STRAUSS *v.* HOLMAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–7846. CACOPERDO *v.* DEMOSTHENES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 504.

No. 94–7854. WALKER *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 94–7856. HARDIMAN *v.* FORD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1510.

No. 94–7858. LIGHTFOOT *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1498.

No. 94–7861. PATTERSON *v.* NOLAND ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 37 F. 3d 1510.

No. 94–7862. ROWE *v.* TEXAS REHABILITATION COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 633.

No. 94–7864. COCHRAN *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1465.

No. 94–7877. SHARROCK *v.* ROMER, GOVERNOR OF COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied.

No. 94–7878. ORTIZ *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 94–7880. IN RE VOHRA. Sup. Ct. Cal. Certiorari denied.

No. 94–7881. LANCASTER *v.* PRESLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 229.

No. 94–7883. HILL *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 884 S. W. 2d 69.

No. 94–7888. SAMEL *v.* ABRAMAJTYS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7889. CLUKE *v.* HIGGINS, SUPERINTENDENT, CENTRAL MISSOURI CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–7890. WILSON *v.* SPITZ ET AL. Cir. Ct. Greenbriar County, W. Va. Certiorari denied.

No. 94–7895. SAMPANG *v.* VIRGINIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 94–7896. ESTY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 642 So. 2d 1074.

No. 94–7899. DEVOLL ET UX. *v.* BURDICK PAINTING, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 408.

No. 94–7902. DAWKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 94–7905. FINOCCHI *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 94–7906. HARDIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94–7920. BARNES *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied.

No. 94–7939. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 562.

No. 94–7959. OKORO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1392.

No. 94–7960. QUIROZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1190.

No. 94–7967. MITCHELL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 41 M. J. 376.

No. 94–7972. ROTHBERG *v.* QUADRANGLE DEVELOPMENT CORP. ET AL. Ct. App. D. C. Certiorari denied. Reported below: 646 A. 2d 309.

No. 94–7975. COLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1463.

No. 94–7976. HAIRSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1508.

No. 94–7985. HILLSTROM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 37 F. 3d 1490.

No. 94–7987. EVANS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 30 F. 3d 1015.

No. 94–7988. DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1514.

No. 94–7989. DEHLER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 71 Ohio St. 3d 330, 643 N. E. 2d 1097.

No. 94–7995. BELTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 647 A. 2d 66.

No. 94–7997. FULLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–8000. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 33 F. 3d 876.

No. 94–8001. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 40 F. 3d 154.

No. 94–8002. GRESHAM *v.* UNITED STATES; and
No. 94–8029. GILCHRIST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 389.

No. 94–8003. DAVIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 641 A. 2d 484.

No. 94–8011. BLACKMON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8013. PEREZ, AKA CEBALLOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8016. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–8018. JAMES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 30 F. 3d 142.

No. 94–8020. HOWARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–8021. HILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 40 F. 3d 164.

No. 94–8022. POLLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 94–8023. POPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 325.

No. 94–8027. SCHWEMBERGER *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 571.

No. 94–8028. HOWARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–8030. MARTINEZ-CIGARROA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 44 F. 3d 908.

No. 94–8031. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94–8040. BORGES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 93.

No. 94–8041. BALLESTEROS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1514.

No. 94–8043. CONNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1074.

No. 94–8047. RODRIGUEZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 637.

No. 94–8048. OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1514.

No. 94–8049. LOMBARDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1463.

No. 94–8052. YOUNG *v.* UNITED STATES; and
No. 94–8053. GREIDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–8058. REED *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 1069.

No. 94–8063. LANHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 43 F. 3d 712.

No. 94–8064. LISKIEWICZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 54 F. 3d 781.

No. 94–8068. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8069. WARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 94–8071. KEITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 661.

No. 94–8072. KELLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–8073. BURNEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 636.

No. 94–8075. ELROD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8076. GRAJALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 761.

No. 94–8079. HINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1179.

No. 94–8082. BUNGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1511.

No. 94–8083. BILLOPS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 43 F. 3d 281.

No. 94–8085. BARLOW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 935.

No. 94–8087. HALL *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 38 F. 3d 1222.

No. 94–8089. FLYNN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 190 Wis. 2d 31, 527 N. W. 2d 343.

No. 94–8090. GEORGESCU *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 28 F. 3d 105.

No. 94–8091. FORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 36 F. 3d 1097.

No. 94–8093. HIGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1128.

No. 94–8094. SUTTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–8099. YUK RUNG TSANG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1458.

No. 94–8100. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 40 F. 3d 48.

No. 94–8102. ALI-DAGGAO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 28 F. 3d 985.

No. 94–8105. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1463.

No. 94–8111. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 573.

No. 94–8112. NELSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–8114. TUTIVEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 40 F. 3d 1.

No. 94–8126. JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 43 F. 3d 712.

No. 94–8132. CANNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1193.

No. 94–8150. BOYCE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–8151. BOWDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–8152. CARDENAS-TRIANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8161. WRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 40 F. 3d 1245.

No. 94–890. National Railway Labor Conference *v.* Railway Labor Executives' Assn. et al.; and

No. 94–907. Burlington Northern Railroad Co. *v.* Railway Labor Executives' Assn. et al. C. A. D. C. Cir. Certiorari denied. Justice Ginsburg took no part in the consideration or decision of these petitions. Reported below: 29 F. 3d 655.

No. 94–1131. Chrysler Corp. *v.* Kearns; and

No. 94–1269. Kearns *v.* Chrysler Corp. et al. C. A. Fed. Cir. Motion of Arnold, White & Durkee for leave to file a brief as *amicus curiae* in No. 94–1131 granted. Certiorari denied. Reported below: 32 F. 3d 1541.

No. 94–1237. Keystone Chapter Associated Builders & Contractors, Inc. *v.* Pennsylvania Secretary of Labor and Industry. C. A. 3d Cir. Motion of Steamfitters Local Union No. 420, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 37 F. 3d 945.

No. 94–1248. O'Bryan, Parent and Next Friend of O'Bryan, et al. *v.* Volkswagen of America et al. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–1289. Class, Warden, et al. *v.* Williams. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 33 F. 3d 1010.

No. 94–1302. Crawford *v.* LaMantia et al. C. A. 1st Cir. Certiorari denied. Justice Breyer took no part in the consideration or decision of this petition. Reported below: 34 F. 3d 28.

No. 94–7751. Raitport *v.* American Telephone & Telegraph et al. C. A. 2d Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition.

Rehearing Denied

No. 93–9242. Sands et al. *v.* United States, 513 U. S. 838;

No. 94–941. Duncan, Warden *v.* Henry, 513 U. S. 364;

No. 94–1006. King *v.* Young et al., 513 U. S. 1127;

No. 94–1018. MASS ET AL. *v.* CITY OF CARLSBAD ET AL., 513 U. S. 1128;

No. 94–6260. BASHARA *v.* UNITED STATES, 513 U. S. 1115;

No. 94–6673. SEARLES *v.* RELIC ET AL., 513 U. S. 1128;

No. 94–6825. WILLIAMS *v.* BORG & WARNER AUTOMOTIVE ELECTRONICS & MECHANICAL SYSTEM CORP., 513 U. S. 1093;

No. 94–6851. RODRIGUEZ MENDOZA *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., 513 U. S. 1094;

No. 94–6912. HARRIS *v.* 7232 PLEASANT VIEW DRIVE, 513 U. S. 1129;

No. 94–6916. FANNY *v.* LEVY ET AL., 513 U. S. 1129;

No. 94–6967. RAWLINS *v.* OLSON ET AL., 513 U. S. 1130;

No. 94–7002. CAZEAU, AKA LAFLEUR *v.* PENNSYLVANIA STATE POLICE ET AL., 513 U. S. 1117;

No. 94–7036. HUMMER *v.* UNITED STATES, 513 U. S. 1100;

No. 94–7044. WARDLAW *v.* BURT, WARDEN, 513 U. S. 1131;

No. 94–7055. MCKENZIE *v.* WEER, WARDEN, 513 U. S. 1118;

No. 94–7066. DEGRIJZE *v.* SCHWARTZ ET AL., 513 U. S. 1131; and

No. 94–7424. CONNELLY *v.* GROSSMAN ET AL., 513 U. S. 1171. Petitions for rehearing denied.

No. 94–6146. ALONSO *v.* MUNICIPAL COURT OF CALIFORNIA, COUNTY OF VENTURA (CALIFORNIA, REAL PARTY IN INTEREST), 513 U. S. 975. Motion for leave to file petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice White (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit from June 14 to June 15, 1995, and for such time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294(a), is ordered entered on the minutes of this Court pursuant to 28 U. S. C. § 295.

MARCH 21, 1995

Certiorari Denied

No. 94–8438 (A–689). WILLIAMS *v.* CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Application for stay of execution of sentence of death, pre-

sented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 40 F. 3d 1529.

No. 94–8536 (A–704). FREE *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 50 F. 3d 1362.

MARCH 27, 1995

Affirmed on Appeal

No. 94–1105. TEXAS *v.* UNITED STATES. Affirmed on appeal from D. C. D. C.

Certiorari Granted—Vacated and Remanded

No. 94–742. HARLEYSVILLE LIFE INSURANCE CO. *v.* MARDELL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352 (1995). Reported below: 31 F. 3d 1221.

Miscellaneous Orders

No. 94–197. ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* GREEN ET AL., 513 U. S. 557. Motion of respondents to amend the judgment denied. Motion of respondents to retax costs granted.

No. 94–1175. BANK ONE CHICAGO, N. A. *v.* MIDWEST BANK & TRUST CO. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 94–7908. WILLIAMS ET UX. *v.* ARNOLD & ARNOLD LAW FIRM ET AL. C. A. 8th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 17, 1995, 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.

No. 94–1355. IN RE LYON. Ct. App. Alaska. Petition for writ of common-law certiorari denied.

No. 94–8254. IN RE KLVANA; and
No. 94–8322. IN RE VOTH. Petitions for writs of habeas corpus denied.

No. 94–7957. IN RE BARNES. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 94–1244. BEHRENS *v.* PELLETIER. C. A. 9th Cir. Certiorari granted.

No. 94–1340. CITIZENS BANK OF MARYLAND *v.* STRUMPF. C. A. 4th Cir. Certiorari granted. Reported below: 37 F. 3d 155.

No. 94–7427. LIBRETTI *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 38 F. 3d 523.

Certiorari Denied. (See also No. 94–1355, *supra.*)

No. 94–770. ANDERSON *v.* NIDORF, CHIEF PROBATION OFFICER, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 26 F. 3d 100.

No. 94–873. FOSTER *v.* FREEMAN UNITED COAL MINING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 30 F. 3d 834.

No. 94–1096. AMERICAN REPUBLIC INSURANCE CO. *v.* SUPERINTENDENT OF INSURANCE OF MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 647 A. 2d 1195.

No. 94–1102. SPRAGENS *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied. Reported below: 36 F. 3d 947.

No. 94–1182. CUTINELLO ET AL. *v.* WHITLEY, DIRECTOR, ILLINOIS DEPARTMENT OF REVENUE, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 161 Ill. 2d 409, 641 N. E. 2d 360.

No. 94–1183. NORAM ENERGY CORP. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 37 F. 3d 621.

No. 94–1187. SMITH *v.* RICKS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 31 F. 3d 1478.

No. 94–1264. DUFRESNE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 26 F. 3d 105.

No. 94–1276. ALLSTATE INSURANCE CO. *v.* LUFTHANSA GERMAN AIRLINES. Ct. App. Mich. Certiorari denied.

No. 94–1296. KELCH *v.* HARDISON, WARDEN, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 110 Nev. 1546, 893 P. 2d 408.

No. 94–1297. LONGO, MAYOR OF THE CITY OF GARFIELD HEIGHTS, ET AL. *v.* ZILICH; and

No. 94–1313. ZILICH *v.* LONGO, MAYOR OF THE CITY OF GARFIELD HEIGHTS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 34 F. 3d 359.

No. 94–1298. PROPST ET AL. *v.* BITZER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 3d 148.

No. 94–1307. SHONG-CHING TONG *v.* FIRST INTERSTATE SERVICES CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1073.

No. 94–1311. CALIFORNIA ET AL. *v.* TAHOE SIERRA PRESERVATION COUNCIL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 753 and 42 F. 3d 1306.

No. 94–1318. IN RE HURLEY. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 418 Mass. 649, 639 N. E. 2d 705.

No. 94–1319. LESLIE *v.* RANEY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–1321. HARLEY-DAVIDSON, INC. *v.* MINSTAR, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 341.

No. 94–1326. CENTER FOR AUTO SAFETY INC. *v.* ATHEY, SECRETARY OF STATE OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 139.

No. 94–1327. BRAYTON *v.* CITY OF NEW BRIGHTON. Ct. App. Minn. Certiorari denied. Reported below: 519 N. W. 2d 243.

No. 94–1331. COLT INDUSTRIES OPERATING CORPORATION INFORMAL PLAN FOR PLANT SHUTDOWN BENEFITS FOR SALARIED EMPLOYEES *v.* HENGLEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 39 F. 3d 1169.

No. 94–1335. ARIZONA *v.* AVERYT ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 179 Ariz. 123, 876 P. 2d 1158.

No. 94–1336. DELAYE *v.* AGRIPAC, INC. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 235.

No. 94–1341. HYDE PARK MEDICAL LABORATORY, INC. *v.* COURT OF CLAIMS OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 259 Ill. App. 3d 889, 632 N. E. 2d 307.

No. 94–1345. SERBEN *v.* INTER-CITY MANUFACTURING CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 36 F. 3d 765.

No. 94–1353. MANNO *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1457.

No. 94–1370. EDMOND *v.* NEWMAN WHITNEY, A DIVISION OF NEWMAN MACHINE CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 32 F. 3d 567.

No. 94–1372. WAMSLEY ET AL. *v.* CHAMPLIN REFINING & CHEMICALS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 534.

No. 94–1375. LITZENBERGER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 537 Pa. 558, 645 A. 2d 211.

No. 94–1385. BONADONNA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1498.

No. 94–1405. SALARIED EMPLOYEES ASSOCIATION OF THE BALTIMORE DIVISION, FEDERATION OF INDEPENDENT SALARIED UNIONS *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1126.

No. 94–6974. DEL VECCHIO *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 31 F. 3d 1363.

No. 94–7158. DEBARDELEBEN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 94–7164. CERNY *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 94–7184. SANCHEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 35 F. 3d 673.

No. 94–7369. GANT *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 231 Conn. 43, 646 A. 2d 835.

No. 94–7445. BROWN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 636.

No. 94–7460. PAINE *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 110 Nev. 609, 877 P. 2d 1025.

No. 94–7579. THOMPKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 161 Ill. 2d 148, 641 N. E. 2d 371.

No. 94–7731. HATCHER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 556, 448 S. E. 2d 698.

No. 94–7870. OLIVER *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1073.

No. 94–7873. PAYNE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 337 N. C. 505, 448 S. E. 2d 93.

No. 94–7892. HOLLAND *v.* WILLIE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–7893. GREEN *v.* SIMPSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 41 F. 3d 1516.

No. 94–7898. LIGHTBOURNE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 54.

No. 94–7901. FEDERICO *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1181.

No. 94–7909. BOSSETT *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1238.

No. 94–7911. BINA *v.* PROVIDENCE COLLEGE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 39 F. 3d 21.

No. 94–7915. NYENEKOR *v.* BOSTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 22 F. 3d 303.

No. 94–7916. LUZANILLA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 179 Ariz. 391, 880 P. 2d 611.

No. 94–7924. POWERS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 641 N. E. 2d 1295.

No. 94–7927. DOUGLAS *v.* WEYERHAEUSER CO. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1115.

No. 94–7931. SANDERS *v.* REVELL, COMMISSIONER, FLORIDA PAROLE COMMISSION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 573.

No. 94–7936. HUKAREVIC *v.* COUNTY OF MENOMINEE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1182.

No. 94–7937. ENGLEFIELD *v.* GEORGE. Super. Ct. Ga., DeKalb County. Certiorari denied.

No. 94–7938. GILMORE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 94–7942. GALLOWAY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 433 Pa. Super. 222, 640 A. 2d 454.

No. 94–7943. HATFIELD *v.* REES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–7945. BOUSER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 26 Cal. App. 4th 1280, 32 Cal. Rptr. 2d 163.

No. 94–7950. VE *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–7951. ZAVALA *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 263 Ill. App. 3d 1119, 683 N. E. 2d 548.

No. 94–7953. GRIGSBY *v.* ANESTHESIOLOGISTS OF SOUTHWESTERN OHIO, INC., ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 94–7956. LAVOLD *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–7958. MARLENE B. *v.* CALIFORNIA DEPARTMENT OF CHILDREN'S SERVICES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 27 Cal. App. 4th 541, 32 Cal. Rptr. 2d 670.

No. 94–7961. MIRANDA ORTIZ *v.* KIMELMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1502.

No. 94–7965. RODRICK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 205 App. Div. 2d 841, 613 N. Y. S. 2d 445.

No. 94–7966. MOSIER *v.* GEORGIA BOARD OF PARDONS AND PAROLES ET AL. Ct. App. Ga. Certiorari denied. Reported below: 213 Ga. App. 545, 445 S. E. 2d 535.

No. 94–7977. ATKINS *v.* SCHRIRO, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied.

No. 94–7978. BAKER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 100 Md. App. 788.

No. 94–7990. DEAN *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 52.

No. 94–7991. HARRISON *v.* BURKETT. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 569.

No. 94–7992. DEYOUNG *v.* PINAL COUNTY SHERIFF ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 94–7994. BOLLINGER *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1186.

No. 94–7998. GIBBS *v.* OKLAHOMA DEPARTMENT OF REHABILITATION SERVICES. Ct. App. Okla. Certiorari denied. Reported below: 889 P. 2d 899.

No. 94–7999. VARGAS *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari before judgment denied.

No. 94–8005. LAMBERT *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1187.

No. 94–8056. TSIMBIDAROS *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1212.

No. 94–8057. SMITHSON-BEY *v.* PRUITT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 40 F. 3d 1241.

No. 94–8077. HILLS *v.* UNITED STATES;
No. 94–8108. ZIDOR *v.* UNITED STATES;
No. 94–8124. MCCOY *v.* UNITED STATES; and
No. 94–8133. SANDERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 667.

No. 94–8078. GUION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1496.

No. 94–8092. GLENDORA *v.* DUBERSTEIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1502.

No. 94–8101. ODOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–8107. ALANIZ-ALANIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 788.

No. 94–8109. ALBERTO CUARTAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–8113. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668 and 669.

No. 94–8115. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 40 F. 3d 436.

No. 94–8117. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 667.

No. 94–8118. PLATERO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1193.

No. 94–8119. ROBINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8123. POLLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8125. COWIE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8128. GOLDSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8129. MASON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–8134. OCHOA-ARANGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8138. UMANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 323.

No. 94–8139. BLODGETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 32 F. 3d 571.

No. 94–8145. GRAY *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 887 S. W. 2d 369.

No. 94–8146. SUSTAITA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1404.

No. 94–8147. PITA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–8156. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1508.

No. 94–8159. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 41 F. 3d 1516.

No. 94–8162. SHELTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8164. MADDOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 664.

No. 94–8165. MOORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1212.

No. 94–8166. GRIGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 50 F. 3d 17.

No. 94–8167. DUNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8168. GUEST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1193.

No. 94–8175. MALOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 632.

No. 94–8188. ROBLES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 45 F. 3d 1.

No. 94–8189. GAVILANES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 643.

No. 94–8199. ALBERTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 1132.

No. 94–8200. CAINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 1185.

No. 94–8202. PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 94.

No. 94–8205. PARLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 637.

No. 94–8209. DEWESE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–8210. FREEMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8214. BLACKBURN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 640.

No. 94–8216. ROBERTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8217. CANNONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1458.

No. 94–8218. BEARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1193.

No. 94–8224. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1179.

No. 94–8225. MCGEE *v.* UNITED STATES; and
No. 94–8234. SIMPSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1508.

No. 94–8227. BURNIM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8228. LOZANO-CERON, AKA DOE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–8229. MARZULLO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 398.

No. 94–8231. ISENBURG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1463.

No. 94–8236. VARGAS-SANDOVAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1404.

No. 94–8238. KYLES *v.* UNITED STATES; and
No. 94–8243. KYLES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 519.

No. 94–8241. WOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8244. MONTENEGRO-PEDROZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 678.

No. 94–8245. AKINS *v.* RICHARDSON, COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 35 F. 3d 577.

No. 94–8246. LEGGETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 F. 3d 573.

No. 94–8249. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1299.

No. 94–8256. CORDERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8259. ALBARELLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1458.

No. 94–8264. GARRITY *v.* FIEDLER, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1150.

No. 94–8272. GARDNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 635.

No. 94–1328. LEGAL ECONOMIC EVALUATIONS, INC., ET AL. *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Mo-

tion of Consumer Federation of America's Insurance Group for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 39 F. 3d 951.

No. 94–1444. MORROW *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 39 F. 3d 1228.

No. 94–8262. LACKEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

Memorandum of JUSTICE STEVENS, respecting the denial of certiorari.

Petitioner raises the question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment. Though the importance and novelty of the question presented by this certiorari petition are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until after it has been addressed by other courts. See, *e. g.*, *McCray* v. *New York*, 461 U. S. 961 (1983) (STEVENS, J., respecting denial of certiorari).

Though novel, petitioner's claim is not without foundation. In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), this Court held that the Eighth Amendment does not prohibit capital punishment. Our decision rested in large part on the grounds that (1) the death penalty was considered permissible by the Framers, see *id.*, at 177 (opinion of Stewart, Powell, and STEVENS, JJ.), and (2) the death penalty might serve "two principal social purposes: retribution and deterrence," *id.*, at 183.

It is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death. Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of petitioner's claim. Moreover, after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted. Over a century ago, this Court recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U. S. 160, 172 (1890).

If the Court accurately described the effect of uncertainty in *Medley*, which involved a period of four weeks, see *ibid.*, that description should apply with even greater force in the case of delays that last for many years.* Finally, the additional deterrent effect from an actual execution now, on the one hand, as compared to 17 years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal. See, *e. g.*, *Coleman* v. *Balkcom*, 451 U. S. 949, 952 (1981) (STEVENS, J., respecting denial of certiorari) ("[T]he deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself"). As Justice White noted, when the death penalty "ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman* v. *Georgia*, 408 U. S. 238, 312 (1972) (opinion concurring in judgment); see also *Gregg* v. *Georgia*, 428 U. S., at 183 ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering").

Petitioner's argument draws further strength from conclusions by English jurists that "execution after inordinate delay would

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*See also *People* v. *Anderson*, 6 Cal. 3d 628, 649, 493 P. 2d 880, 894 (1972) ("The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture") (footnote omitted); *Furman* v. *Georgia*, 408 U. S. 238, 288–289 (1972) (Brennan, J., concurring) ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death"); *Solesbee* v. *Balkcom*, 339 U. S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon"); *Suffolk County District Attorney* v. *Watson*, 381 Mass. 648, 673, 411 N. E. 2d 1274, 1287 (1980) (Braucher, J., concurring) (death penalty is unconstitutional under State Constitution in part because "[i]t will be carried out only after agonizing months and years of uncertainty"); *id.*, at 675–686, 411 N. E. 2d, at 1289–1295 (Liacos, J., concurring).

have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights 1689." *Riley* v. *Attorney General of Jamaica*, [1983] 1 A. C. 719, 734, 3 All E. R. 469, 478 (P. C. 1983) (Lord Scarman, dissenting, joined by Lord Brightman). As we have previously recognized, that section is undoubtedly the precursor of our own Eighth Amendment. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S., at 169–170; *Harmelin* v. *Michigan*, 501 U. S. 957, 966 (1991) (SCALIA, J., concurring in judgment).

Finally, as petitioner notes, the highest courts in other countries have found arguments such as petitioner's to be persuasive. See *Pratt* v. *Attorney General of Jamaica*, [1994] 2 A. C. 1, 4 All E. R. 769 (P. C. 1993) (en banc); *id.*, at 32–33, 4 All E. R., at 785–786 (collecting cases).

Closely related to the basic question presented by the petition is a question concerning the portion of the 17-year delay that should be considered in the analysis. There may well be constitutional significance to the reasons for the various delays that have occurred in petitioner's case. It may be appropriate to distinguish, for example, among delays resulting from (a) a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings; (b) a petitioner's legitimate exercise of his right to review; and (c) negligence or deliberate action by the State. Thus, though English cases indicate that the prisoner should not be held responsible for delays occurring in the latter two categories, see *id.*, at 33, 4 All E. R., at 786, it is at least arguable that some portion of the time that has elapsed since this petitioner was first sentenced to death in 1978 should be excluded from the calculus.

As I have pointed out on past occasions, the Court's denial of certiorari does not constitute a ruling on the merits. See, *e. g.*, *Barber* v. *Tennessee*, 513 U. S. 1184 (1995); *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (STEVENS, J., respecting denial of certiorari). Often, a denial of certiorari on a novel issue will permit the state and federal courts to "serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray* v. *New York*, 461 U. S., at 963. Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study.

JUSTICE BREYER agrees with JUSTICE STEVENS that the issue is an important undecided one.

Rehearing Denied

No. 94–882. KLEVE *v.* BOARD OF GREEN TOWNSHIP TRUSTEES, 513 U. S. 1083;

No. 94–1015. GELLERT *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, 513 U. S. 1149;

No. 94–6712. OGDEN *v.* SAN JUAN COUNTY ET AL., 513 U. S. 1090;

No. 94–7156. FULLER *v.* SCHAEFER, GOVERNOR OF MARYLAND, ET AL., 513 U. S. 1161; and

No. 94–7275. MANN *v.* CONNECTICUT, 513 U. S. 1165. Petitions for rehearing denied.

MARCH 31, 1995

Dismissal Under Rule 46

No. 94–555. ROCKY MOUNTAIN HOSPITAL & MEDICAL SERVICE *v.* PHILLIPS. C. A. 10th Cir. [Certiorari granted, 513 U. S. 1071.] Writ of certiorari dismissed under this Court's 46.

APRIL 1, 1995

Miscellaneous Order

No. A–736. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* PORTER. C. A. 11th Cir. Application to vacate the stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

APRIL 3, 1995

Dismissal Under Rule 46

No. 94–1424. HORN *v.* SEACATCHER FISHERIES, INC., ET AL. Ct. App. Ore. Certiorari dismissed under this Court's Rule 46. Reported below: 128 Ore. App. 585, 876 P. 2d 352.

Miscellaneous Orders

No. ——. CHAPMAN *v.* BRYAN. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. D–1490. IN RE DISBARMENT OF MCGEE. Disbarment entered. [For earlier order herein, see 513 U. S. 1073.]

No. D–1494. In re Disbarment of Otchere. Disbarment entered. [For earlier order herein, see 513 U. S. 1074.]

No. 93–2068. Kimberlin *v.* Quinlan et al. C. A. D. C. Cir. [Certiorari granted, 513 U. S. 1123.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–203. Morse et al. *v.* Republican Party of Virginia et al. D. C. W. D. Va. [Probable jurisdiction noted, 513 U. S. 1125.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–372. Shalala, Secretary of Health and Human Services *v.* Whitecotton et al. C. A. Fed. Cir. [Certiorari granted, 513 U. S. 959.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 94–8032. Kviatkovsky *v.* Temple University et al. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 24, 1995, 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.

Certiorari Granted

No. 94–818. Hercules Inc. et al. *v.* United States. C. A. Fed. Cir. Certiorari granted. Justice Stevens took no part in the consideration or decision of this petition. Reported below: 24 F. 3d 188.

Certiorari Denied

No. 94–746. California *v.* Gutierrez. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 24 Cal. App. 4th 153, 29 Cal. Rptr. 2d 376.

No. 94–878. Igartua et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 32 F. 3d 8.

No. 94–977. Tucker *v.* United States; and
No. 94–6963. McDonald *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 28 F. 3d 1420.

No. 94–1004. WHITE *v.* RUBIN, SECRETARY OF THE TREASURY. C. A. 7th Cir. Certiorari denied. Reported below: 31 F. 3d 474.

No. 94–1075. BRUNSWICK CORP. *v.* BRITISH SEAGULL LTD. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 35 F. 3d 1527.

No. 94–1134. DEHAINAUT, AS WIDOW AND REPRESENTATIVE OF DEHAINAUT, DECEASED, ET AL. *v.* PENA, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 32 F. 3d 1066.

No. 94–1154. GRYBOS ET AL. *v.* DEPARTMENT OF STATE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 36 F. 3d 1097.

No. 94–1173. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 94–1213. NEW YORK ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 919.

No. 94–1208. SUMMERFIELD *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1506.

No. 94–1333. NAEGELE *v.* FIRST AMERICAN TITLE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1072.

No. 94–1346. EICHELBERGER ET AL. *v.* SMITH, TRUSTEE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 32 F. 3d 567.

No. 94–1347. IPARRAGUIRRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–1350. AREA BELLE CHASSE COMMUNITY RADIO *v.* BELLE CHASSE BROADCASTING CORP. ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 641 So. 2d 8.

No. 94–1352. HENNESSEY ET AL. *v.* BLALACK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 561 and 562.

No. 94–1360. SIPCO, INC., ET AL. *v.* JENSEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 38 F. 3d 945.

No. 94–1364. FEI, LTD., ET AL. *v.* OLYMPIA & YORK BATTERY PARK CO., AKA WFC TOWER A CO., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1501.

No. 94–1365. DE LUCA *v.* UNITED NATIONS ORGANIZATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1502.

No. 94–1366. MURRAY *v.* MCINTYRE ET AL. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 94–1367. TOUS RODRIGUEZ *v.* CUEVAS CUEVAS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 34 F. 3d 1065.

No. 94–1374. GORDON ET AL. *v.* PRESIDENT CONTAINER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1501.

No. 94–1406. MATHIS ET AL. *v.* VELSICOL CHEMICAL CORP. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 390.

No. 94–1410. WELLS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94–1438. FOWLER *v.* UNITED STATES; and
No. 94–1439. RUIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 26 F. 3d 1533.

No. 94–1442. MCELDOWNEY *v.* NATIONAL CONFERENCE OF BAR EXAMINERS. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1072.

No. 94–1448. EISENBERG, INDIVIDUALLY AND AS TRUSTEE AND ADMINISTRATOR OF THE ALAN D. EISENBERG, S. C. PENSION AND PROFIT SHARING PLAN, ET AL. *v.* BASSLER-HARSCH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1391.

No. 94–1459. DUENAS *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 719.

No. 94–1461. BRISCOE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 26 F. 3d 142.

No. 94–1466. FIERRO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 761.

No. 94–1475. PRI-HAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–5845. BRAY *v.* DOWLING ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 25 F. 3d 135.

No. 94–6929. WILKES ET AL. *v.* GOMEZ. C. A. 8th Cir. Certiorari denied. Reported below: 32 F. 3d 1324.

No. 94–7101. RILEY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 110 Nev. 638, 878 P. 2d 272.

No. 94–7309. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 20 F. 3d 480.

No. 94–7480. MCCALL *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 31 F. 3d 750.

No. 94–7518. MORALES-MENDOZA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 32 F. 3d 242.

No. 94–7557. PINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 569.

No. 94–7573. WILLETT *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 1265.

No. 94–7585. PURGASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 21 F. 3d 1118.

No. 94–7588. BYRD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 31 F. 3d 1329.

No. 94–7604. DOTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 1179.

No. 94–7630. BLAIR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 572.

No. 94–7632. FRIAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 39 F. 3d 391.

No. 94–7869. RAMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 219.

No. 94–7914. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 94–7944. BURKET *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 248 Va. 596, 450 S. E. 2d 124.

No. 94–7984. TRAYLOR *v.* REYNOLDS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1483.

No. 94–7986. KIDD *v.* KAY AUTOMOTIVE DISTRIBUTORS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1479.

No. 94–7996. SHOWS *v.* DYAL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 389.

No. 94–8006. MASON *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–8007. CLAY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 1091.

No. 94–8008. BOOTH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 265 Ill. App. 3d 462, 637 N. E. 2d 580.

No. 94–8015. JONES *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 436.

No. 94–8017. MARTIN *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 41 F. 3d 1516.

No. 94–8019. CALIFORRNIAA *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 94–8024. YOUNG *v.* SHILAOS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 441.

No. 94–8026. RAMIREZ *v.* PRICE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1483.

No. 94–8033. MCCORMACK *v.* RUNYON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 34 F. 3d 1068.

No. 94–8034. GLENDORA *v.* GANNETT CO. INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1238.

No. 94–8035. DAVIS *v.* FIRST WORTHING MANAGEMENT. C. A. 5th Cir. Certiorari denied. Reported below: 33 F. 3d 1378.

No. 94–8036. HARRIS *v.* BELCHER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 636.

No. 94–8037. ROBINSON *v.* SYNTHETIC PRODUCTS. C. A. 5th Cir. Certiorari denied.

No. 94–8038. PETERSON *v.* HADDAD. C. A. 11th Cir. Certiorari denied.

No. 94–8039. BRANSON *v.* ARTHUR. Ct. App. Ariz. Certiorari denied.

No. 94–8042. BOSSETT *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 825.

No. 94–8046. PUDDER *v.* IRWIN. C. A. 11th Cir. Certiorari denied.

No. 94–8050. WILLIAMS *v.* CITY OF COLUMBUS POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied.

No. 94–8051. THOMAS *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 94–8054. YOUNG *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 1457.

No. 94–8055. THOMAS ET AL. *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 637 So. 2d 1272.

No. 94–8059. JUDD *v.* NURNBERG, MEDICAL DIRECTOR OF UNM MEDICAL MENTAL HEALTH CENTER. Sup. Ct. N. M. Certiorari denied.

No. 94–8060. JONES *v.* LANHAM, COMMISSIONER, MARYLAND DIVISION OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1177.

No. 94–8066. BROWN *v.* BROWN ET AL. C. A. D. C. Cir. Certiorari denied.

No. 94–8070. CRAMER *v.* SPADA ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 203 App. Div. 2d 739, 610 N. Y. S. 2d 662.

No. 94–8074. NASH *v.* NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–8080. HEARN *v.* WELLINGTON LEASING CO. ET AL. C. A. 2d Cir. Certiorari denied.

No. 94–8081. GATOV *v.* RIVER BANK AMERICA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 84 N. Y. 2d 921, 645 N. E. 2d 1209.

No. 94–8140. AMARAL *v.* RHODE ISLAND HOSPITAL TRUST ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 39 F. 3d 1166.

No. 94–8141. SLATER *v.* NEWMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 42 F. 3d 1386.

No. 94–8187. BOWMAN *v.* MARYLAND MASS TRANSIT ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1465.

No. 94–8190. GIVENS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 100 Md. App. 795.

No. 94–8223. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 42 F. 3d 1312.

No. 94–8240. BERGODERE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 40 F. 3d 512.

No. 94–8266. RAWLINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1075.

No. 94–8267. PEET *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1152.

No. 94–8268. LAMPKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 47 F. 3d 175.

No. 94–8280. DUPLESSIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–8283. AMERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–8284. HOLMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 388.

No. 94–8285. GRIFFITHS *v.* UNITED STATES (two cases). C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 844 (first case).

No. 94–8286. WINTERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1497.

No. 94–8287. WORTHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8291. SALVAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 218.

No. 94–8292. RECTOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–8295. JAMES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 38 F. 3d 610.

No. 94–8296. MARDER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 48 F. 3d 564.

No. 94–8301. BROYLES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 37 F. 3d 1314.

No. 94–8302. BRADY *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied.

No. 94–8303. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8305. MILEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 71.

No. 94–8319. HUANG SHAO MING ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 94–8320. MCRAVEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1473.

No. 94–8326. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 192.

No. 94–8327. WASHINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8338. NEWBERN *v.* MACDONALD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–8339. SOUN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 188 Wis. 2d 606, 526 N. W. 2d 281.

No. 94–1356. GABLE ET AL. *v.* SWEETHEART CUP CO., INC., ET AL. C. A. 4th Cir. Motion of General Motors Salaried Retirees for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 35 F. 3d 851.

Rehearing Denied

No. 94–6866. JUDD *v.* HANSEN, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, 513 U. S. 1158;
No. 94–7135. KLOPP *v.* AVCO LYCOMING TEXTRON ET AL., 513 U. S. 1161;
No. 94–7207. GODAIRE *v.* ULRICH ET AL., 513 U. S. 1163;
No. 94–7463. HARRIS *v.* RICHARDSON, COMMISSIONER OF INTERNAL REVENUE, 513 U. S. 1173;
No. 94–7486. MORRITZ *v.* GOVERNMENT OF ISRAEL, 513 U. S. 1175;
No. 94–7509. PIZZO *v.* WHITLEY, WARDEN, ET AL., 513 U. S. 1193;
No. 94–7611. JACKSON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 513 U. S. 1179; and
No. 94–7623. BURDINE *v.* TEXAS, 513 U. S. 1185. Petitions for rehearing denied.

No. 94–662. CITY OF HENDERSON ET AL. *v.* NEVADA ENTERTAINMENT INDUSTRIES, INC., ET AL., 513 U. S. 1078 and 1199. Motion for leave to file second petition for rehearing denied.

No. 94–5565. CARRIO *v.* HEMSTREE ET AL., 513 U. S. 907. Motion for leave to file petition for rehearing denied.

APRIL 5, 1995

Certiorari Denied

No. 94–8748 (A–745). MAYS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of

death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 51 F. 3d 1045.

Rehearing Denied

No. 94–7318 (A–711). INGRAM *v.* THOMAS, WARDEN, 513 U. S. 1167. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for rehearing denied.

APRIL 6, 1995

Dismissal Under Rule 46

No. 94–7628. LANE *v.* NEVADA. Sup. Ct. Nev. Certiorari dismissed under this Court's Rule 46.1. Reported below: 110 Nev. 1156, 881 P. 2d 1358.

Certiorari Denied

No. 94–8766 (A–750). MAYS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE SOUTER would grant the application for stay of execution. JUSTICE BREYER took no part in the consideration or decision of this application.

APRIL 7, 1995

Miscellaneous Order

No. A–754. INGRAM *v.* AULT, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution.

Certiorari Denied

No. 94–8790 (A–760). INGRAM *v.* THOMAS, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

No. 94–8792 (A–761). INGRAM *v.* THOMAS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

APRIL 17, 1995

Vacated and Remanded on Appeal

No. 94–66. MOORE ET AL. *v.* DUPREE ET AL.; and

No. 94–82. LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES ET AL. *v.* DUPREE ET AL. Appeals from D. C. S. D. Miss. Judgment vacated and cases remanded to the District Court to clarify whether it has enjoined only § 47 of the Uniform School Law, 1986 Miss. Gen. Laws, ch. 492, or whether it has also enjoined the effect of § 52 of the Act (codified as Miss. Code Ann. § 37–7–103 (1990)), insofar as § 52 implicitly repealed Miss. Code Ann. § 37–7–611 (1972). Reported below: 831 F. Supp. 1310.

Miscellaneous Orders. (See also No. 94–7743, *ante*, p. 208.)

No. ——. FRITZ *v.* UNITED STATES;

No. ——. KALLAS *v.* CHICAGO BOARD OF EDUCATION ET AL.;

No. ——. MAGUIRE *v.* MAGUIRE;

No. ——. ROKKE *v.* ROKKE; and

No. ——. SINICROPI *v.* MILONE, FORMER DIRECTOR OF PROBATION, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–1499. IN RE DISBARMENT OF BENSON. Disbarment entered. [For earlier order herein, see 513 U. S. 1142.]

No. D–1500. IN RE DISBARMENT OF SACKS. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1501. IN RE DISBARMENT OF TINARI. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1503. IN RE DISBARMENT OF SYDNOR. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1504. IN RE DISBARMENT OF HANSON. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1509. IN RE DISBARMENT OF MASON. Disbarment entered. [For earlier order herein, see 513 U. S. 1144.]

No. D–1516. IN RE DISBARMENT OF KENT. Disbarment entered. [For earlier order herein, see 513 U. S. 1189.]

No. D–1527. IN RE DISBARMENT OF HERKENHOFF. It is ordered that Walter Eugene Herkenhoff, of Las Cruces, N. M., 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–1528. IN RE DISBARMENT OF EVANS. It is ordered that Jake R. Evans, of Las Cruces, N. M., 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–1529. IN RE DISBARMENT OF SPIVAK. It is ordered that Peter B. Spivak, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1530. IN RE DISBARMENT OF WINDHEIM. It is ordered that Aaron G. Windheim, of Nyack, 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–1531. IN RE DISBARMENT OF MADDOX. It is ordered that Alton H. Maddox, Jr., of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1532. IN RE DISBARMENT OF CRAWFORD. It is ordered that Todd Howard Crawford, of Greensburg, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1533. IN RE DISBARMENT OF SHREVE. It is ordered that David H. Shreve, of Pittsburgh, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1534. IN RE DISBARMENT OF DOYLE. It is ordered that Robert W. Doyle, of Minneapolis, Minn., 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–1535. IN RE DISBARMENT OF FRANKUM. It is ordered that John W. Frankum, of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1536. IN RE DISBARMENT OF STERN. It is ordered that Stanley R. Stern, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1537. IN RE DISBARMENT OF WAGNER. It is ordered that Arthur Wagner, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1538. IN RE DISBARMENT OF MAIOLO. It is ordered that Jenny M. Maiolo, of Richmond Hill, N. Y., 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. 94–631. MILLER ET AL. *v.* JOHNSON ET AL.;

No. 94–797. ABRAMS ET AL. *v.* JOHNSON ET AL.; and

No. 94–929. UNITED STATES *v.* JOHNSON ET AL. D. C. S. D. Ga. [Probable jurisdiction noted, 513 U. S. 1071.] Motion of appellants Lucious Abrams, Jr., et al. for reconsideration of order denying motion for additional time for oral argument [*ante*, p. 1013] denied.

No. 94–749. HURLEY ET AL. *v.* IRISH-AMERICAN GAY, LESBIAN & BISEXUAL GROUP OF BOSTON ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, 513 U. S. 1071.] Motion of Individual Rights Foundation for leave to file a brief as *amicus curiae* out of time denied.

No. 94–7636. IN RE GAYDOS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [513 U. S. 1189] denied.

No. 94–7852. WILLIAMS ET UX. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 1003] denied.

No. 94–8603. IN RE ENGLERT. Petition for writ of habeas corpus denied.

No. 94–1468. IN RE LAW;
No. 94–1478. IN RE GRECO;
No. 94–8045. IN RE SOLIMINE; and
No. 94–8137. IN RE HOLLINGSWORTH. Petitions for writs of mandamus denied.

Certiorari Granted

No. 94–1239. FULTON CORP. *v.* FAULKNER, SECRETARY OF REVENUE OF NORTH CAROLINA. Sup. Ct. N. C. Certiorari granted. Reported below: 338 N. C. 472, 450 S. E. 2d 728.

No. 94–1361. ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KOLE, ET AL. *v.* KOREAN AIR LINES CO., LTD.; and
No. 94–1477. KOREAN AIR LINES CO., LTD. *v.* ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF KOLE, ET AL. C. A. 2d Cir. Certiorari in No. 94–1361 granted limited to Question 1 presented by the petition. Certiorari in No. 94–1477 granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 43 F. 3d 18.

No. 94–7448. BAILEY *v.* UNITED STATES; and
No. 94–7492. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 36 F. 3d 106.

Certiorari Denied

No. 94–1202. MOTTOLA *v.* AYENI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 35 F. 3d 680.

No. 94–1204. ALEXANDER SHOKAI, INC., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1480.

No. 94–1216. GILLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 33 F. 3d 46.

No. 94–1223. BROOKMAN *v.* RUBIN, SECRETARY OF THE TREASURY. C. A. 7th Cir. Certiorari denied.

No. 94–1226. FLEMING FOODS OF ALABAMA, INC. *v.* ALABAMA DEPARTMENT OF REVENUE. Sup. Ct. Ala. Certiorari denied. Reported below: 648 So. 2d 577.

No. 94–1240. WHITTLESEY *v.* OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 39 F. 3d 1197.

No. 94–1245. BEVACQUA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1186.

No. 94–1258. NATIONAL POSTAL MAIL HANDLERS UNION, A DIVISION OF LIUNA, DBA MAIL HANDLERS BENEFITS PLAN *v.* GOEPEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 36 F. 3d 306.

No. 94–1267. PREVETIRE *v.* WEYHER/LIVSEY CONSTRUCTORS, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 27 F. 3d 985.

No. 94–1278. F. SCHUMACHER & CO. *v.* ALVORD-POLK, INC., ET AL.; and

No. 94–1363. NATIONAL DECORATING PRODUCTS ASSN., INC. *v.* ALVORD-POLK, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 37 F. 3d 996.

No. 94–1300. GUIDRY *v.* SHEET METAL WORKERS' NATIONAL PENSION FUND ET AL.; and

No. 94–1452. SHEET METAL WORKERS' INTERNATIONAL ASSN., LOCAL 9 *v.* GUIDRY. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1078.

No. 94–1309. HUFNAGEL *v.* MEDICAL BOARD OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–1348. THOMPSON ET AL. *v.* BOGGS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 33 F. 3d 847.

No. 94–1368. FIDELITY & CASUALTY COMPANY OF NEW YORK *v.* SAMPSELL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 638 So. 2d 477.

No. 94–1371. STROIK *v.* PONSETI. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 155.

No. 94–1373. REICH *v.* SPELLMAN ET AL. Ct. App. Wis. Certiorari denied. Reported below: 185 Wis. 2d 918, 520 N. W. 2d 291.

No. 94–1376. ILIC *v.* LIQUID AIR CORP. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 668.

No. 94–1377. SUN CITY TAXPAYERS' ASSN. *v.* CITIZENS UTILITIES CO. C. A. 2d Cir. Certiorari denied. Reported below: 45 F. 3d 58.

No. 94–1379. MATTIOLI ET AL. *v.* TUNKHANNOCK TOWNSHIP ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 166 Pa. Commw. 15, 646 A. 2d 6.

No. 94–1381. DAVIDSON BROS., INC. *v.* D. KATZ & SONS, INC., ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 274 N. J. Super. 159, 643 A. 2d 642.

No. 94–1384. REAHARD ET UX. *v.* LEE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1412.

No. 94–1386. RYAN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 259 Ill. App. 3d 611, 631 N. E. 2d 348.

No. 94–1388. BERRY ET AL. *v.* PARRISH, KANSAS SECURITIES COMMISSIONER. Ct. App. Kan. Certiorari denied. Reported below: 19 Kan. App. 2d xxix, 880 P. 2d 1291.

No. 94–1389. KELL *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 36 F. 3d 1115.

No. 94–1390. WILLIAMS ET AL. *v.* NAGEL ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 162 Ill. 2d 542, 643 N. E. 2d 816.

No. 94–1391. STONUM *v.* CCH COMPUTAX INC. C. A. 9th Cir. Certiorari denied. Reported below: 34 F. 3d 1073.

No. 94–1394. UNDERWOOD ET AL. *v.* ALASKA ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 881 P. 2d 322.

No. 94–1395. HERNANDEZ ET UX. *v.* BADGER CONSTRUCTION EQUIPMENT CO. ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 28 Cal. App. 4th 1791, 34 Cal. Rptr. 2d 732.

No. 94–1396. RIGGS *v.* SCINDIA STEAM NAVIGATION CO., LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 1466.

No. 94–1397. ARRINGTON ET AL. *v.* WILKS ET AL.; and
No. 94–1422. MARTIN ET AL. *v.* WILKS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 20 F. 3d 1525.

No. 94–1399. BULETTE ET AL. *v.* TROUT ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 164 Pa. Commw. 701, 643 A. 2d 1192.

No. 94–1400. SAKAI, ADMINISTRATOR, HALAWA CORRECTION FACILITY, ET AL. *v.* SMITH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 1001.

No. 94–1402. THOMAS M. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–1403. BERNARD ET UX. *v.* COYNE, CHAPTER 7 TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 1028.

No. 94–1409. SUMMERS *v.* GRIFFITH. Sup. Ct. Ark. Certiorari denied. Reported below: 317 Ark. 404, 878 S. W. 2d 401.

No. 94–1411. ST. JUDE HOSPITAL OF KENNER, LOUISIANA, INC. *v.* TRAVELERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 193.

No. 94–1413. BAKER, LEGALLY INCAPACITATED PERSON BY BAKER, GUARDIAN, ET AL. *v.* SEARS, ROEBUCK & CO. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1471.

No. 94–1414. MEAD CORP. *v.* BEAZER EAST, INC. C. A. 3d Cir. Certiorari denied. Reported below: 34 F. 3d 206.

No. 94–1415. IMMANUEL *v.* BARRY, MAYOR OF THE DISTRICT OF COLUMBIA, ET AL. Ct. App. D. C. Certiorari denied.

No. 94–1425. DAVIS *v.* UNION NATIONAL BANK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 24.

No. 94–1426. TRIPLETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 37 F. 3d 1500.

No. 94–1427. DEAN, SHERIFF, CITRUS COUNTY, FLORIDA *v.* REDNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 29 F. 3d 1495.

No. 94–1428. MCKENZIE *v.* GENERAL TELEPHONE COMPANY OF CALIFORNIA, DBA GTEL, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1310.

No. 94–1429. SWAIN *v.* STEVENS. Sup. Ct. Miss. Certiorari denied. Reported below: 628 So. 2d 1385.

No. 94–1430. WHEEL *v.* ROBINSON, SUPERINTENDENT, CHITTENDEN COUNTY CORRECTIONAL CENTER. C. A. 2d Cir. Certiorari denied. Reported below: 34 F. 3d 60.

No. 94–1433. LEE ET AL. *v.* COAHOMA COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 384.

No. 94–1435. JOHNSON *v.* HILLS & DALES GENERAL HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 40 F. 3d 837.

No. 94–1436. WILSON ET UX. *v.* ALEXANDER'S POWER SHIPPING CO., LTD. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 638.

No. 94–1440. CALIFORNIA *v.* BLAIR. C. A. 9th Cir. Certiorari denied. Reported below: 38 F. 3d 1514.

No. 94–1441. MORETTI *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1462.

No. 94–1454. PLANT *v.* VOUGHT AIRCRAFT CO. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 640.

No. 94–1458. ADAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–1464. BORST ET AL. *v.* CHEVRON CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 1308.

No. 94–1469. RANDOLPH *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 94–1472. ALEXANDER, CO-ADMINISTRATOR OF THE ESTATE OF COLEMAN, DECEASED, ET AL. *v.* HERBERT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 290.

No. 94–1480. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1359.

No. 94–1487. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–1493. MERVIS *v.* UNITED STATES; and
No. 94–8462. ZEHRBACH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1252.

No. 94–1499. RATLIFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1392.

No. 94–1502. DUQUESNE LIGHT CO. *v.* CLAUS. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1115.

No. 94–1503. NORTH CAROLINA DEPARTMENT OF AGRICULTURE *v.* PARKER. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1178.

No. 94–1504. MARKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 38 F. 3d 1009.

No. 94–1505. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–1510. AU *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1398.

No. 94–1526. BELL *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 42 M. J. 56.

No. 94–1547. DEVOLL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 39 F. 3d 575.

No. 94–7281. JONES, AKA TILLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 34 F. 3d 596.

No. 94–7377. LONGNECKER *v.* KELLEY. Sup. Ct. Pa. Certiorari denied. Reported below: 538 Pa. 626, 646 A. 2d 1180.

No. 94–7413. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7425. RIDDLE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 888 S. W. 2d 1.

No. 94–7668. TYRELL J. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 68, 876 P. 2d 519.

No. 94–7744. TURNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 137, 878 P. 2d 521.

No. 94–7745. WATERS *v.* RUNYON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–7779. HANOUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 1128.

No. 94–7785. SINGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1216.

No. 94–7903. GAREY *v.* OH. Sup. Ct. Fla. Certiorari denied. Reported below: 648 So. 2d 722.

No. 94–8061. LONG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 883 P. 2d 167.

No. 94–8065. KEELER *v.* MAUNEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1125.

No. 94–8086. COLEMAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 659 A. 2d 227.

No. 94–8088. GREEN *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 36 F. 3d 602.

No. 94–8095. LATHAM *v.* LAWHON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1177.

No. 94–8096. MASTERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 965, 884 P. 2d 136.

No. 94–8097. YOUNG *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1470.

No. 94–8098. TEMPLIN *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 568.

No. 94–8103. SANCHEZ *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 670.

No. 94–8106. ABEDI *v.* SMITH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1398.

No. 94–8120. JAMES *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 39 F. 3d 607.

No. 94–8121. KRESE *v.* OVERTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1507.

No. 94–8122. SUTTON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 94–8127. LANGFORD *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 94–8130. MIKKILINENI *v.* INDIANA COUNTY TRANSIT AUTHORITY ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 436 Pa. Super. 655, 647 A. 2d 272.

No. 94–8135. WUORNOS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 1000.

No. 94–8142. LAMBROS *v.* NORTHWEST AIRLINES, INC., ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–8144. STOW *v.* HORAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 36 F. 3d 1089.

No. 94–8148. SALAZAR *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 636.

No. 94–8149. AYERS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1465.

No. 94–8160. LEWIS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 94–8170. PESEK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 94–8171. PADILLOW *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1192.

No. 94–8173. GONZALEZ *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 389.

No. 94–8174. REDMOND *v.* SCHOCKWEILER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 432.

No. 94–8177. CREEL *v.* KYLE. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 955.

No. 94–8178. BRIM *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1175.

No. 94–8180. FRIEDMAN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 646 So. 2d 188.

No. 94–8181. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 94–8182. AVERY *v.* BRODEUR, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 32 F. 3d 561.

No. 94–8183. BANKS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 648 So. 2d 766.

No. 94–8185. COOPER *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 562.

No. 94–8186. AZUBUKO *v.* CHIEF ADULT PROBATION OFFICER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 40 F. 3d 1235.

No. 94–8191. DAWSON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 94–8193. WUORNOS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 1012.

No. 94–8195. MCCULLUM *v.* JACKSON PUBLIC SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 91.

No. 94–8197. STRAUSS *v.* NOONAN. C. A. 9th Cir. Certiorari denied.

No. 94–8201. WATSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 168, 449 S. E. 2d 694.

No. 94–8204. IN RE JUDD. Ct. App. N. M. Certiorari denied.

No. 94–8206. STANWOOD *v.* MULTNOMAH COUNTY, OREGON, ET AL. Ct. App. Ore. Certiorari denied. Reported below: 129 Ore. App. 305, 879 P. 2d 246.

No. 94–8207. WATSON *v.* WHITE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 94–8208. BALL *v.* CIRCUIT COURT OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 94–8212. GIBSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 251 Ill. App. 3d 1106, 661 N. E. 2d 1197.

No. 94–8213. BURROWS *v.* BABYLON, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 50 F. 3d 3.

No. 94–8215. REILLY *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 94–8219. ARMSTEAD *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 202.

No. 94–8220. JEFFERS *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 38 F. 3d 411.

No. 94–8221. JOHNSON *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1388.

No. 94–8235. CORONEL *v.* OLSON. Sup. Ct. Haw. Certiorari denied. Reported below: 77 Haw. 488, 889 P. 2d 65.

No. 94–8237. BAILEY *v.* SOKOLOWSKI ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–8247. HILL *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 885 S. W. 2d 738.

No. 94–8250. DAVIS *v.* LEONARDO, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 94–8252. HALF-DAY *v.* PEROT ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–8253. THOMAS *v.* VIRGINIA (two cases). Sup. Ct. Va. Certiorari denied.

No. 94–8257. BANKHEAD *v.* CITY OF COLUMBUS, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 662.

No. 94–8258. TIMMERMAN *v.* UTAH STATE TAX COMMISSION. Ct. App. Utah. Certiorari denied.

No. 94–8261. COLEMAN *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 633.

No. 94–8297. KAMAL *v.* BROWN ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–8298. MOORE, GUARDIAN AD LITEM *v.* AETNA CASUALTY & SURETY CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 570.

No. 94–8306. RIVERA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1404.

No. 94–8307. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 643.

No. 94–8308. SANTANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–8309. SUTTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 41 F. 3d 1257.

No. 94–8310. ROGERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 31.

No. 94–8315. PETRYKIEVICZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 36 F. 3d 1104.

No. 94–8323. VIAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8328. TAVERAS *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1213.

No. 94–8330. HUNTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1392.

No. 94–8331. DOLORES-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 32 F. 3d 572.

No. 94–8332. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 42 F. 3d 604.

No. 94–8333. ESCOBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1458.

No. 94–8334. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8335. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–8336. GILBREATH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8340. RIVERA-URENA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1402.

No. 94–8341. WASHINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8342. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8344. SENIOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 645.

No. 94–8345. GONZALEZ-DIAZ *v.* UNITED STATES; and
No. 94–8348. SANTANA-MADERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–8346. NOEL *v.* UNITED STATES; and
No. 94–8347. MARSH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–8349. De la Rosa *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1116.

No. 94–8350. Fulford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8351. Harps *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8355. James *v.* Government of the Virgin Islands. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1116.

No. 94–8356. Turcks *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 41 F. 3d 893.

No. 94–8357. White *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1515.

No. 94–8360. Doward *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 41 F. 3d 789.

No. 94–8361. Gonzales *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 735.

No. 94–8362. Gallegos-Corrales *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 548.

No. 94–8363. Ramirez-Frias *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 636.

No. 94–8366. Ruffin *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 40 F. 3d 1296.

No. 94–8367. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 35 F. 3d 567.

No. 94–8368. Rivera-Garcia *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1212.

No. 94–8369. Soto *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8370. St. Hill *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8371. Tracy *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 36 F. 3d 187.

No. 94–8376. EARLY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1215.

No. 94–8378. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–8383. BOWENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–8389. ZURITO-BERRIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8390. LOHM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–8393. VAN KRIEKEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 227.

No. 94–8394. WALTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 669.

No. 94–8396. WILES *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 434 Pa. Super. 696, 641 A. 2d 1229.

No. 94–8400. ROSE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–8403. ORTIZ-ESPINOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1478.

No. 94–8408. BIVOLCIC *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1115.

No. 94–8410. BARNETT-INCLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1478.

No. 94–8412. FOSTER *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 873.

No. 94–8413. VALENZUELA-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1507.

No. 94–8415. DURDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–8416. BORJAS DE LOZANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–8417. HEFFLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8418. GOLDEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1392.

No. 94–8419. FLORES-LOMELI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8421. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8422. GRISSOM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 44 F. 3d 1507.

No. 94–8428. MOORE *v.* PERRILL, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1192.

No. 94–8431. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1507.

No. 94–8433. KOPP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 1450.

No. 94–8443. HALLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 40 F. 3d 275.

No. 94–8446. MUNOZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–8454. STROBRIDGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 42 F. 3d 1387.

No. 94–8461. EAGLE THUNDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 51 F. 3d 278.

No. 94–8469. FAULKNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 47 F. 3d 429.

No. 94–8476. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–8477. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8479. LAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 127.

No. 94–8480. MARSHALL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–8482. WELLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 33 F. 3d 944.

No. 94–8483. KYUNG HWAN MUN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 409.

No. 94–8497. MCLYMONT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 45 F. 3d 400.

No. 94–8501. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1213.

No. 94–8503. BURNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1478.

No. 94–8504. BRUTZMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–8520. CHERUBIN *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8521. CARILLO *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1116.

No. 94–8568. CHAPMAN *v.* ABRAHAMSON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1510.

No. 94–1003. MICHIGAN *v.* GOSS. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 446 Mich. 587, 521 N. W. 2d 312.

No. 94–1408. CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. *v.* MCINTYRE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 35 F. 3d 338.

No. 94–1261. ARCHER-DANIELS-MIDLAND CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 37 F. 3d 321.

No. 94–1418. CHIAVOLA ET AL. *v.* VILLAGE OF OAKWOOD, MISSOURI, ET AL. Ct. App. Mo., Western Dist. Motion of American Planning Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 886 S. W. 2d 74.

No. 94–1437. CONOPCO, INC., DBA CHESEBROUGH-POND'S USA CO. *v.* MAY DEPARTMENT STORES CO. ET AL. C. A. Fed. Cir. Motions of Bristol-Myers Squibb Co., International Trademark Association, SmithKline Beecham Corp., Gerstman + Meyers, Inc., et al., and American Home Products Corp. et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 46 F. 3d 1556.

Rehearing Denied

No. 93–1975. KING *v.* BROWN, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER, 513 U. S. 925;

No. 93–7659. HARRIS *v.* ALABAMA, 513 U. S. 504;

No. 93–9434. MCGAHEE *v.* ALABAMA, 513 U. S. 1189;

No. 93–9690. FAIRCHILD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, 513 U. S. 1146;

No. 94–1046. EAST *v.* WEST ONE BANK, IDAHO, 513 U. S. 1150;

No. 94–1061. JENSEN *v.* BROKAW, CHIEF FINANCING DIVISION AGENT, SMALL BUSINESS ADMINISTRATION, 513 U. S. 1150;

No. 94–1100. IN RE ROGERS, 513 U. S. 1145;

No. 94–1132. CIAFFONI *v.* COWDEN, 513 U. S. 1153;

No. 94–1136. TONN *v.* FORSBERG ET AL., 513 U. S. 1153;

No. 94–1171. RESHARD *v.* PENA, SECRETARY OF TRANSPORTATION (two cases), 513 U. S. 1155;

No. 94–1199. ZISK *v.* HIGH STREET ASSOCIATES, 513 U. S. 1192;

No. 94–1231. CATERINA *v.* BLAKELY BOROUGH ET AL., 513 U. S. 1156;

No. 94–6294. WEEDEN *v.* RUNYON, POSTMASTER GENERAL, 513 U. S. 1157;

No. 94–6785. KIKUMURA *v.* TURNER, WARDEN, *ante*, p. 1005;

No. 94–6831. BECKER *v.* CITY OF KENNEWICK, 513 U. S. 1129;

No. 94–7004. BRONFMAN *v.* CITY OF KANSAS CITY, MISSOURI, ET AL., 513 U. S. 1117;

No. 94–7089. MCNAIR *v.* ALABAMA, 513 U. S. 1159;

No. 94–7119. WEEKS *v.* JONES, WARDEN, 513 U. S. 1193;

No. 94–7157. DEVIER *v.* THOMAS, WARDEN, 513 U. S. 1161;

No. 94–7178. HARRIS *v.* WHITE, WARDEN, 513 U. S. 1162;

No. 94–7181. SCHREYER *v.* TATTERSALL, INC., 513 U. S. 1162;
No. 94–7187. CLISBY *v.* ALABAMA, 513 U. S. 1162;
No. 94–7188. KENDALL *v.* KENDALL, 513 U. S. 1162;
No. 94–7220. BROWN *v.* SIEGEL, WARDEN, 513 U. S. 1163;
No. 94–7272. DAVIS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 513 U. S. 1165;
No. 94–7292. CHIVARS *v.* BORG, WARDEN, 513 U. S. 1166;
No. 94–7326. HILL *v.* UNITED STATES, 513 U. S. 1167;
No. 94–7362. BISHOP *v.* STATE BAR OF GEORGIA, 513 U. S. 1168;
No. 94–7465. KRAMER *v.* UNIVERSITY OF PITTSBURGH ET AL., 513 U. S. 1173;
No. 94–7478. BUSSELL *v.* KENTUCKY, 513 U. S. 1174;
No. 94–7532. BORROMEO *v.* JOHNSON ET AL., 513 U. S. 1176;
No. 94–7536. CARTER *v.* APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, 513 U. S. 1194;
No. 94–7543. JACKSON *v.* ROCHESTER HOUSING AUTHORITY ET AL., 513 U. S. 1194;
No. 94–7568. IN RE FLAKES, 513 U. S. 1145;
No. 94–7685. TAI TAN DUONG *v.* UNITED STATES, 513 U. S. 1181; and
No. 94–7917. IN RE BRANCH, 513 U. S. 1189. Petitions for rehearing denied.

No. 94–6914. FIELDS *v.* KANSAS, 513 U. S. 1129; and
No. 94–7351. VIJENDIRA *v.* UNITED STATES, 513 U. S. 1136. Motions for leave to file petitions for rehearing denied.

APRIL 19, 1995

Miscellaneous Order

No. A–787. SNELL *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied.

APRIL 24, 1995

Certiorari Granted—Vacated and Remanded

No. 93–313. BDO SEIDMAN ET AL. *v.* SIMMONS ET AL.; and
No. 93–611. CONTINENTAL INSURANCE CO. *v.* SIMMONS ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and cases

remanded for further consideration in light of *Plaut* v. *Spendthrift Farm, Inc.*, *ante*, p. 211. Reported below: 997 F. 2d 39.

Miscellaneous Orders

No. ——. OPS Shopping Center, Inc. *v.* Federal Deposit Insurance Corporation; and

No. ——. Alabama *v.* Nutter. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. ——. Jermyn *v.* Pennsylvania; and

No. ——. Maturana *v.* Arizona. Motions for leave to proceed *in forma pauperis* without affidavits of indigency executed by petitioners granted.

No. D–1505. In re Disbarment of Beitler. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1506. In re Disbarment of Westler. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1511. In re Disbarment of Zeltzer. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1514. In re Disbarment of Mazer. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1517. In re Disbarment of Provine. Disbarment entered. [For earlier order herein, see 513 U. S. 1189.]

No. D–1519. In re Disbarment of High. John Emerson High, of West Chester, Pa., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 6, 1995 [*ante*, p. 1002], is hereby discharged.

No. D–1539. In re Disbarment of Quaid. It is ordered that James F. Quaid, Jr., of Metairie, La., 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–1540. In re Disbarment of Whitehair. It is ordered that George Joseph Whitehair, of Marlton, 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–1541. IN RE DISBARMENT OF BELL. It is ordered that Alan R. Bell, of Fort Lee, 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–1542. IN RE DISBARMENT OF KITSOS. It is ordered that Nicholas T. Kitsos, 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–1543. IN RE DISBARMENT OF YOUNG. It is ordered that James K. Young, of Bloomingdale, 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–1544. IN RE DISBARMENT OF PRITZKER. It is ordered that Michael L. Pritzker, of Northbrook, 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. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Motion of West Bank Homeowners Association for leave to intervene denied. [For earlier order herein, see, *e. g.*, 513 U. S. 803.]

No. 94–1288. HIRAM WALKER & SONS, INC. *v.* ELLER & CO., INC., *ante*, p. 1018. Motion of respondent for an award of costs denied.

No. 94–8625. IN RE BOWEN;
No. 94–8699. IN RE VERDONE; and
No. 94–8726. IN RE VISINTINE. Petitions for writs of habeas corpus denied.

No. 94–8239. IN RE BREWER; and
No. 94–8242. IN RE CALIFORRNIAA. Petitions for writs of mandamus denied.

No. 94–8617. IN RE WILSON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 94–1471. VARITY CORP. *v.* HOWE ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 36 F. 3d 746 and 41 F. 3d 1263.

Certiorari Denied

No. 93–564. KIDDER, PEABODY & CO. *v.* COOPERATIVA DE AHORRO Y CREDITO AGUADA. C. A. 1st Cir. Certiorari denied. Reported below: 993 F. 2d 269.

No. 93–1723. JOHNSTON ET AL. *v.* CIGNA CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 14 F. 3d 486.

No. 93–9240. CRAWFORD *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 94–1143. CHANDLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 358.

No. 94–1246. HEDGES, THROUGH BECKETT, HIS PERSONAL REPRESENTATIVE, ET AL. *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF GIBRALTAR SAVINGS, F. A., SUCCESSOR IN INTEREST TO CATHEDRAL MORTGAGE CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 32 F. 3d 1360.

No. 94–1284. KURINSKY ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 33 F. 3d 594.

No. 94–1291. RYAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 41 F. 3d 361.

No. 94–1304. WEST VIRGINIA STATE DEPARTMENT OF TAX AND REVENUE *v.* INTERNAL REVENUE SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 37 F. 3d 982.

No. 94–1316. SOUTHVIEW FARM ET AL. *v.* CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 34 F. 3d 114.

No. 94–1332. THOMAS, CHIEF, UNITED STATES FOREST SERVICE, ET AL. *v.* PACIFIC RIVERS COUNCIL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 30 F. 3d 1050.

No. 94–1342. CONTI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 658.

No. 94–1421. SUGGS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 64.

No. 94–1445. NILSEN *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1513.

No. 94–1447. SALKIND *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CHAPLIN ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–1449. CITY OF COLUMBUS ET AL. *v.* QUETGLES, DBA BABY DOLLS, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 708, 450 S. E. 2d 677.

No. 94–1451. PANTRON I CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 1088.

No. 94–1455. CARTER *v.* DETELLA, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 36 F. 3d 1385.

No. 94–1456. GRISET ET AL. *v.* FAIR POLITICAL PRACTICES COMMISSION. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 851, 884 P. 2d 116.

No. 94–1463. NIPPER ET AL. *v.* SMITH, SECRETARY OF STATE OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 1494.

No. 94–1465. ROBERTS *v.* KINGS COUNTY HOSPITAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1236.

No. 94–1467. TAMPA CROWN DISTRIBUTORS, INC. *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 643 So. 2d 16.

No. 94–1470. EVANS, INC. *v.* SPIERER. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–1473. HOBBINS ET AL. *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN; and

No. 94–1490. KEVORKIAN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 447 Mich. 436, 527 N. W. 2d 714.

No. 94–1485. ALLEN *v.* MCENTEE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 44 F. 3d 1031.

No. 94–1500. FRITCH ET UX., ON BEHALF OF FRITCH *v.* CALALLEN INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 386.

No. 94–1520. FISHER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 434 Pa. Super. 716, 643 A. 2d 703.

No. 94–1550. MCBRIDE *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 187 Wis. 2d 409, 523 N. W. 2d 106.

No. 94–1570. RELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 32 F. 3d 31 and 45 F. 3d 680.

No. 94–1571. HOWARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HOWARD *v.* CRYSTAL CRUISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 527.

No. 94–1587. MEDINA PUERTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 38 F. 3d 34.

No. 94–1593. AUSTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–1594. SIDOR *v.* JANIGAN ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 94–7083. HILLARD *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 94–7485. HOLMQUIST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 36 F. 3d 154.

No. 94–7511. GRAY *v.* DISTRICT COURT OF COLORADO, 11TH JUDICIAL DISTRICT, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 884 P. 2d 286.

No. 94–7547. ADAMS *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–7737. STORM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 1289.

No. 94–7765. MARTIN *v.* BRISTOL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–7836. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7853. WELLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 635.

No. 94–7887. IBARRA-MARTINEZ, AKA HURTADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 39 F. 3d 324.

No. 94–7891. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 381.

No. 94–7913. MINETTI *v.* INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 29 F. 3d 633.

No. 94–7993. SMITH *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 539 Pa. 128, 650 A. 2d 863.

No. 94–8172. HOUSTON *v.* CITY OF CLEVELAND. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 94–8198. ARMSTRONG *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 642 So. 2d 730.

No. 94–8251. GARCIA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 59.

No. 94–8255. LITZENBERG *v.* CARR, JUDGE, CIRCUIT COURT OF MARYLAND, HARFORD COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1125.

No. 94–8260. JACKSON *v.* GARDNER, JUDGE, CIRCUIT COURT OF ILLINOIS, COOK COUNTY. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1391.

No. 94–8271. WRIGHT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 248 Va. 485, 450 S. E. 2d 361.

No. 94–8275. EARLS *v.* UNITED STATES; and
No. 94–8405. BISCHOF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 42 F. 3d 1321.

No. 94–8278. RAMDASS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 248 Va. 518, 450 S. E. 2d 360.

No. 94–8289. HUGHES *v.* SOUTHWORTH ET AL. C. A. 6th Cir. Certiorari denied.

No. 94–8321. ABBOTT *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 129 Ore. App. 642, 881 P. 2d 183.

No. 94–8343. PALMER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 162 Ill. 2d 465, 643 N. E. 2d 797.

No. 94–8364. COLEMAN *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 30 F. 3d 1420.

No. 94–8385. RUDOLPH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 39 F. 3d 1183.

No. 94–8404. UBOH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 94–8409. CLEMONS *v.* UNITED STATES; and
No. 94–8627. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 32 F. 3d 1504.

No. 94–8420. HENSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 37 F. 3d 635.

No. 94–8425. GLANT *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 645 So. 2d 962.

No. 94–8430. MERINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 44 F. 3d 749.

No. 94–8432. LEE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–8439. CHAPA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 569.

No. 94–8442. BONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 669.

No. 94–8449. BAZEMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 94–8450. CHAMBRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–8451. ACOSTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1484.

No. 94–8455. ROQUE ROMERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 662.

No. 94–8456. LARA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–8457. LONG *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 320 Ore. 361, 885 P. 2d 696.

No. 94–8458. HERNANDO NARVAEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 162.

No. 94–8459. MCCOLLUM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 679.

No. 94–8460. MASON *v.* UNITED STATES;
No. 94–8468. EVANS *v.* UNITED STATES; and
No. 94–8484. HAZEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8478. PALMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 1080.

No. 94–8489. LANGLEY *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 94.

No. 94–8491. TEAS *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 94–8498. LEBARON *v.* UNITED STATES; and
No. 94–8500. LEBARON, AKA DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 935.

No. 94–8505. PANIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8506. SAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 F. 3d 431.

No. 94–8508. AFEMATA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1146.

No. 94–8513. SAMOILIW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–8515. MANUEL ROMERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 22 F. 3d 1097.

No. 94–8518. WAITE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 94–8519. THOMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1120.

No. 94–8522. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1171.

No. 94–8523. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 44 F. 3d 1206.

No. 94–8524. GRANDE GRAJEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1480.

No. 94–8526. FALCON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1134.

No. 94–8527. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–8528. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 1069.

No. 94–8529. FIELD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 39 F. 3d 15.

No. 94–8535. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–8537. HICKS *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 94–8542. MCCRAE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–8544. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1469.

No. 94–8545. BRYANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 F. 3d 431.

No. 94–8547. MORALES-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1403.

No. 94–8548. CHRISTOPHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 572.

No. 94–8561. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–8563. MASON *v.* OHIO. Ct. App. Ohio, Ashland County. Certiorari denied.

No. 94–8564. KHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1214.

No. 94–8565. ZAMUDIO MADRIGAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1367.

No. 94–8574. ROSALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 438.

No. 94–8575. HANDS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1511.

No. 94–8578. GREEN *v.* UNITED STATES;
No. 94–8620. SIMS *v.* UNITED STATES; and
No. 94–8629. WHEELER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 1167.

No. 94–8581. RUSSELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8582. BULLARD *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 37 F. 3d 765.

No. 94–8584. BASKIN-BEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 200.

No. 94–8585. COURTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8586. REED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 47 F. 3d 175.

No. 94–8590. STAUFFER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 667.

No. 94–8591. ORTEGA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1459.

No. 94–8592. ORTLOFF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 669.

No. 94–8593. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 669.

No. 94–8594. HOWELL ET VIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 37 F. 3d 1197.

No. 94–8598. CAMACHO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 349.

No. 94–8599. KEELEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–8601. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1391.

No. 94–8602. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8604. PARIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 961.

No. 94–8606. AKINYEMI *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 38 F. 3d 609.

No. 94–8608. NODD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 680.

No. 94–8609. KOSINSKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94–8611. ECHAVARRIA-OLARTE *v.* RENO, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 35 F. 3d 395.

No. 94–8613. ROBERTSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 891.

No. 94–8618. BULLA-HENAO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 48 F. 3d 1229.

No. 94–8621. O'ROURKE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 82.

No. 94–8626. RUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 438.

No. 94–8632. MICHAEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 669.

No. 94–8633. NOTTINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8636. MCDILE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 94–8639. LOVETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–8640. BALLEW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 40 F. 3d 936.

No. 94–8641. CARR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 44 F. 3d 1031.

No. 94–8643. BEADLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–8645. WALTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 679.

No. 94–8648. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8652. MCREYNOLDS *v.* COMMISSIONER, OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 94–8653. LUNDY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 94.

No. 94–8660. HAMMONDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 670.

No. 94–8668. CAMPBELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1199.

No. 94–8669. HOGG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1008.

No. 94–8676. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1299.

No. 94–8677. MOSELEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 1, 449 S. E. 2d 412.

No. 94–8686. COLLIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 1218.

No. 94–8687. BROCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 38 F. 3d 1218.

No. 94–8688. CATALDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 47 F. 3d 1178.

No. 94–8689. GREEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1216.

No. 94–8694. MCCOY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1508.

No. 94–8696. PORTER *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 653 So. 2d 374.

No. 94–8697. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8702. TSCHUOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–8703. WITHERSPOON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–1287. PHILLIPS PETROLEUM CO. *v.* JOHNSON ET AL.;
No. 94–1292. BABBITT, SECRETARY OF THE INTERIOR, ET AL. *v.* PHILLIPS PETROLEUM CO. ET AL.; and
No. 94–1479. ATLANTIC RICHFIELD CO. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 22 F. 3d 616.

Rehearing Denied

No. 94–7246. JONES *v.* BAKER, WARDEN, 513 U. S. 1164;
No. 94–7582. IN RE ENGLEFIELD, *ante*, p. 1014;
No. 94–7725. LANE *v.* UNIVERSAL CITY STUDIOS, INC., *ante*, p. 1007; and
No. 94–7999. VARGAS *v.* THOMAS, WARDEN, *ante*, p. 1040. Petitions for rehearing denied.

No. 94–7657. LINEHAN *v.* HARVARD UNIVERSITY, 513 U. S. 1199. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

APRIL 27, 1995

Certiorari Dismissed

No. 94–9047 (A–811). LACKEY *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the District Court's consideration of petitioner's petition for writ of habeas corpus. Certiorari dismissed. Reported below: 52 F. 3d 98.

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1139; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1147; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1153; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1161.)

Certiorari Denied

No. 94–9048 (A–812). CLISBY *v.* ALABAMA. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. Reported below: 52 F. 3d 905.

APRIL 28, 1995

Dismissal Under Rule 46

No. 94–8226. TAYLOR *v.* RILEY, SECRETARY OF EDUCATION. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 39 F. 3d 1192.

MAY 1, 1995

Certiorari Granted—Vacated and Remanded

No. 93–8487. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Lopez*, *ante*, p. 549. Reported below: 13 F. 3d 291.

No. 94–745. CHASSIN ET AL. *v.* NYSA–ILA MEDICAL AND CLINICAL SERVICES FUND ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, *ante*, p. 645. Reported below: 27 F. 3d 823.

No. 94–1305. VOLKSWAGEN OF AMERICA, INC., ET AL. *v.* HERNANDEZ-GOMEZ. Sup. Ct. Ariz. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Freightliner Corp.* v. *Myrick*, *ante*, p. 280. JUSTICE STEVENS would dismiss the petition for want of jurisdiction. Reported below: 180 Ariz. 297, 884 P. 2d 183.

No. 94–6333. CAMPBELL *v.* FLORIDA PAROLE COMMISSION. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California Dept. of Corrections* v. *Morales*, *ante*, p. 499. Reported below: 630 So. 2d 1210.

No. 94–7797. COOPER *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California Dept. of Corrections* v. *Morales*, *ante*, p. 499. Reported below: 35 F. 3d 1248.

Miscellaneous Orders

No. ——. MADDEN *v.* UNITED STATES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. ——. BILZERIAN *v.* SECURITIES AND EXCHANGE COMMISSION. Motion for reconsideration of order denying leave to file petition for writ of certiorari out of time [*ante*, p. 1011] denied.

No. ——. BABY RICHARD, BY HIS GUARDIAN AD LITEM, O'CONNELL *v.* KIRCHNER ET AL. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–762. GRACEY *v.* REIGLE. Bkrtcy. Ct. E. D. Pa. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for award of compensation and fees granted, and the River Master is awarded a total of $2,808 for the period January 1 through March 31, 1995, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 513 U. S. 997.]

No. 94–7427. LIBRETTI *v.* UNITED STATES. C. A. 10th Cir. [Certiorari granted, *ante,* p. 1035.] Motion for appointment of counsel granted, and it is ordered that Sara Sun Beale, Esq., of Durham, N. C., be appointed to serve as counsel for petitioner in this case.

Certiorari Granted

No. 94–967. FIELD ET AL. *v.* MANS. C. A. 1st Cir. Certiorari granted. Reported below: 36 F. 3d 1089.

No. 94–1530. THINGS REMEMBERED, INC. *v.* PETRARCA. C. A. 6th Cir. Certiorari granted. Reported below: 65 F. 3d 169.

No. 94–1140. 44 LIQUORMART, INC., ET AL. *v.* RHODE ISLAND ET AL. C. A. 1st Cir. Certiorari granted limited to the following question: "Whether Rhode Island may, consistent with the First Amendment, prohibit truthful, nonmisleading price advertising regarding alcoholic beverages?" Reported below: 39 F. 3d 5.

Certiorari Denied

No. 94–1295. BLANDFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 33 F. 3d 685.

No. 94–1308. CHILDERS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 973.

No. 94–1329. PLANTATION LANDING RESORT, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 39 F. 3d 1197.

No. 94–1351. WERNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 1095.

No. 94–1383. BLOOMINGDALE PUBLIC SCHOOLS ET AL. *v.* WASHEGESIC, AS NEXT FRIEND OF PENSINGER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 33 F. 3d 679.

No. 94–1392. HAUERT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 40 F. 3d 197.

No. 94–1481. T. S. Books, Inc. *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 261 Ill. App. 3d 1129, 682 N. E. 2d 1265.

No. 94–1483. City of Independence et al. *v.* Rinehart. C. A. 8th Cir. Certiorari denied. Reported below: 35 F. 3d 1263.

No. 94–1484. Hartnagel *v.* General Motors Corp. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 89.

No. 94–1486. Wright *v.* Heimer. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 651 So. 2d 1200.

No. 94–1488. Sherwin *v.* Department of the Air Force. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1495.

No. 94–1492. Crist *v.* Lac du Flambeau Band of Lake Superior Chippewa Indians et al. C. A. 7th Cir. Certiorari denied. Reported below: 41 F. 3d 1190.

No. 94–1494. Erpenbeck Commercial Enterprises, Inc. *v.* Boone Fiscal Court et al.; and

No. 94–1516. Enterprise VI *v.* Boone Fiscal Court et al. Ct. App. Ky. Certiorari denied.

No. 94–1496. Aetna Casualty & Surety Co. *v.* Ellison et al. C. A. 10th Cir. Certiorari denied.

No. 94–1501. Williamson County *v.* Bondholder Committee. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 256.

No. 94–1506. Wagshal *v.* Bramon et al. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 572.

No. 94–1512. Trupiano *v.* Captain Gus & Brothers, Inc. C. A. 1st Cir. Certiorari denied. Reported below: 42 F. 3d 1384.

No. 94–1514. Martin et ux. *v.* Bank of Floyd et al. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 71.

No. 94–1538. Miron Construction Co., Inc. *v.* International Union of Operating Engineers, Local 139, et al. C. A. 7th Cir. Certiorari denied. Reported below: 44 F. 3d 558.

No. 94–1551. Snead et al. *v.* Goodyear Tire & Rubber Co. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 645.

No. 94–1580. COSSETT ET AL. *v.* CLINTON ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 71 Ohio St. 3d 1411, 641 N. E. 2d 1110.

No. 94–1582. ALEXIOU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 973.

No. 94–1609. GARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 1539.

No. 94–1622. PETRUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 1004.

No. 94–6640. OSTEEN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 30 F. 3d 135.

No. 94–7553. HAMMOND *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 35 F. 3d 559.

No. 94–7570. JOHNSON *v.* EL PASO COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 18 F. 3d 936.

No. 94–7586. BARRAZA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7715. STITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1217.

No. 94–7734. O'HARA *v.* SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 398, 878 P. 2d 1297.

No. 94–7778. DARBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1059.

No. 94–7912. RECILE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 385.

No. 94–7930. CARDWELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 248 Va. 501, 450 S. E. 2d 146.

No. 94–7968. SOTO *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 205 App. Div. 2d 810, 614 N. Y. S. 2d 928.

No. 94–8157. PARKER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 886 S. W. 2d 908.

No. 94–8269. KIM *v.* VILLALOBOS. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1400.

No. 94–8274. BURLEY *v.* GULBRANSON ET AL. Ct. App. Ariz. Certiorari denied.

No. 94–8276. HINES *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–8277. ETHERIDGE *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 36 F. 3d 1115.

No. 94–8281. GLENDORA *v.* DOLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1212.

No. 94–8288. WARREN *v.* HOLLERAUER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1134.

No. 94–8290. GRUBE *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 126 Idaho 377, 883 P. 2d 1069.

No. 94–8293. REVELLO *v.* GRAYSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 440.

No. 94–8299. SOLIS *v.* CIRCLE K CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 629.

No. 94–8300. CRAWFORD *v.* HATCHER, JUDGE, CIRCUIT COURT OF WEST VIRGINIA, FAYETTE COUNTY; and CRAWFORD *v.* CIRCUIT COURT OF WEST VIRGINIA, FAYETTE COUNTY. Sup. Ct. App. W. Va. Certiorari denied.

No. 94–8304. LOCKETT *v.* DAY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 641.

No. 94–8311. PACE *v.* HURT. C. A. 9th Cir. Certiorari denied. Reported below: 26 F. 3d 130.

No. 94–8312. SKEET *v.* NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS. C. A. 2d Cir. Certiorari denied.

No. 94–8316. CROW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 94–8317. MILLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 28 Cal. App. 4th 522, 33 Cal. Rptr. 2d 663.

No. 94–8318. NORTHINGTON *v.* CIRCUIT COURT OF MICHIGAN, MONROE COUNTY, ET AL. Ct. App. Mich. Certiorari denied.

No. 94–8325. WALKER *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 94–8329. DANIELS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 261 Ill. App. 3d 695, 634 N. E. 2d 4.

No. 94–8337. DUNN *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1388.

No. 94–8352. HUSTON *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1187.

No. 94–8353. GUILLORY *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 94–8354. ECKERT ET AL. *v.* ESTATE OF ECKERT. Ct. App. Kan. Certiorari denied.

No. 94–8386. SCHORN *v.* LAROSE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 94–8411. STAFFORD *v.* WARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 34 F. 3d 1557.

No. 94–8452. KIDD *v.* HOOD, DEPUTY WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 1246.

No. 94–8474. SANDFORD *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 94–8517. VAN HOOK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 1216, 639 N. E. 2d 1199.

No. 94–8539. LATSHAW *v.* FEDERAL BUREAU OF INVESTIGATION, F. O. I. A. SECTION. C. A. 3d Cir. Certiorari denied. Reported below: 40 F. 3d 1240.

No. 94–8549. FREEMAN *v.* PARKS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 43 F. 3d 1479.

No. 94–8571. BAILEY *v.* COYLE ET AL. C. A. 6th Cir. Certiorari denied.

No. 94–8577. HUBBARD *v.* LOWE. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1483.

No. 94–8600. FERGUSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 35 F. 3d 327.

No. 94–8605. MOREJON *v.* UNITED STATES;
No. 94–8615. ROBAINA-GONZALEZ *v.* UNITED STATES; and
No. 94–8616. ZALDIVAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 43 F. 3d 677.

No. 94–8656. MASON ET AL. *v.* UNITED STATES; and MASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–8658. HARRIS *v.* GETTY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1176.

No. 94–8661. HOOKS *v.* UNITED STATES; and
No. 94–8731. WATTERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–8662. HARRIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 129, 449 S. E. 2d 371.

No. 94–8680. MCCARTHY *v.* HEDRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 94–8681. MCCARTHY *v.* RENO, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1158.

No. 94–8682. WALKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–8684. WALDRON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8710. GIL *v.* UNITED STATES; and

No. 94–8754. GIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8711. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 F. 3d 431.

No. 94–8713. MCCAULEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 94–8715. MCCABE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 531.

No. 94–8718. RODRIGUEZ-QUINONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 438.

No. 94–8721. PATTERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 246.

No. 94–8724. CHAPPLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–8727. CLEGHORN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1148.

No. 94–8728. AUSTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 45 F. 3d 434.

No. 94–8732. WELLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1042.

No. 94–8735. JACOBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 44 F. 3d 1219.

No. 94–8736. JENSEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 946.

No. 94–8737. MUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 1095.

No. 94–8741. BELLIZZI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8745. UKPABIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1159.

No. 94–8746. RAHMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 48 F. 3d 1213.

No. 94–8750. BRENT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1150.

No. 94–8751. FLOREZ-BORRERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1236.

No. 94–8752. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8760. ARBEITER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 45 F. 3d 434.

No. 94–8768. PERKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8770. CARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 51 F. 3d 1041.

No. 94–8772. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1464.

No. 94–8776. BOWMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1127.

No. 93–1362. UNITED STATES *v.* ESTRADA. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 8 F. 3d 23.

No. 94–1393. SELSKY *v.* YOUNG. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 41 F. 3d 47.

No. 94–1491. MICHIGAN *v.* BANKS. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 94–1583. WASHINGTON, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS *v.* BARGER ET AL. Sup. Ct. Ill. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 163 Ill. 2d 357, 645 N. E. 2d 175.

No. 94–642. MOORE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE SCALIA would grant the petition, vacate the judgment, and remand the case for further consideration in light of *United States* v. *Lopez*, *ante*, p. 549. Reported below: 25 F. 3d 1042.

No. 94–1489. RICKETTS ET AL. *v.* CITY OF COLUMBIA. C. A. 8th Cir. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 36 F. 3d 775.

No. 94–1495. WINBACK & CONSERVE PROGRAM, INC., ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 42 F. 3d 1421.

No. 94–5755. RAMEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE SCALIA would grant the petition, vacate the judgment, and remand the case for further consideration in light of *United States* v. *Lopez*, *ante*, p. 549. Reported below: 24 F. 3d 602.

Rehearing Denied

No. 94–7238. IWUALA *v.* IMMIGRATION AND NATURALIZATION SERVICE, 513 U. S. 1164;

No. 94–7525. WILLIAMS *v.* MEESE, FORMER ATTORNEY GENERAL, ET AL., 513 U. S. 1176;

No. 94–7598. IN RE ADAMS, 513 U. S. 1189;

No. 94–7823. MCCANN *v.* WESTINGHOUSE ELECTRIC CORP., *ante*, p. 1007;

No. 94–7825. MCDONALD *v.* POLK COUNTY, GEORGIA, *ante*, p. 1025;

No. 94–8087. HALL *v.* UNITED STATES, *ante*, p. 1030; and

No. 94–8154. IN RE TRICE, *ante*, p. 1014. Petitions for rehearing denied.

No. 94–7494. MUSGRAVE *v.* WELBORN, WARDEN, 513 U. S. 1193. Motion for leave to file petition for rehearing denied.

No. 94–7552. COOPER *v.* NATIONAL RX SERVICES, 513 U. S. 1198. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 94–7751. RAITPORT *v.* AMERICAN TELEPHONE & TELEGRAPH ET AL., *ante*, p. 1032. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

MAY 2, 1995

Certiorari Denied

No. 94–9086 (A–829). ZETTLEMOYER, BY AND THROUGH DEVETSCO ET AL. *v.* HORN, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency granted. Application for stay of execution of sentence of death, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. Reported below: 53 F. 3d 24.

No. 94–9098 (A–833). FOSTER *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 54 F. 3d 463.

MAY 10, 1995

Certiorari Denied

No. 94–9207 (A–855). MCKENZIE *v.* DAY, DIRECTOR, MONTANA DEPARTMENT OF CORRECTIONS AND HUMAN SERVICES. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 57 F. 3d 1461 and 1493.

MAY 11, 1995

Certiorari Denied

No. 94–9233 (A–866). WEEKS *v.* JONES, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 52 F. 3d 1559.

MAY 15, 1995

Certiorari Granted—Reversed and Remanded. (See No. 94–802, *ante,* p. 765.)

Miscellaneous Orders

No. A–765. CAHILL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. Application for injunction, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–771. BOLT *v.* SINGLETON ET AL. D. C. Alaska. Application for stay of proceedings, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–871. DAVIS *v.* PAGE, WARDEN, ET AL. Application for certificate of probable cause and stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. A–873 (94–9265). DEVIER *v.* THOMAS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, scheduled for 7 p.m., May 15, 1995, presented to JUSTICE KENNEDY, and by him referred to the Court, granted pending receipt of a response on or before 5 p.m., Tuesday, May 16, 1995, and further order of the Court.

No. D–1502. IN RE DISBARMENT OF STEUTERMANN. Disbarment entered. [For earlier order herein, see 513 U. S. 1143.]

No. D–1508. IN RE DISBARMENT OF SAMARCO. Disbarment entered. [For earlier order herein, see 513 U. S. 1144.]

No. D–1510. IN RE DISBARMENT OF WATSON. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1512. IN RE DISBARMENT OF PELS. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1513. IN RE DISBARMENT OF POLANSKY. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1515. IN RE DISBARMENT OF SIMONE. Disbarment entered. [For earlier order herein, see 513 U. S. 1188.]

No. D–1520. IN RE DISBARMENT OF DISCIPIO. Disbarment entered. [For earlier order herein, see *ante,* p. 1002.]

No. D–1523. IN RE DISBARMENT OF RUBIN. Disbarment entered. [For earlier order herein, see *ante,* p. 1013.]

No. D–1539. IN RE DISBARMENT OF QUAID. James F. Quaid, Jr., of Metairie, La., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 24, 1995 [*ante,* p. 1080], is hereby discharged.

No. D–1545. IN RE DISBARMENT OF POTTS. It is ordered that Dominic Joseph Potts, of Steubenville, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1546. IN RE DISBARMENT OF SMITH. It is ordered that Allen Nathaniel Smith, Jr., of Indianapolis, Ind., 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–1547. IN RE DISBARMENT OF SEALY. It is ordered that Patrick C. Sealy, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1548. IN RE DISBARMENT OF DICKINSON. It is ordered that Gregory David Dickinson, of Burbank, 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. 94–1244. BEHRENS *v.* PELLETIER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1035.] Motion of the Solicitor General for an extension of time within which to file a brief for the United States as *amicus curiae* granted as follows: Petitioner's brief is due on or before July 24, 1995; Respondent's brief is due 30 days after receipt of petitioner's brief.

No. 94–8801. IN RE WHITFIELD; and

No. 94–8834. IN RE WHITE. Petitions for writs of habeas corpus denied.

No. 94–8211. IN RE HETHERINGTON;

No. 94–8294. IN RE SNAVELY;

No. 94–8324. IN RE VERDONE;

No. 94–8464. IN RE LITZENBERG;

No. 94–8555. IN RE MALLETT; and

No. 94–8624. IN RE COOPER ET AL. Petitions for writs of mandamus denied.

No. 94–8398. IN RE ROGERS. Petition for writ of prohibition denied.

Certiorari Denied

No. 94–1164. C. E. ET AL. *v.* ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES. Sup. Ct. Ill. Certiorari denied. Reported below: 161 Ill. 2d 200, 641 N. E. 2d 345.

No. 94–1191. WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 28 F. 3d 1563.

No. 94–1254. RANDALL *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 30 F. 3d 518.

No. 94–1330. ERICKSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 161 Ill. 2d 82, 641 N. E. 2d 455.

No. 94–1354. COLE *v.* DEPARTMENT OF AGRICULTURE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 33 F. 3d 1263.

No. 94–1357. PIERCE *v.* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 1146.

No. 94–1359. CLEMENTS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 32 F. 3d 569.

No. 94–1378. JOHNSON CONTROLS, INC., SYSTEMS & SERVICES DIVISION, ET AL. *v.* UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 3d 821.

No. 94–1380. AJ & AJ SERVICING, INC., ET AL. *v.* TUDOR ASSOCIATES, LTD., II, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 36 F. 3d 1094.

No. 94–1401. NAKAMURA ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 1096.

No. 94–1404. ATTAR ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 F. 3d 727.

No. 94–1416. SMITH *v.* STRATUS COMPUTER, INC. C. A. 1st Cir. Certiorari denied. Reported below: 40 F. 3d 11.

No. 94–1446. MCMILLION DOZER SERVICE, INC. *v.* LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 639 So. 2d 766.

No. 94–1460. CULP *v.* WISMER & BECKER ET AL. Ct. App. Mich. Certiorari denied.

No. 94–1507. AEROLINEAS ARGENTINAS S. A. *v.* MARO LEATHER CO. App. Term, Sup. Ct. N. Y., 1st and 12th Jud. Dists. Certiorari denied. Reported below: 161 Misc. 2d 920, 617 N. Y. S. 2d 617.

No. 94–1508. LUTZ *v.* NAVISTAR INTERNATIONAL TRANSPORTATION CORP. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1472.

No. 94–1513. EZZONE ET AL. *v.* HANSEN ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 525 N. W. 2d 388.

No. 94–1515. ROCHMAN ET AL. *v.* PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 43 F. 3d 763.

No. 94–1517. YARI *v.* PRITZKER. C. A. 1st Cir. Certiorari denied. Reported below: 42 F. 3d 53.

No. 94–1521. SPENCER *v.* MRS. BAIRD'S BAKERIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 30 F. 3d 1492.

No. 94–1522. ALLRIDGE *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 213.

No. 94–1524. TURNER ET AL. *v.* GILES. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 812, 450 S. E. 2d 421.

No. 94–1529. HUDSON *v.* FIRST FIDELITY BANK, N. A., NEW JERSEY, FKA FIRST NATIONAL STATE BANK. C. A. 3d Cir. Certiorari denied. Reported below: 40 F. 3d 1239.

No. 94–1534. KAYLOR ET AL. *v.* DALL. Sup. Ct. Vt. Certiorari denied. Reported below: 163 Vt. 274, 658 A. 2d 78.

No. 94–1535. COUNCIL, TRUSTEE FOR JBS CONTRACTING, INC. *v.* ANJO CONSTRUCTION CO. Super. Ct. Pa. Certiorari denied. Reported below: 434 Pa. Super. 726, 643 A. 2d 711.

No. 94–1536. CLARKE ET AL. *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 40 F. 3d 807.

No. 94–1539. MORRIS *v.* CITY OF HOBART. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1105.

No. 94–1542. MEARS TRANSPORTATION GROUP, INC., ET AL. *v.* DICKINSON, EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES. C. A. 11th Cir. Certiorari denied. Reported below: 34 F. 3d 1013.

No. 94–1543. WARREN *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 94–1545. NORTH GEORGIA ELECTRIC MEMBERSHIP CORP. *v.* CITY OF CALHOUN. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 769, 450 S. E. 2d 410.

No. 94–1546. SASSOWER *v.* MANGANO ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 83 N. Y. 2d 904, 637 N. E. 2d 276.

No. 94–1548. LIBERTY SEAFOOD, INC. *v.* HERNDON MARINE PRODUCTS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 755.

No. 94–1549. GLEASON *v.* WELBORN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 42 F. 3d 1107.

No. 94–1552. SPIEGEL ET AL. *v.* GOODMAN ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 204 App. Div. 2d 430, 614 N. Y. S. 2d 179.

No. 94–1553. SCARNATI *v.* OHIO DEPARTMENT OF MENTAL HEALTH. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 94–1555. LENOX HILL HOSPITAL *v.* MANOCHERIAN ET AL.; and

No. 94–1560. NEW YORK *v.* MANOCHERIAN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 84 N. Y. 2d 385, 643 N. E. 2d 479.

No. 94–1556. BUHR ET AL. *v.* FLATHEAD COUNTY ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 268 Mont. 223, 886 P. 2d 381.

No. 94–1559. HAMROL *v.* CITY AND COUNTY OF SAN FRANCISCO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 94–1561. BETHLEHEM MINERALS CO. ET AL. *v.* CHURCH & MULLINS CORP. ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 887 S. W. 2d 321.

No. 94–1563. CADILLAC PRODUCTS, INC. *v.* TRIENDA CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 44 F. 3d 967.

No. 94–1565. SMITH *v.* PIFER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–1566. FORBES *v.* ARKANSAS EDUCATIONAL TELEVISION COMMISSION NETWORK FOUNDATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 22 F. 3d 1423.

No. 94–1568. BENJAMIN *v.* COMMITTEE ON PROFESSIONAL STANDARDS, NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT. Ct. App. N. Y. Certiorari denied. Reported below: 84 N. Y. 2d 863, 642 N. E. 2d 327.

No. 94–1572. ST. LOUIS SOUTHWESTERN RAILWAY CO. *v.* MALONE FREIGHT LINES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 864.

No. 94–1573. COMER, PERSONAL REPRESENTATIVE OF THE ESTATE OF COMER *v.* KAISER FOUNDATION HEALTH PLAN, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 435.

No. 94–1574. KALIARDOS *v.* GENERAL MOTORS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 41 F. 3d 1521.

No. 94–1575. RISBECK ET UX. *v.* BOND ET AL. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 885 S. W. 2d 749.

No. 94–1576. GOERING ET AL. *v.* NEBRASKA. Ct. App. Neb. Certiorari denied.

No. 94–1577. FBT Bancshares, Inc. *v.* Mutual Fire, Marine & Inland Insurance Co., Inc. Sup. Ct. Pa. Certiorari denied. Reported below: 539 Pa. 684, 652 A. 2d 1328.

No. 94–1578. Maniace et al. *v.* Commerce Bank of Kansas City, N. A. C. A. 8th Cir. Certiorari denied. Reported below: 40 F. 3d 264.

No. 94–1584. Nanny Cay Enterprises, Ltd., et al. *v.* Barclays Bank PLC. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1117.

No. 94–1588. Buckeye Union Life Insurance Co. *v.* Leber et al. Sup. Ct. Ohio. Certiorari denied. Reported below: 70 Ohio St. 3d 548, 639 N. E. 2d 1159.

No. 94–1603. Smith *v.* Board of Regents, University of Houston System, et al. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 874 S. W. 2d 706.

No. 94–1618. Boyd *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied. Reported below: 45 F. 3d 876.

No. 94–1635. Nova Biomedical Corp. et al. *v.* Rice. C. A. 7th Cir. Certiorari denied. Reported below: 38 F. 3d 909.

No. 94–1637. Allard *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–1639. Brewer *v.* Clarke County School District et al. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1008.

No. 94–1643. Alexander *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 46 F. 3d 1131.

No. 94–1645. Genstar Stone Products Co. et al. *v.* Maryland et al. Ct. App. Md. Certiorari denied. Reported below: 337 Md. 658, 655 A. 2d 886.

No. 94–1646. O'Connor *v.* Rehabilitation Support Services, Inc., et al. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 207 App. Div. 2d 939, 617 N. Y. S. 2d 540.

No. 94–1648. CHAPPELL *v.* BARRERAS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 439.

No. 94–1659. BYRD *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1122.

No. 94–1673. ADULT VIDEO ASSN. ET AL. *v.* RENO, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 503.

No. 94–1678. MILLS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 36 F. 3d 1052.

No. 94–1679. LESLIE *v.* LESLIE. Ct. App. Colo. Certiorari denied. Reported below: 886 P. 2d 284.

No. 94–1690. DAUW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1133.

No. 94–1697. GILBREATH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 650 So. 2d 10.

No. 94–7191. SMITH *v.* GILBERT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 39 F. 3d 319.

No. 94–7408. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–7464. HUGHES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 897 S. W. 2d 285.

No. 94–7471. LAYTON *v.* WHITLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 39 F. 3d 1187.

No. 94–7720. HARRIS *v.* UNITED STATES;
No. 94–7747. ELZY *v.* UNITED STATES; and
No. 94–7748. DAVENPORT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 89.

No. 94–7800. DOUGLAS *v.* ALASKA DEPARTMENT OF REVENUE. Sup. Ct. Alaska. Certiorari denied. Reported below: 880 P. 2d 113.

No. 94–7816. MCCALLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 38 F. 3d 675.

No. 94–7831. PATTERSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 38 F. 3d 139.

No. 94–7900. HOWELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 882 P. 2d 1086.

No. 94–7908. WILLIAMS ET UX. *v.* ARNOLD & ARNOLD LAW FIRM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 3d 1395.

No. 94–7974. NGO *v.* UNITED STATES; and
No. 94–8004. KWOK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 40 F. 3d 1347.

No. 94–8025. PARDUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 36 F. 3d 429.

No. 94–8032. KVIATKOVSKY *v.* TEMPLE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 39 F. 3d 1170.

No. 94–8062. NNANYERERUGO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 39 F. 3d 1205.

No. 94–8084. ASHBURN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 803.

No. 94–8110. JARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8116. HABURN *v.* SHARP, MAGISTRATE JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 28 F. 3d 1209.

No. 94–8136. VALDEZ-SOTO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 31 F. 3d 1467.

No. 94–8153. BLOOMFIELD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 40 F. 3d 910.

No. 94–8155. THOMPSON *v.* MISSOURI BOARD OF PROBATION AND PAROLE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 186.

No. 94–8163. SMITH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 44 F. 3d 1259.

No. 94–8169. OVERSTREET *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 1090.

No. 94–8176. FORD *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 539 Pa. 85, 650 A. 2d 433.

No. 94–8184. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 94–8203. REEVES *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 337 N. C. 700, 448 S. E. 2d 802.

No. 94–8248. HILI *v.* HILI. Sup. Ct. Vt. Certiorari denied. Reported below: 163 Vt. 648, 654 A. 2d 715.

No. 94–8313. PRICE *v.* RUNYON, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–8358. KING *v.* CITY OF DOTHAN POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 669.

No. 94–8359. MORRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–8372. CAMPBELL *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 71.

No. 94–8373. WHEELER *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 42 F. 3d 1404.

No. 94–8374. FENELON *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 669.

No. 94–8375. FRUSHER *v.* BASKIN-ROBBINS ICE CREAM CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 43 F. 3d 1456.

No. 94–8382. CONLEY *v.* ARMONTROUT, ASSISTANT DIRECTOR/ZONE II, MISSOURI DIVISION OF ADULT INSTITUTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 39 F. 3d 1184.

No. 94–8384. BOST *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1504.

No. 94–8387. PRICE *v.* WASHINGTON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 94–8391. MAES *v.* THOMAS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 979.

No. 94–8392. WALLACE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 640 N. E. 2d 374.

No. 94–8395. PEEPLES *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 46 F. 3d 1136.

No. 94–8397. SCOTT *v.* KERNAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1506.

No. 94–8399. SMITH *v.* EDGAR, GOVERNOR OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 94–8401. BURTON *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 651 So. 2d 659.

No. 94–8402. ROLAND *v.* STALDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 423.

No. 94–8406. YOUNG *v.* LOMBARDI ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–8407. BLACK *v.* CLEVELAND POLICE DEPARTMENT ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 96 Ohio App. 3d 84, 644 N. E. 2d 682.

No. 94–8414. GEIGER *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 94–8423. FLOWERS *v.* TRAUGHBER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 41 F. 3d 1506.

No. 94–8424. HINES *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 37 F. 3d 1505.

No. 94–8426. JAMES *v.* CARMICHAEL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 426.

No. 94–8427. MAXBERRY *v.* DANIEL P. KING ASSOCIATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 94–8429. McLemore *v.* Louisiana. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 640 So. 2d 847.

No. 94–8434. Luna *v.* Ohio (two cases). Ct. App. Ohio, Huron County. Certiorari denied.

No. 94–8435. Montgomery *v.* Taylor, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1467.

No. 94–8436. Judd *v.* Peck. Sup. Ct. N. M. Certiorari denied.

No. 94–8437. Mack *v.* Dime Savings Bank. C. A. 2d Cir. Certiorari denied.

No. 94–8440. Boal *v.* Department of the Army. C. A. 4th Cir. Certiorari denied. Reported below: 40 F. 3d 1243.

No. 94–8441. Amiri *v.* Radio WTOP. C. A. D. C. Cir. Certiorari denied.

No. 94–8444. DeYoung *v.* Galati, Judge, Superior Court of Arizona, Maricopa County, et al. Ct. App. Ariz. Certiorari denied.

No. 94–8445. DeYoung *v.* O'Neil, Judge, Superior Court of Arizona, Pinal County, et al. Ct. App. Ariz. Certiorari denied.

No. 94–8447. Nesbitt *v.* Hyman et al. Ct. App. D. C. Certiorari denied.

No. 94–8448. Aysisayh *v.* Oden, Superintendent, Okaloosa Correctional Institution, et al. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 650 So. 2d 993.

No. 94–8453. Olinde *v.* State Farm Fire & Casualty Insurance Co. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 641.

No. 94–8466. McNeil *v.* Vaughn, Warden, et al. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1461.

No. 94–8470. Flye *v.* Rocketts et al. C. A. 6th Cir. Certiorari denied.

No. 94–8471. ELLIOTT *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 188.

No. 94–8472. FREEMAN *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 25 F. 3d 1060.

No. 94–8486. MANN *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 968.

No. 94–8488. MONTGOMERY *v.* THURMAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–8490. LAKE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 210 App. Div. 2d 1012, 621 N. Y. S. 2d 996.

No. 94–8492. SWORD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 29 Cal. App. 4th 614, 34 Cal. Rptr. 2d 810.

No. 94–8493. DAVIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 433 Pa. Super. 607, 636 A. 2d 1209.

No. 94–8494. CROW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 94–8495. JOINER *v.* WISDOM ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 37 F. 3d 1499.

No. 94–8496. MINES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 888 S. W. 2d 816.

No. 94–8499. JARAMILLO *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 94–8502. BARWICK *v.* CITY OF AURORA, COLORADO, ANIMAL CARE DIVISION. C. A. 10th Cir. Certiorari denied. Reported below: 39 F. 3d 1191.

No. 94–8509. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 644 So. 2d 52.

No. 94–8514. ROBINSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 94–8530. EASTLACK *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 180 Ariz. 243, 883 P. 2d 999.

No. 94–8531. GRANT *v.* CALDERON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 94–8532. SIMMS *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1468.

No. 94–8533. ODOM *v.* CARR, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 94–8534. PETRICK *v.* FIELDS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 42 F. 3d 1406.

No. 94–8538. KUKES *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 94–8540. JENKINS *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 19 Kan. App. 2d xxxvii, 876 P. 2d 625.

No. 94–8541. JACKSON *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1142.

No. 94–8543. BROWN *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 94–8546. JENSEN *v.* WROLSTAD ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 526 N. W. 2d 113.

No. 94–8550. FISHER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 94–8551. DEAN *v.* BAKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1215.

No. 94–8552. HAMONS *v.* MCKUNE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 36 F. 3d 1105.

No. 94–8553. GUINN *v.* HOECKER. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 1483.

No. 94–8554. GRIFFIN *v.* L. K. COMSTOCK & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 41 F. 3d 1502.

No. 94–8556. GRAYER *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 94–8557. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 887 S. W. 2d 601.

No. 94–8558. BELL *v.* WASHINGTON, WARDEN. Sup. Ct. Ill. Certiorari denied.

No. 94–8559. ROJAS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 524 N. W. 2d 659.

No. 94–8560. CSOKA *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 94–8567. DEL VALLE VILLEGAS *v.* COUGHLIN, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 94–8569. GRIFFIN *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 33 F. 3d 895.

No. 94–8570. CHAMBERS *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 94–8572. REUSCHER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 887 S. W. 2d 588.

No. 94–8576. GAMBLE *v.* TERRY. Sup. Ct. Ga. Certiorari denied.

No. 94–8589. PITTMAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 646 So. 2d 167.

No. 94–8596. GREEN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 36 F. 3d 1116.

No. 94–8614. PRATER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 94–8622. BROWN *v.* WARREN. C. A. 4th Cir. Certiorari denied. Reported below: 39 F. 3d 1175.

No. 94–8623. CURRY *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 48 F. 3d 1237.

No. 94–8644. WYATT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 641 So. 2d 1336.

No. 94–8650. NORMA M. *v.* SAN DIEGO COUNTY DEPARTMENT OF SOCIAL SERVICES. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 94–8673. CROSS *v.* DODD ET AL. C. A. 8th Cir. Certiorari denied.

No. 94–8691. PAJARO-RACERO *v.* UNITED STATES; and
No. 94–8753. PEREZ-RAMOS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 44 F. 3d 1007.

No. 94–8695. TRINIDAD LOZA *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 71 Ohio St. 3d 61, 641 N. E. 2d 1082.

No. 94–8707. WEEKS *v.* KAY & ASSOCIATES, INC. C. A. 11th Cir. Certiorari denied.

No. 94–8708. HISER *v.* CITY OF BOWLING GREEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 382.

No. 94–8716. MCQUEEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 94–8717. GREENSPAN *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 38 F. 3d 232.

No. 94–8719. ROCHA *v.* PRICE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1152.

No. 94–8739. PARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 383.

No. 94–8743. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 45 F. 3d 428.

No. 94–8756. LUJAN GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 49 F. 3d 727.

No. 94–8762. LUIS COLON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 50 F. 3d 2.

No. 94–8763. ROBERTS *v.* MOTION PICTURE PENSION PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1144.

No. 94–8764. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 41 F. 3d 370.

No. 94–8767. DATCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 94–8784. CARTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 40 F. 3d 1218.

No. 94–8785. CERVANTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–8787. COBIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 1473.

No. 94–8788. GOUDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 432.

No. 94–8796. GROTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 200.

No. 94–8798. FELIX-MONTAS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 41 F. 3d 775.

No. 94–8805. COLLINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 95.

No. 94–8809. FOSTER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1127.

No. 94–8812. CRITTON *v.* UNITED STATES; and
No. 94–8855. LIVINGSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1089.

No. 94–8814. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–8816. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1171.

No. 94–8819. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 1435.

No. 94–8826. GALO YANEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 43 F. 3d 1457.

No. 94–8827. THURLOW, AKA MCQUADE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 44 F. 3d 46.

No. 94–8832. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 45 F. 3d 440.

No. 94–8836. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–8837. CHARCZENKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–8838. LOAIZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–8840. TUFARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 50 F. 3d 3.

No. 94–8849. LANDE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 40 F. 3d 329.

No. 94–8862. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 438.

No. 94–8864. WILSON, AKA GASTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1129.

No. 94–8867. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1162.

No. 94–8868. FAIRCHILD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 46 F. 3d 1152.

No. 94–8877. CUERVO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8882. AJAEGBU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–8885. WYATT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1129.

No. 94–8886. PENA-CARRILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 879.

No. 94–8894. TREMELLING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 43 F. 3d 148.

No. 94–8956. HARDIN *v.* BOWLEN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 94–1293. MISSISSIPPI *v.* DUPLANTIS. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 644 So. 2d 1235.

No. 94–1597. TRANSCRAFT CORP. ET AL. *v.* LIBERTY MUTUAL INSURANCE CO., INC., ET AL. C. A. 7th Cir. Motion of petitioners for leave to file affidavit of Stewart C. Myers denied. Certiorari denied. Reported below: 39 F. 3d 812.

No. 94–8637. JOSE *v.* UNITED ENGINEERS & CONSTRUCTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 42 F. 3d 640.

No. 94–8638. JOSE *v.* HARMON, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari before judgment denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 94–9230 (A–856). WARD *v.* CAIN, WARDEN. Sup. Ct. La. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. Reported below: 654 So. 2d 1087.

No. 94–9266 (A–874). WARD *v.* CAIN, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 53 F. 3d 106.

Rehearing Denied

No. 94–1146. WALSH *v.* SOUTHWEST FLAGLER ASSOCIATES, LTD., *ante*, p. 1016;

No. 94–1283. QUALLS *v.* REGIONAL TRANSPORTATION DISTRICT ET AL.; and QUALLS ET AL. *v.* REGIONAL TRANSPORTATION DISTRICT ET AL., *ante*, p. 1010;

No. 94–1325. JACKSON ET AL. *v.* UNITED STATES, *ante*, p. 1005;

No. 94–6940. FOSTER *v.* MISSISSIPPI, *ante*, p. 1019;

No. 94–6974. DEL VECCHIO *v.* ILLINOIS DEPARTMENT OF CORRECTIONS, *ante*, p. 1037;

No. 94–7164. CERNY *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, *ante*, p. 1037;

No. 94–7455. FUDGE *v.* CALIFORNIA, *ante*, p. 1021;
No. 94–7651. SHEA *v.* PIERCETON TRUCKING CO., INC., *ante*, p. 1007;
No. 94–7672. PRICE *v.* NORTH CAROLINA, *ante*, p. 1021;
No. 94–7704. WEINSTEIN *v.* LASOVER ET AL., *ante*, p. 1022;
No. 94–7730. HARPER *v.* HATCHER TRAILER PARK, *ante*, p. 1022;
No. 94–7808. WILKINS *v.* CALIFORNIA, *ante*, p. 1024;
No. 94–7815. MOITY *v.* FARM CREDIT BANK OF TEXAS, *ante*, p. 1025;
No. 94–7877. SHARROCK *v.* ROMER, GOVERNOR OF COLORADO, ET AL., *ante*, p. 1026;
No. 94–7880. IN RE VOHRA, *ante*, p. 1026;
No. 94–7931. SANDERS *v.* REVELL, COMMISSIONER, FLORIDA PAROLE COMMISSION, ET AL., *ante*, p. 1039;
No. 94–7937. ENGLEFIELD *v.* GEORGE, *ante*, p. 1039;
No. 94–7951. ZAVALA *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., *ante*, p. 1039; and
No. 94–8019. CALIFORRNIAA *v.* CALIFORNIA, *ante*, p. 1053. Petitions for rehearing denied.

No. 94–1302. CRAWFORD *v.* LAMANTIA ET AL., *ante*, p. 1032. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

MAY 17, 1995

Certiorari Denied

No. 94–9265 (A–873). DEVIER *v.* THOMAS, WARDEN. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by the Court [*ante*, p. 1105] is vacated.

No. 94–9277. DEVIER *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied.

MAY 22, 1995

Certiorari Granted—Vacated and Remanded

No. 94–1059. CALAMIA *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari granted, judgment vacated, and case remanded for further consid-

eration in light of *California Dept. of Corrections* v. *Morales*, *ante*, p. 499. Reported below: 645 So. 2d 450.

Miscellaneous Orders

No. D–1518. IN RE DISBARMENT OF GOUIRAN. Disbarment entered. [For earlier order herein, see 513 U. S. 1189.]

No. D–1521. IN RE DISBARMENT OF WILSON. Disbarment entered. [For earlier order herein, see *ante*, p. 1012.]

No. D–1522. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see *ante*, p. 1012.]

No. D–1524. IN RE DISBARMENT OF CARSON. Disbarment entered. [For earlier order herein, see *ante*, p. 1013.]

No. D–1525. IN RE DISBARMENT OF HANDY. Disbarment entered. [For earlier order herein, see *ante*, p. 1013.]

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Report of the Special Master received and ordered filed. Motion of the City of New York to intervene as a party defendant denied. [For earlier order herein, see, *e. g.*, *ante*, p. 1013.]

No. 94–12. SEMINOLE TRIBE OF FLORIDA *v.* FLORIDA ET AL. C. A. 11th Cir. [Certiorari granted, 513 U. S. 1125.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–1340. CITIZENS BANK OF MARYLAND *v.* STRUMPF. C. A. 4th Cir. [Certiorari granted, *ante*, p. 1035.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 94–7492. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1062.] Motion for appointment of counsel granted, and it is ordered that David B. Smith, Esq., of Alexandria, Va., be appointed to serve as counsel for petitioner in this case.

No. 94–8610. EISENSTEIN *v.* EISENSTEIN. Super. Ct. N. J., App. Div. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 12, 1995, 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.

No. 94–8628. IN RE BEARDEN;
No. 94–8657. IN RE GLASS; and
No. 94–8875. IN RE RAITPORT. Petitions for writs of mandamus denied.

Certiorari Granted

No. 94–1453. PEACOCK *v.* THOMAS. C. A. 4th Cir. Certiorari granted. Reported below: 39 F. 3d 493.

No. 94–1511. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CASEY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 43 F. 3d 1261.

No. 94–1387. YAMAHA MOTOR CORP., U. S. A., ET AL. *v.* CALHOUN ET AL., INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF CALHOUN, DECEASED. C. A. 3d Cir. Certiorari granted limited to Question 1 presented by the petition. In addition to Question 1 presented by the petition, the parties are requested to brief and argue the following question: "Under 28 U. S. C. § 1292(b), can the courts of appeals exercise jurisdiction over any question that is included within the order that contains the controlling question of law identified by the district court?" Reported below: 40 F. 3d 622.

Certiorari Denied

No. 94–1431. B&W INVESTMENT PROPERTIES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 38 F. 3d 362.

No. 94–1554. ABBOTT LABORATORIES ET AL. *v.* SEINFELD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 39 F. 3d 761.

No. 94–1562. UNITED PAPERWORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* BRIGGS & STRATTON CORP. C. A. 7th Cir. Certiorari denied. Reported below: 36 F. 3d 712.

No. 94–1586. WOODSON *v.* MCGEORGE CAMPING CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 42 F. 3d 1387.

No. 94–1589. MALPASS *v.* CITY OF BOULDER, COLORADO. Dist. Ct. App. Colo., Boulder County. Certiorari denied.

No. 94–1590. CRAWLEY *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied. Reported below: 96 Ohio App. 3d 149, 644 N. E. 2d 724.

No. 94–1591. ALEXANDER *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 879 S. W. 2d 338.

No. 94–1595. CHAMPION ET AL. *v.* DEPARTMENT OF LABOR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 38 F. 3d 572.

No. 94–1596. MIDWEST DEVELOPMENT, INC., ET AL. *v.* FLAMINGO REALTY, INC., ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 110 Nev. 984, 879 P. 2d 69.

No. 94–1598. DEPLUZER *v.* VILLAGE OF WINNETKA. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 265 Ill. App. 3d 1061, 638 N. E. 2d 1157.

No. 94–1599. SNEAD *v.* UNUM LIFE INSURANCE COMPANY OF AMERICA. C. A. 4th Cir. Certiorari denied. Reported below: 35 F. 3d 556.

No. 94–1600. DAVIS *v.* TEXACO REFINING & MARKETING, INC. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 437.

No. 94–1601. VILLAGE OF SEBRING *v.* WAYNE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 36 F. 3d 517.

No. 94–1602. BEATTIE *v.* BOEING CO. C. A. 10th Cir. Certiorari denied. Reported below: 43 F. 3d 559.

No. 94–1604. FUN 'N SUN RV, INC., ET AL. *v.* MICHIGAN ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 447 Mich. 765, 527 N. W. 2d 468.

No. 94–1606. CROSS *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1471.

No. 94–1607. NEAL *v.* BROWN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 43 F. 3d 1462.

No. 94–1608. NTN COMMUNICATIONS, INC. *v.* INTERACTIVE NETWORK, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 41 F. 3d 1520.

No. 94–1610. BEADLE *v.* HILLSBOROUGH COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 29 F. 3d 589.

No. 94–1615. CALIFORNIA POZZOLAN, INC., ET AL. *v.* ZODIAC INVESTMENT, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 438.

No. 94–1617. DISTEFANO, TRUSTEE, FIRST AVENUE REALTY TRUST *v.* DONOVAN ET AL. App. Ct. Mass. Certiorari denied. Reported below: 37 Mass. App. 935, 641 N. E. 2d 134.

No. 94–1619. DOUGLAS *v.* FIRST SECURITY FEDERAL SAVINGS BANK ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 101 Md. App. 170, 643 A. 2d 920.

No. 94–1620. KIRWAN ET AL. *v.* PODBERESKY; and
No. 94–1621. GREENE ET AL. *v.* PODBERESKY. C. A. 4th Cir. Certiorari denied. Reported below: 38 F. 3d 147.

No. 94–1623. MCFARLAND ET AL. *v.* LEYH, TRUSTEE OF THE LIQUIDATING TRUST OF TEXAS GENERAL PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 40 F. 3d 763.

No. 94–1624. HAGER *v.* LARGENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 1004.

No. 94–1633. BAKER *v.* BAKER. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 206 App. Div. 2d 931, 615 N. Y. S. 2d 549.

No. 94–1634. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* WEBB. C. A. 9th Cir. Certiorari denied. Reported below: 44 F. 3d 1387.

No. 94–1667. CADLE CO. *v.* ESTATE OF WEAVER. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 94–1674. FLORENCE NIGHTINGALE NURSING SERVICE, INC. *v.* BLUE CROSS & BLUE SHIELD OF ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 41 F. 3d 1476.

No. 94–1700. BROWN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–1701. WARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 94–1714. HABIE *v.* KRISCHER, STATE ATTORNEY, FIFTEENTH JUDICIAL CIRCUIT, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 642 So. 2d 138.

No. 94–1716. BOSTIC *v.* UNITED STATES; and
No. 94–8911. CHAVEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 664.

No. 94–1718. SNEED *v.* BROOKS, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF BROOKS, DECEASED. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1471.

No. 94–1724. HAAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 642.

No. 94–1741. CROCKER *v.* UNITED STATES AVIATION UNDERWRITERS, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 42 F. 3d 84.

No. 94–1744. LIVINGSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1089.

No. 94–1758. NIECE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 42 F. 3d 1389.

No. 94–7614. KIRK *v.* DUTTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 38 F. 3d 1216.

No. 94–8014. RUSSELL *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 125 Wash. 2d 24, 882 P. 2d 747.

No. 94–8143. MIHALY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 94–8158. MOBLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 40 F. 3d 688.

No. 94–8196. WERTH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 37 F. 3d 1500.

No. 94–8263. HITTSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 264 Ga. 682, 449 S. E. 2d 586.

No. 94–8562. BRACY *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 94–8579. SLOAN *v.* AMHERST COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Sup. Ct. Va. Certiorari denied.

No. 94–8583. BRANSFORD ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 4th 885, 884 P. 2d 70.

No. 94–8588. THOMPSON *v.* ALEXANDER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 37 F. 3d 631.

No. 94–8595. HENDERSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 41 F. 3d 1504.

No. 94–8597. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 94–8612. HENSON *v.* MYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 94–8619. SHARP *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 29 Cal. App. 4th 1772, 36 Cal. Rptr. 2d 117.

No. 94–8630. LUCIEN *v.* PAGE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1133.

No. 94–8634. LITMON *v.* YLST, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 436.

No. 94–8646. WATSON *v.* BALSAMO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 41 F. 3d 663.

No. 94–8647. WORTHON *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 94–8649. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 263 Ill. App. 3d 1126, 683 N. E. 2d 550.

No. 94–8651. WILBUR M. *v.* MENTAL HYGIENE LEGAL SERVICE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 202 App. Div. 2d 1, 615 N. Y. S. 2d 367.

No. 94–8654. McNatt *v.* Coleman et al. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1125.

No. 94–8655. Mason *v.* California. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 94–8663. Harjo *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 882 P. 2d 1067.

No. 94–8665. Ashworth *v.* Myers, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 45 F. 3d 435.

No. 94–8666. Brown *v.* Murray, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 43 F. 3d 1465.

No. 94–8670. Dunbar *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 94–8671. Hall *v.* Missouri Department of Corrections and Human Resources et al. C. A. 8th Cir. Certiorari denied.

No. 94–8683. White *v.* Singletary, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1218.

No. 94–8701. Petrick *v.* Minnesota. Sup. Ct. Minn. Certiorari denied. Reported below: 527 N. W. 2d 87.

No. 94–8704. Talley *v.* Walker, Superintendent, Auburn Correctional Facility, et al. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 203 App. Div. 2d 924, 611 N. Y. S. 2d 408.

No. 94–8783. Carr *v.* United States; and
No. 94–8913. Gardner *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 49 F. 3d 362.

No. 94–8817. Kinchen *v.* Shalala, Secretary of Health and Human Services. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 65.

No. 94–8850. Jobe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 46 F. 3d 1119.

No. 94–8851. MAYS *v.* DRAGOVICH, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 94–8857. CARR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1170.

No. 94–8859. POINDEXTER *v.* UNITED STATES; and
No. 94–8861. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 44 F. 3d 406.

No. 94–8866. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8871. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8878. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8881. LENTZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1514.

No. 94–8887. SANDERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 480.

No. 94–8892. ALEXIUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 65.

No. 94–8895. VROOMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1172.

No. 94–8896. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 33 F. 3d 60.

No. 94–8897. DODD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 40 F. 3d 1246.

No. 94–8898. GARY *v.* UNITED STATES; and
No. 94–8899. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 46 F. 3d 66.

No. 94–8900. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 1271.

No. 94–8903. VASQUEZ MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 424.

No. 94–8907. MONDIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1473.

No. 94–8912. FUENTES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 42 F. 3d 644.

No. 94–8918. SWANK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 436 Pa. Super. 669, 648 A. 2d 1238.

No. 94–8919. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 196.

No. 94–8921. ATKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 48 F. 3d 532.

No. 94–8924. SEATON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 F. 3d 108.

No. 94–8925. RENDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1158.

No. 94–8926. MOSLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 69.

No. 94–8930. HANLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 37 F. 3d 1496.

No. 94–8931. GROCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1134.

No. 94–8932. FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 44 F. 3d 1004.

No. 94–8933. MAXIE *v.* HAMILTON. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1141.

No. 94–8937. DIAZ-ARENAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 46 F. 3d 784.

No. 94–8940. ESPOSITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 47 F. 3d 1157.

No. 94–8942. GIL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 46 F. 3d 1134.

No. 94–8943. MCGRATH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 47 F. 3d 1176.

No. 94–8944. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 46 F. 3d 1129.

No. 94–8949. MASON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 46 F. 3d 70.

No. 94–8950. JARAMILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 42 F. 3d 920.

No. 94–8952. WARD *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 338 N. C. 64, 449 S. E. 2d 709.

No. 94–8955. LEMON *v.* MARTIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1142.

No. 94–8961. RIGSBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 45 F. 3d 120.

No. 94–8965. RAMOS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 42 F. 3d 1160.

No. 94–8969. HERRING *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 94–8974. GARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 45 F. 3d 1135.

No. 94–8976. THOMAS, AKA ALONZO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 438 Pa. Super. 698, 652 A. 2d 411.

No. 94–8977. WEINSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 32 F. 3d 31 and 45 F. 3d 680.

No. 94–8979. BORCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 47 F. 3d 1167.

No. 94–8980. ACOSTA-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1145.

No. 94–8984. MATURANA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 180 Ariz. 126, 882 P. 2d 933.

No. 94–8985. RIVERA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 94–8990. NAYLOR, AKA WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 50 F. 3d 1038.

No. 94–8996. MCCUNE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1162.

No. 94–8997. LOEB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 45 F. 3d 719.

No. 94–9000. CHAPEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 41 F. 3d 1338.

No. 94–9001. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 94–9005. DEVON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 47 F. 3d 1162.

No. 94–9006. DURAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1146.

No. 94–9007. GALLIGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 46 F. 3d 1147.

No. 94–9008. HOPKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 43 F. 3d 1116.

No. 94–9012. COATS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 47 F. 3d 425.

No. 94–9015. MALCOLM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 94–1585. KANOIVICKI ET AL. *v.* GREEN ET AL. Ct. App. Tenn. Motion of respondents for award of damages and double costs denied. Certiorari denied. Reported below: 891 S. W. 2d 220.

Rehearing Denied

No. 93–1677. OKLAHOMA TAX COMMISSION *v.* JEFFERSON LINES, INC., *ante*, p. 175;

No. 94–1352. HENNESSEY ET AL. *v.* BLALACK ET AL., *ante*, p. 1050;

No. 94–1365. DE LUCA *v.* UNITED NATIONS ORGANIZATION ET AL., *ante*, p. 1051;

No. 94–1366. MURRAY *v.* MCINTYRE ET AL., *ante*, p. 1051;

No. 94–8038. PETERSON *v.* HADDAD, *ante*, p. 1054; and
No. 94–8272. GARDNER *v.* UNITED STATES, *ante*, p. 1044. Petitions for rehearing denied.

MAY 23, 1995

Dismissal Under Rule 46

No. 94–8635. LANDAU *v.* LOVE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46.

MAY 25, 1995

Certiorari Denied

No. 94–9415 (A–902). TURNER *v.* JABE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution. Reported below: 58 F. 3d 924.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 27, 1995, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1138. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, and 511 U. S. 1155.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 1995

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner.

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 27, 1995

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 8, 10, and 47.

[See *infra*, pp. 1141–1143.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1995, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right—when taken.

(*a*) *Appeal in a civil case.*

. . . . . .

(4) If any party files a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b), whether or not granting the motion would alter the judgment;

(C) to alter or amend the judgment under Rule 59;

(D) for attorney's fees under Rule 54 if a district court under Rule 58 extends the time for appeal;

(E) for a new trial under Rule 59; or

(F) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment.

A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal

within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

. . . . .

Rule 8. Stay or injunction pending appeal.

. . . . .

(*c*) *Stay in a criminal case.*—A stay in a criminal case shall be had in accordance with the provisions of Rule 38 of the Federal Rules of Criminal Procedure.

Rule 10. The record on appeal.

(*a*) *Composition of the record on appeal.*—The record on appeal consists of the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

(*b*) *The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.*

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

. . . . .

Rule 47. Rules of a court of appeals.

(*a*) *Local rules.*

(1) Each court of appeals acting by a majority of its judges in regular active service may, after giving appro-

priate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U. S. C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. The clerk of each court of appeals shall send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A court of appeals may regulate practice in a particular case in any manner consistent with federal law, these rules, and local rules of the circuit. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 27, 1995, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1146. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, and 511 U. S. 1169.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 1995

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner.

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 27, 1995

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 8018 and 9029.

[See *infra*, pp. 1149–1150.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 1995, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8018. Rules by circuit councils and district courts; procedure when there is no controlling law.

(*a*) *Local rules by circuit councils and district courts.*

(1) Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U. S. C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with—but not duplicative of—Acts of Congress and the rules of this Part VIII. Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F. R. Civ. P. governs the procedure for making and amending rules to govern appeals.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the circuit council or district court. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the circuit council or district court unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Rule 9029. Local bankruptcy rules; procedure when there is no controlling law.

(*a*) *Local bankruptcy rules.*

(1) Each district court acting by a majority of its district judges may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F. R. Civ. P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F. R. Civ. P., to make and amend rules of practice and procedure which are consistent with—but not duplicative of—Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 27, 1995, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1152. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, and 507 U. S. 1089.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 1995

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner. In addition, the Court has restored the word "made" to the last sentence of Fed. R. Civ. P. 83(a)(1) to keep that Rule consistent with Fed. R. Crim. P. 57(c).

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 27, 1995

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Civil Rules 50, 52, 59, and 83.

[See *infra,* pp. 1155–1157.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1995, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 50. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

. . . . .

(*b*) *Renewing motion for judgment after trial; alternative motion for new trial.*—If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial, or
(B) direct entry of judgment as a matter of law.

(*c*) *Granting renewed motion for judgment as a matter of law; conditional rulings; new trial motion.*

. . . . .

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is ren-

dered shall be filed no later than 10 days after entry of the judgment.

. . . . .

Rule 52. Findings by the court; judgment on partial findings.

. . . . .

(*b*) *Amendment.*—On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

. . . . .

Rule 59. New trials; amendment of judgments.

. . . . .

(*b*) *Time for motion.*—Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(*c*) *Time for serving affidavits.*—When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(*d*) *On court's initiative; notice; specifying grounds.*—No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(*e*) *Motion to alter or amend judgment.*—Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

Rule 83. Rules by district courts; judge's directives.

(*a*) *Local rules.*

(1) Each district court, acting by a majority of its district judges, may, after giving appropriate public notice and an opportunity for comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U. S. C. §§ 2072 and 2075, and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments shall, upon their promulgation, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedures when there is no controlling law.*—A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U. S. C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 27, 1995, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1160. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, and 511 U. S. 1175.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 27, 1995

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code. To maintain uniformity between revised and unrevised Rules, the Court has edited the amendments transmitted to the Supreme Court by the Judicial Conference of the United States to use the word "shall" in a consistent manner.

The rules are accompanied by an excerpt from the report of the Judicial Conference of the United States' Committee on Rules of Practice and Procedure and that Committee's Advisory Committee Notes. In order to minimize confusion, a footnote noting the changes made by the Supreme Court has been added to the marked-up version of the proposed amendments that accompanies the Advisory Committee Notes.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 27, 1995

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 40, 43, 49, and 57.

[See *infra*, pp. 1163–1166.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1995, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial appearance before the magistrate judge.

(*a*) *In general.*—Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U. S. C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), shall be promptly filed. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U. S. C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney for the government moves promptly, in the district in which the warrant was issued, to dismiss the complaint.

. . . . .

Rule 40. Commitment to another district.

(*a*) *Appearance before federal magistrate judge.*—If a person is arrested in a district other than that in which the offense is alleged to have been committed, that person shall be taken without unnecessary delay before the nearest available federal magistrate judge, in accordance with the provi-

sions of Rule 5. Preliminary proceedings concerning the defendant shall be conducted in accordance with Rules 5 and 5.1, except that if no preliminary examination is held because an indictment has been returned or an information filed or because the defendant elects to have the preliminary examination conducted in the district in which the prosecution is pending, the person shall be held to answer upon a finding that such person is the person named in the indictment, information or warrant. If held to answer, the defendant shall be held to answer in the district court in which the prosecution is pending—provided that a warrant is issued in that district if the arrest was made without a warrant—upon production of the warrant or a certified copy thereof. The warrant or certified copy may be produced by facsimile transmission.

. . . . .

Rule 43. Presence of the defendant.

(*a*) *Presence required.*—The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(*b*) *Continued presence not required.*—The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will not be prevented and the defendant will be considered to have waived the right to be present whenever a defendant, initially present at trial, or having pleaded guilty or nolo contendere,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial),

(2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

(*c*) *Presence not required.*—A defendant need not be present:

(1) when represented by counsel and the defendant is an organization, as defined in 18 U. S. C. § 18;

(2) when the offense is punishable by fine or by imprisonment for not more than one year or both, and the court, with the written consent of the defendant, permits arraignment, plea, trial, and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law; or

(4) when the proceeding involves a correction of sentence under Rule 35.

Rule 49. Service and filing of papers.

. . . . .

(*e*) *Filing of dangerous offender notice.*—(Abrogated April 27, 1995, eff. December 1, 1995.)

Rule 57. Rules by district courts.

(*a*) *In general.*

(1) Each district court acting by a majority of its district judges may, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice. A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U. S. C. § 2072 and shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.

(*b*) *Procedure when there is no controlling law.*—A judge may regulate practice in any manner consistent with federal law, these rules, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or

the local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

(*c*) *Effective date and notice.*—A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public.

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